DECISIONS AND ORDERS

OF THE

NATIONAL LABOR RELATIONS BOARD

VOLUME 273

NOVEMBER 30, 1984 THROUGH FEBRUARY 12, 1985

PUBLISHED BY THE BOARD

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1986

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

READEX MICRO best copy available

NATIONAL LABOR RELATIONS BOARD

Members of the Board

DONALD L. DOTSON, *Chairman*

DON A. ZIMMERMAN[1]

ROBERT P. HUNTER

PATRICIA DIAZ DENNIS

Chief Counsels of Board Members

CHARLES M. WILLIAMSON

PETER B. ROBB

J. AL LATHAM, JR.

JOHN C. TRUESDALE, *Executive Secretary*

HUGH L. REILLY, *Solicitor*

MELVIN J. WELLES, *Chief Administrative Law Judge*

DAVID B. PARKER, *Director of Information*

Office of the General Counsel

ROSEMARY M. COLLYER, *General Counsel*

JOHN E. HIGGINS, JR., *Deputy General Counsel*

JOSEPH E. DESIO
Associate General Counsel
Division of Operations Management

HAROLD J. DATZ
Associate General Counsel
Division of Advice

ROBERT E. ALLEN
Associate General Counsel
Division of Enforcement Litigation

ERNEST RUSSELL
Director
Division of Administration

[1] Term expired 16 December 1984.

CONTENTS

Table of Cases..... VII
Cross-Reference..... XIV
Decisions and Orders of the Board..... 1

This volume includes all important Decisions and Orders issued by the Board during the period November 30, 1984, through February 12, 1985.

Some Board Decisions granting routine motions for summary judgment contain nothing of precedential value and are not included in this volume. Copies of such Decisions can be obtained from the NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

The page numbers of Board Decisions that carry pamphlet numbers may be found by referring to the Cross-Reference which appears immediately after the Table of Cases.

NOTE: The Board Decisions cited herein which contain the volume and pamphlet number, rather than the volume and page number, may be located in the Table of Cases or the Cross-Reference table of the particular volume cited.

TABLE OF CASES

PAGE

A-1 Fire Protection, 7–CA–12659 964
A. G. Brawner Plastering, see Plasterers Local 346 (Brawner Plastering)
Ace Cab Co. d/b/a, see Checker Cab Co.
ACL Corp. d/b/a, see Atlanta Hilton & Towers
Airco, Inc., 10–RC–12839 348
Airport Bus Service, 29–CA–6185 561
Airtron Division, see Litton Systems
Aladdin Hotel, 31–CA–13095 773
Aladdin Hotel & Casino, 31–CA–11999 270
Albany Medical Center, 3–RC–8289 485
Albertson's Inc., 19–RD–1907 286
Alemite & Instrument Divisions, see Stewart-Warner Corp.
Alpha Beta Co., 32–CA–1275 1546
Americana Healthcare Center, 10–CA–19274 1728
Amos J. Walker, Inc., see Electrical Workers IBEW Local 340 (Hulse Electric)
Anco Electrical Contractors, see Electrical Workers IBEW Local 11 (Anco Electrical)
ARA Services, 22–CA–13463 ..... *
Arizona Public Service Co., 28–CA–7074 1757
Arlington Hotel Co., 26–CA–8974 210
Armstrong Rubber Co., 32–CA–5876–5 233
Associated General Contractors of America, Wisconsin Chapter, see Operating Engineers Local 139 (AGC of Wisconsin)
Atlanta Hilton & Towers, 10–CA–18929, 10–RC–12727 87
Atlantic Cement Co., see Longshoremen ILA Local 1588 (Atlantic Cement)
Atlas Glass & Mirror Co., 16–CA–11309 179
Ausable Communications, 3–CA–10407 1410
B & K Transportation, see Hood Industries
B. J. Heating, Inc., 20–CA–16621(E) 329
Badger Pattern Works, see Pattern Makers (Badger Pattern)
Balsam Village Management Co., 29–CA–10276 420
Banner Tire Co., 14–CA–16409 480
Barbara George Collection, 22–RC–8945 1239
Bassett Bedding Division, see E. B. Malone Corp.
BDJ Contracting Co., 22–CA–12792 1858
Bellingham Division, see Longshoremen ILWU Local 7 (Georgia-Pacific)
Bellingham Stevedoring Co., see Longshoremen ILWU Local 7 (Georgia-Pacific)
Berry-Mahurin Construction, 18–CA–6614, 18–CB–1017 1044
Best Mechanical Contractors, 15–CA–8824 83
Bishopric Products Co., see Plumbers Local 392 (Oberle-Jordre)
Blue Island Newspaper Printing, 13–RC–16459 1709
Boilermakers Local 29 (Boston Chimney), 1–CD–698 110
Bolton-Emerson, Inc., see Machinists (Bolton-Emerson)
Borman, Inc., 7–CA–22182 312
Boryn Steel, 7–CA–20392 ..... *
Boston Chimney & Tower Co., see Boilermakers Local 29 (Boston Chimney)
Brady-Stannard Motor Co., 2–CA–19219 1434
Burger Pits, Inc., 32–CA–2812 1001
Burner Systems International, 10–CA–18558 954
Buzzard Rentals, see Eagle Express Co.
Canterbury Villa, 8–CA–14834 1196
Carter Hawley Hale Stores, 20–RC–15594 621
Carthage Heating Co., 17–CA–11741(E) 120
Carvel Corp., see Teamsters Local 456 (Carvel Corp.)
Central Mack Sales, 11–CA–9325 1268

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Central Truck Leasing Corp., see Central Mack Sales
Century Wine & Spirits, see Standard Wine & Spirits Co.
Cerock Wire & Cable Group, 10–RC–12799 1041
Certified Grocers, 13–CA–23281 1608
Chamac Inc., see Plasterers Local 744 (Chamac Inc.)
Checker Cab Co., 14–CA–15712 1492
Checker Taxi Co., see Production Workers Local 707 (Checker Taxi)
Chicago Metallic Corp., 21–CA–20824, 21–RC–16865 1677
City Cab Co. of Orlando, 12–CA–8705 1344
City Markets, 27–RD–614 469
Clare Hospital, 7–RC–16921 1755
Clint McCubbin, Inc., see Electrical Workers IBEW Local 340 (Hulse Electric)
Coastside Scavenger Co., 20–CA–17305 1618
Coca-Cola Bottling Co., 26–RD–532 444
Commercial Cartage Co., 14–CA–15790 637
Cone Mills Corp., 11–CA–7458 1515
Consumat Systems, 5–CA–14719 410
Continental Composition, 13–RD–1400 942
Contract Glass, see Iron Workers (Hoffman Construction)
Cooper & Cooper Painting, see Edward Cooper Painting
Cooper Industries, see Crouse-Hinds Co.
Cooper Union of Science & Art, 21–CA–17483 1768
Corcoran Automatic Sprinklers, see A-1 Fire Protection
Cross County Coach Corp., see Airport Bus Service
Crouse-Hinds Co., 16–CA–11026 333
Crown Cork de Puerto Rico, 24–CA–3787, 24–CB–980, 24–RC–5775 243
D & M Sheet Metal, 4–RC–15562 654
Daily Mining Gazette, see Thomson Newspapers
Dane County Dairy, 30–CA–7966 1711
Dawson Carbide Industries, 7–CA–21026, 7–RC–16764 382
Dayton Typographical Service, 9–CA–16957 1205
December 12, Inc., 31–CA–12661 1
Delaware Beverage Co., see Standard Wine & Spirits Co.
Dell Bus Co., see Airport Bus Service
Destiny Delivery Systems, 7–CA–23538 ..... *
Dextra Industries, 29–CA–7277 1660
Dixie Cab Co., see City Cab Co. of Orlando
Doral Building Services, 31–CA–2403 454
Dr. Pepper Bottling Co., see Coca-Cola Bottling Co.
Ducane Heating Corp., 11–CA–8747 1389
Dynasty Fashions, see BDJ Contracting Co.
E. B. Malone Corp., 1–CA–20752 78
Eagle Express Co., 9–CA–18451 501
Eagle Headers, 31–CA–13088 1486
Eastern Telecom Corp., 6–CA–15663 237
Eastman Interiors d/b/a, see Eastman West
Eastman West, 21–RC–17339 610
Edward Cooper Painting, 9–CA–17245 1870
Edward J. DeBartolo Corp., see Florida Building Trades Council (DeBartolo Corp.)
Electrical Workers IBEW Local 11 (Anco Electrical), 31–CB–4422–1 183
Electrical Workers IBEW Local 46 (PAC, Inc.), 19–CB–4917 1357
Electrical Workers IBEW Local 340 (Hulse Electric), 20–CB–5397 428
Eller & Co., 12–CA–10556, 12–CB–2480–1 57
Emporium-Capwell, see Carter Hawley Hale Stores
EMR Photoelectric, see Sangamo Weston Inc.

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

EPE, Inc., 5–CA–16111 1375
Erickson's Sentry of Bend, 36–CA–4532 63
F. Mullins Construction, 11–CA–10124 1016
Fedco Freightlines, 9–CA–17745 399
Fleur DuLac, 20–CA–16918 93
Florida Building Trades Council (DeBartolo Corp.), 12–CC–1062 1431
Florida Steel Corp., 11–CA–5324 889
Foam Fabricators, 18–RC–13521 511
Food & Commercial Workers Local 1357, 4–CA–12427 299
Foothills Food d/b/a see Erickson's Sentry of Bend
Fugazy Continental Corp., see Airport Bus Service
G & G Fabrication, see Dextra Industries
G & R Contractors, see Best Mechanical Contractors
G. R. Roberts Construction Co., see Operating Engineers Local 825 (Harms Construction)
General Store No. Two, 17–CA–11529 415
George Harms Construction Co, see Operating Engineers Local 825 (Harms Construction)
Georgia-Pacific Corp., see Longshoremen ILWU Local 7 (Georgia-Pacific)
Gibraltar Steel Corp., 3–CA–11440 1012
Glade Springs, Inc., 9–CA–18481 944
Glass & Pottery Workers Local 185 (Liberty Glass), 16–CB–2164–1 198
Glaziers Local 513 (SK Consultants), 14–CD–702 1428
Glenoaks Hospital, 31–CA–13158 488
Goodyear Tire & Rubber Co., 16–CA–11335, 16–RC–8611 36
Greater Pennsylvania Avenue Nursing Center, see Hospital Employees District 1199E (Pennsylvania Avenue Nursing)
Greyhound Lines, 2–CA–18223 1443
Gunther-Nash Construction Co., see United Services Union (Mountaineer Resources)
Harley-Davidson Co., 4–CA–13710 1531
Harvard Folding Box Co.
1–CA–17917 1031
1–CA–20070 841
Haynes Motor Lines, 15–CA–9207, 15–RC–7037 1851
Health Care Logistics, 9–CA–20594 822
Health Enterprises of America d/b/a, see Canterbury Villa
Heck's, Inc., 9–CA–20275 202
Hennessy Products, 6–CA–13640 1511
Henry Miller Spring Co., 6–CA–16466 472
Herbert F. Darling, Inc., 3–CA–10565 346
Herman Bros., Inc., 4–CA–14122 124
Heuer International Trucks, 10–CA–19174 361
Hilty Tank Corp., 4–CA–14084 979
Hoffman Construction Co., see Iron Workers (Hoffman Construction)
Holland Industries d/b/a Dell Bus Co., see Airport Bus Service
Holyoke Water Power Co., 1–CA–20618 1369
Honaker Mills, see Top Form Mills
Hood Industries, 1–CA–14624 1587
Hospital Employees District 1199E (Johns Hopkins), 5–CB–3533 319
Hospital Employees District 1199E (Pennsylvania Avenue Nursing), 5–CB–2173 1458
Hospital of St. Raphael, 39–CA–539 46
Hulse Electric, see Electrical Workers IBEW Local 340 (Hulse Electric)
I. Shor Co., see Service Employees Local 1–J (Shor Co.)
Indiana & Michigan Electric Co., 25–CA–10346 1540
Indianapolis Power Co., 25–CA–15784 1715
Industrial Contracting, see United Services Union (Mountaineer Resources)
Industrial Resources, Inc., see United Services Union (Mountaineer Resources)

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Inland Container Corp., 17-CA-10772 1856
International Paper Co., 16-RC-8592 615
Interprint Co., 4-CA-11919 1863
Iron Workers (Hoffman Construction), 19-CD-434 260
Iron Workers Local 482 (Norment Glass), 23-CD-442 1831
Irving Tanning Co., 1-CA-19118 6
J & H Rainwear, 2-CA-17327 497
J.R.R. Realty Co., 29-CA-8809 1523
Jaydon, Inc., 33-CA-6346 1594
Jenkins Index Co., 21-CA-21994 736
John P. Bell & Sons, 3-CA-10679 33
Johns Hopkins Hospital, see Hospital Employees District 1199E (Johns Hopkins)
Joseph F. Whelan Co., 29-CA-10004 340
Joseph Schlitz Co., 11-CA-10906 1604
Kansas Van & Storage Co., 17-CA-10086 855
Karsh's Bakery, 32-CA-4120 1131
KCRA-TV, 20-CA-17626 1632
Kelly Broadcasting Co. d/b/a, see KCRA-TV
Keystone Auto Parts, 6-CA-17118 1323
Kohler Co., 30-CA-7372 1580
Kraft, Inc., 3-RD-819 1484
Kree Institute of Electrology, see Carter Hawley Hale Stores
Krispy Kreme Doughnut Corp., 9-CA-18422, 9-CB-4595, 9-RC-13315 70
Kroger Co., 25-CA-14427 462
KTY Leasing Co., see Fedco Freightlines
Kut-Kwick Corp., 10-CA-19484(E) 838
Landing Construction Co., 23-RC-5175 1288
Lawyers Publishing Co., 30-CA-5603 129
Liberty Glass Co., see Glass & Pottery Workers Local 185 (Liberty Glass)
Lincoln Contracting & Equipment Co., see United Services Union (Lincoln Contracting)
Litton Systems, 22-CA-10877 288
Lockheed Shipbuilding Co., 19-CA-13226 171
Lomasney Combustion, Inc., 3-CA-10813 1241
Longshoremen ILWU Local 7 (Georgia-Pacific), 19-CD-415 363
Longshoremen ILA Local 1588 (Atlantic Cement), 22-CD-429 1723
Lycee Francais de New York, 2-CA-19291, 2-RC-19215 1538
M & M Electric, see Electrical Workers IBEW Local 340 (Hulse Electric)
M. W. Kellogg Constructors, 21-CA-21330, 21-CB-8117 1049
Machinists (Bolton-Emerson), 1-CB-5899 1159
Machinists (Motor Trucks), 19-CB-4865 650
Maintenance & Manpower, see Airport Bus Service
Major Distributing Co., see Standard Wine & Spirits Co.
Manchester Cab Co., see Checker Cab Co.
Marcella Cab Co., see Checker Cab Co.
Mariposa Press, 32-CA-3135, 32-RC-1175 528
Martin-Brower Co., 10-CA-19074-1, -2 803
Mastell Trailer Corp., 18-CA-6750 1190
May-Han Electric d/b/a M & M Electric, see Electrical Workers IBEW Local 340 (Hulse Electric)
McWhorter Trucking, 27-CA-8039 369
Mead Packaging, 10-CA-16871 1451
Metcalf Excavating, 7-CA-22378 ..... *
Michigan Transportation Co., 7-CA-21504 1418
Micronesian Telecommunications, 37-RC-2717 354
Mid-Continent Spring Co., 9-RD-1193 884

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE
Mike Sullivan & Associates, see Teamsters Local 420
MLRS Systems Division, see Vought Corp.
Molded Acoustical Products, 4–RC–15481 156
Monroe Auto Equipment, 10–RD–859 103
Montgomery Ward & Co., 32–CA–2797 1226
Motor Rim & Wheel Service, 32–CA–3470 866
Motor Trucks, see Machinists (Motor Trucks)
Mountaineer Resources, Inc., see United Services Union (Mountaineer Resources)
N & T Associates d/b/a, see Aladdin Hotel
N & T Associates, see Aladdin Hotel & Casino
N.K.S. Distributors, see Standard Wine & Spirits Co.
Neo-Life Co. of America, 32–CA–4529 72
New Galax Mirror Corp., 5–CA–13923 1232
New York University, 2–CA–17974 1104
Noel Produce, 19–CA–15720(E) 769
Norment Glass Co., see Iron Workers Local 482 (Norment Glass)
North Carolina Coastal Motor Lines, see Central Mack Sales
Oberle-Jordre Co., see Plumbers Local 392 (Oberle-Jordre)
Omsco, Inc., 23–CA–8185 872
Operating Engineers Local 139 (AGC of Wisconsin), 30–CB–2029 992
Operating Engineers Local 400, 19–CA–12852 226
Operating Engineers Local 825 (Harms Construction), 4–CD–627 833
PAC, Inc., see Electrical Workers IBEW Local 46 (PAC, Inc.)
Pagerly Detective Agency, 4–CA–13330 494
Painters Local 64 (Saxon Enterprises), 19–CB–4937 13
Paprikas Fono, 20–RC–15534 1326
Parametric, 32–CA–6405 ..... *
Park Distributing Co., see Standard Wine & Spirits Co.
Pattern Makers (Badger Pattern), 30–CB–2122 113
Peters Electric Co., see Electrical Workers IBEW Local 340 (Hulse Electric)
Physicians Hospital, 5–CA–13846(E) 1332
Plasterers Local 346 (Brawner Plastering), 21–CB–8274 1143
Plasterers Local 744 (Chamac Inc.), 21–CB–8734 829
Plumbers Local 392 (Oberle-Jordre), 9–CB–5527 786
Postal Service, 5–CA–15203(P) 1746
Preterm, Inc., 1–CA–12325 683
Production Workers Local 707 (Checker Taxi), 13–CC–1159 1178
Queen Anne Record Sales d/b/a, see Tower Books
Quinn Co., 32–CA–5228 795
R & K Caterers, 4–CA–13726 602
R.E.D. Ltd., 5–CA–14614 ..... *
Radisson Muehlebach Hotel, 17–CA–10704 1464
Ralph's Grocery Co., see Alpha Beta Co.
Reading Anthracite Co., 4–CA–13877 1502
Repco Distributing, 29–CA–7861 158
Rex Moore Electrical Co., see Electrical Workers IBEW Local 340 (Hulse Electric)
Robins Federal Credit Union, 10–CA–19842 1352
Ryder Truck Lines, 10–CA–19042 713
Salem Construction, see United Services Union (Mountaineer Resources)
Salem Corp., see United Services Union (Mountaineer Resources)
Sangamo Weston Inc., 22–CA–8121 256
Saxon Enterprises, see Painters Local 64 (Saxon Enterprises)
Scott Management Co., see Seligman & Associates
Self Serv Food Corp., see Burger Pits, Inc.
Seligman & Associates, 7–CA–13576 1216

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE
Seligman & Latz, see Carter Hawley Hale Stores
Seneca Steel Division, see Gibraltar Steel Corp.
Senftner Volkswagen, 18–CA–7666 166
Service Employees Local 1–J (Shor Co.), 2–CB–9557, 2–RD–1073 929
Sheet Metal Workers Local 85 (Suburban Sheet Metal), 10–CB–4305 523
Shelun Co., d/b/a Super Saver, see Super Save
Shin Nihon Kosan, Inc. d/b/a see Shogun Restaurant
Shogun Restaurant, 31–CA–12304 755
Shortway Lines, see Airport Bus Service
Signetics Corp., 32–CA–4606 722
SK Consultants, see Glaziers Local 513 (SK Consultants)
So-Cal Products d/b/a, see Eagle Headers
Southwest Forest Industries, 25–CA–13189 765
Southwestern Bell Telephone Co., 14–CA–16558 663
St. Louis Telephone Employees Credit Union, 14–CA–15991 625
Standard Wine & Spirits Co., 4–CA–12835 1100
State Bank of India
2–CA–19487 264
2–CA–19667 267
State Distributors Co., see Standard Wine & Spirits Co.
Stewart-Warner Corp., 13–RC–16423 1736
Stolte, Inc., 31–CA–12019 1316
Stone's Express, 37–RC–2704 1154
Stroh Brewery Company a/k/a, see Joseph Schlitz
Suburban Sheet Metal Co., see Sheet Metal Workers Local 85 (Suburban Sheet Metal)
Sun Coast Foods, 15–CA–8758 1642
SunarHauserman, 26–UC–104 1176
Super Save, 21–CA–22021 20
T.L.B. Plastics Corp., 13–CA–22322 1835
Taracorp Inc., 14–CA–13551 221
Teamsters Local 87, 31–CB–5242 1838
Teamsters Local 420, 21–CA–21452 1381
Teamsters Local 456 (Carvel Corp.), 2–CC–1541 516
Tenneco Automotive, see Monroe Auto Equipment
Texaco, Inc., 14–CA–13419 1335
Thomson Newspapers, 30–RC–4346 350
Top Form Mills, 5–CA–11305 1246
Tower Books, 19–CA–15570 671
U-Tel Extruded Plastics, 21–CA–23171 ..... *
United Food Services, 10–CA–19939 1611
United Parcel Service, 9–CA–14987 1673
United Services Union (Lincoln Contracting), 6–CD–797 1164
United Services Union (Mountaineer Resources), 5–CD–278 1167
United Services Union (Mountaineer Resources), 6–CD–800 1172
Universidad Central de Bayamon, 24–CA–4348 1110
Vought Corp., 26–CA–10240 1290
Waco, Inc., 5–CA–12951 746
Walker Boat Yard, 9–RC–14191 309
Walter Brucker & Co., 4–CA–12594 1306
Washington Gas Light Co., 5–CA–12052 116
Washington Star Co., 5–CA–13812–2 391
Watt Electric Co., 16–CA–11434 655
Wedgewood Nursing Home, 29–CA–9996 1738
West Florida Hospital, 15–CA–8213 1421
Wilson Beverage Co., see Standard Wine & Spirits Co.

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE
Windsor Industries, 29–CA–7943 1157
Wisconsin Chapter, see Associated General Contractors of America
Wm. T. Burnett & Co., 11–CA–10690, 11–RC–5110 1084
Wynn V.I.P. Limousine Service, see Airport Bus Service
Yellow Cab Co., see City Cab Co. of Orlando
Yellow Cab Co., see Production Workers Local 707 (Checker Taxi)
Yellow Freight System, 39–CA–1640, D & O 44

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

CROSS-REFERENCE

Advance Sheet Numbers and Volume Page Numbers

No.	Page
1	1
2	6
3	13
4	20
5	33
6	36
7	44
8	46
9	87
10	57
11	63
12	93
13	70
14	103
15	72
16	78
17	113
18	110
19	83
20	116
21	156
22	120
23	158
24	166
25	171
26	179
27	124
28	183
29	*
30	198
31	129
32	256
33	226
34	202
35	210
36	260
37	233
38	264
39	267
40	237
41	270
42	286
43	288
44	299
45	243
46	309
47	312
48	319
49	329
50	333
51	340
52	346
53	348
54	221
55	350
56	354
57	361
58	363
59	369
60	382
61	391
62	399
63	410
64	*
65	415
66	420
67	428
68	444
69	454
70	462
71	469
72	472
73	480
74	1323
75	485
76	488
77	494
78	497
79	501
80	511
81	516
82	523
83	528
84	561
85	602
86	1326
87	610
88	615
89	621
90	625
91	637
92	650
93	654
94	655
95	663
96	671
97	683
98	713
99	722
100	736
101	746
102	755
103	765
104	769
105	773
106	786
107	795
108	803
109	822
110	829
111	833
112	838
113	841
114	855
115	866
116	872
117	884
118	889
119	1316
120	929
121	942
122	944
123	954
124	964
125	979
126	992
127	1001
128	1012
129	1016
130	1031
131	1344
132	1041
133	1044
134	1049
135	1084
136	1100
137	1104
138	1110
139	1131
140	1143
141	1154
142	1157
143	1159
144	1164
145	1167
146	1172
147	1176
148	1178
149	1190
150	1196
151	1205
152	*
153	1216
154	1226
155	1232
156	1239
157	1241
158	1246
159	1268
160	1288
161	1290
162	1306
163	1332
164	1335
165	1352
166	1410
167	1357
168	1369
169	1375
170	1381
171	1428
172	1431
173	1458
174	1418
175	1389
176	*
177	1421
178	1434
179	*
180	1443
181	1451
182	*
183	1464
184	1484
185	1486
186	1492
187	1502
188	1515
189	1523
190	1511
191	1538
192	1531
193	1540
194	1546
195	1580
196	1608
197	1587
198	1618
199	1594

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

CROSS-REFERENCE

Advance Sheet Numbers and Volume Page Numbers

No.	Page	No.	Page	No.	Page	No.	Page
200	1604	207	1677	214	1768	221	1851
201	1611	208	1709	215	1736	222	1863
202	1858	209	1711	216	1738	223	1835
203	1642	210	1757	217	1746	224	1870
204	1660	211	1715	218	1755	225	1838
205	1673	212	1723	219	1831	226	1856
206	1632	213	1728	220	*		

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

December 12, Inc. *and* Harold D. Alexander. Case 31-CA-12661

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 5 June 1984 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, December 12, Inc., Beverly Hills, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Los Angeles, California, on July 6 and 7, 1983. The charge was filed on December 1, 1982, by Harold D. Alexander, acting in his individual capacity (Alexander). The complaint issued on March 23, 1983, and alleges that December 12, Inc.[1] (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Alexander about October 1, 1982.[2]

[1] The Company's name and the caption are as amended during the trial.

[2] Sec. 8(a)(1) states that "it shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Sec. 7 states in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

FINDINGS OF FACT

I. JURISDICTION

Respondent, located in Beverly Hills, California, is the corporate entity formed around the vocalist Dionne Warwick (Warwick). She is its president and board chairperson. Its annual revenues exceed $500,000, of which over $50,000 derives from performances elsewhere than in California.

Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

From January 1980 until discharged on September 30, 1982, Alexander, a percussionist, was one of six musicians providing instrumental accompaniment for Warwick. All six belonged to the American Federation of Musicians, Local 47 (AF of M); and, in Alexander's words, they looked to the AF of M "as the organization which determine[d] the conditions and terms under which [they] work[ed]." Respondent, however, was not signatory to a collective-bargaining agreement with the AF of M at any relevant time.

On September 29, 1982, Alexander returned to Los Angeles following a 49-day tour of Australia and the Orient as part of the Warwick entourage. On September 30, Respondent's accountant, Michael Donner, informed him by telephone that Respondent was eliminating the payment to each musician of $75 for every travel day on which there was no performance. The record indicates that such payments, designed to compensate the musicians for being precluded by travel from taking alternative engagements,[3] were not universal in the industry; and is inconclusive whether AF of M standards mandated them. Donner further told Alexander that those to whom this was unacceptable no longer would work for Respondent. The other musicians received a similar message from Donner.[4]

Alexander responded to Donner that, while he would need some time to decide if this was acceptable, he thought it "unfair and . . . outrageous to suggest cuts in pay" when he had yet to receive a raise in almost 3 years with Respondent and had "witnessed extremely extravagant spending of money by Ms. Warwick." He elaborated that, on the just-concluded tour, Warwick had purchased an $800 ring as a gift for a Hilton Hotels official in Australia, had bought cognac in Baccarat crystal at $200 to $300 per bottle, and had spent $800 to fly excess baggage from Singapore to Bangkok. Donner replied that he had "been trying to tell [Warwick] to cool the spending."

Later on September 30, Warwick received word from Marie Byars, Respondent's corporate secretary, that Al-

[3] Respondent's musicians did not work exclusively for Respondent.

[4] Some, stopping over in Hawaii on their return from the tour, did not receive word until later. Donner was acting on instructions from Warwick, transmitted from Hawaii.

exander had told Donner he did not "wish to contribute to [Warwick's] extravagance" by taking a pay cut. Warwick then called Donner, who told her that Alexander "was irate" at the prospect of a pay cut, and had said he did not "want to contribute to" her extravagance. Warwick reacted: "Listen, if that's the way he feels about it, you can call him and tell him that he's part of my extravagance and I no longer need his services."

With that, Donner called Alexander again, telling him that his "services were no longer needed." Alexander answered that he "did not accept being fired by" Donner; that, if he "were indeed to be terminated," he wanted it in writing from Warwick.

Warwick obliged with this letter, dated October 1:

> Harold:
> In lieu of the fact that you do not wish to contribute to my extravagances, the first cut in my extravagances will be you.
> Your services are no longer needed nor required.
> Sincerely
> December 12, Inc.
> /s/DW
> Dionne Warwick

Alexander had served as "contractor" for the musicians during the tour to Australia and the Orient. That entailed, among other things, preparing and submitting standard AF of M "personal service" contracts on their behalf, which set forth their wage and fringe-benefit entitlements for specified radio and television appearances on the tour, and seeing that the contracts were honored.[5] Alexander had been designated for this role, with the evident approval of the other musicians, by Respondent's musical director, Robert (Joe) Kloess.

The tour was not without incident for Alexander, as contractor. On August 16, in anticipation of an appearance that day on the Don Lane television show in Melbourne,[6] Warwick called a meeting of the band in her Melbourne hotel suite. During the meeting, directing most of her remarks to Alexander as "spokesman for the group," she asked that the musicians do her "a favor" and accept Australian scale, rather than the substantially higher U.S. scale, for the appearance. Alexander answered that that would mean "go[ing] against our union" and the contract he had "filled out" concerning that show.

Warwick rejoined that they were in Australia, that they could not "get United States scale when [they were] out of the country," and that all they would be able to get "is Australian tv scale." Alexander replied that the AF of M was "aware of what [they] were doing," inasmuch as he had "already filed" copies of the contracts with it, and that he and the others consequently "could get fined" if they accepted less than the contracts called for. Warwick, pointing a finger at Alexander, exclaimed that "the union stuff . . . had to go" because it was causing her too much "grief"; that Alexander "had nerve" to protest Australian scale since she did not even need a percussionist; and that, if he did not "drop" his insistence of AF of M scale, he could find himself on a plane home—"the plane flies both ways."

About then, Wade Short, the bassist, interjected that Alexander "was just doing what he had been asked to do" as contractor, and that they "were subject to fines and suspensions . . . from the union if [they] didn't comply with [its] rules." Similarly, Steven Sullivan, the keyboard player, remarked: "All he's doing is . . . his job, that's all. That's why he's so adamant." Warwick replied, "Fine, that's why I'm talking to [Alexander]."

During the meeting, as well, Warwick thanked three of the six, who had indicated a willingness to accept Australian scale, "for helping her out," observing that she "knew who her friends were." The meeting ended without resolution otherwise. As Alexander put it, it was decided to "do the show and continue the conversation at another time."

A followup meeting was held the next day, August 17, in Warwick's hotel suite in Sydney. The atmosphere, as recalled by Short, was "much more amicable" than in the previous meeting. Warwick began by apologizing to Alexander for her harsh words in Melbourne, explaining that she had not understood "the position" the musicians "were in" with the AF of M, and that she now realized that he was only doing what he "had to do, or had been asked to do."[7] Alexander expressed acceptance of the apology, and it was settled that the musicians—including those who had agreed to a lesser scale—would receive AF of M scale for the entire tour, including the August 16 Don Lane Show.

The discussion then turned to a forthcoming trip to Europe. Warwick or Joe Grant, her personal manager, asked if there were some way "to get around" the AF of M as concerns overseas work, such as not filing copies of the contracts. Alexander and Kloess answered that this "would probably be impossible, because those television shows are monitored so well." Grant asked that Alexander supply him with an AF of M wage schedule for the European tour; and the meeting ended, according to Short, with matters "up in the air" whether there would be sufficient funding for that tour.[8]

---

[5] These contracts, one of which is in evidence, were not between the musicians and Respondent, but rather between them and the producers, so called, of the performances. The contract in evidence thus was between the musicians, each of whom is named, and one Peter Gromotka, acting for the Sydney Hilton, a hotel, and concerns a 1-hour radio broadcast on a program called "FM Radio Australia."

[6] Alexander testified that the Don Lane Show is a "talk/variety show similar to the Johnny Carson show."

[7] Further with regard to the apology, Warwick testified: "I [had been] made aware of the fact that, not only could a fine be levied, but the guys could be blackballed from the union. They could, just in general, lose their livelihoods."

[8] The description of the August 16 meeting derives from an amalgam of the unconflicting and credible testimony of Alexander, Short, and Sullivan. That concerning the August 17 meeting is based on their testimony, plus that of Warwick. Warwick testified variously that she could not recall a Melbourne meeting; that she could remember only one meeting; that she "thought both of the meetings were in Sydney"; and that, if there were two meetings, both were in Sydney. Alexander, Short, and Sullivan not only were eminently believable that there was an August 16 meeting in Melbourne, but Warwick's testimony about the August 17 meeting, particularly with respect to her apology, would have made no sense had there not been a prior meeting.

Alexander provided Grant with the requested information "a few days later."

Nothing of note occurred thereafter until September 23, in Manila, when Warwick presented Alexander with a carved-wood hand depicting that gesture of contempt commonly known as "the finger." A card accompanying it, in Warwick's writing, stated:

> To Harold
> Let your finger do the talking.
> From Dionne

Warwick testified that she "gave gifts to all of the members of [her] group," and that she chose this for Alexander "because it was apropos to" him. She elaborated that it was given "in jest," both Alexander and she having "a warped sense of humor." She also explained that Alexander "received the finger because he always gave [her] the finger."[9]

Asked the reason for Alexander's discharge, Warwick testified that "she had no more use for his expertise." She enlarged that he "was a luxury"; that "the kind of show that [she does] does not necessarily require a percussionist"; and that "percussionists are available" on an as-needed basis. She later testified that the remark reportedly made by Alexander to Donner about not wishing to contribute to her extravagance was "typically Harold"; that she "didn't need that around [her]—a negativity"; that she does not "function well around negative action"; and that she consequently "felt that it was time to eliminate that."

Regarding the timing of the discharge decision, Warwick initially testified that it was made while she "was still in Australia"—whether before or after the Don Lane Show she could not be sure—incidental to a telephone conversation with Donner in Los Angeles in which he impressed upon her "the kinds of dollars [she] was spending" and that "the extravagance of the payroll . . . had gotten beyond control." She testified elsewhere that the decision was made October 1—the day she composed the termination letter. As earlier set forth, she instructed Donner on September 30 to tell Alexander he no longer would be needed.

Warwick averred that Alexander's stand in Australia concerning AF of M scale had "nothing whatsoever [to do] with [her] firing him." With respect to those encounters, she testified:

> I believe he was doing something he felt absolutely right to do. Harold is a union person . . . . [T]hat was established inside the group when he first joined it . . . . He was making me aware of the actuality of it all. He was not going to perform under any other circumstances, other than what the union said he had to perform under. That's what he was doing.

Asked by Respondent's counsel what other economies had been effected in the fall of 1982, besides terminating Alexander and eliminating the $75 allowance for nonperformance travel days, Warwick testified that she reduced the salaries of Respondent's office staff, cut the amounts spent on herself "drastically," and discharged her full-time lighting technician, giving those duties to her road manager. To counsel's question if there were any other discharges, she testified, "I can't think of anybody else." Then, led by counsel, she asserted that she also released her sound man and her wardrobe man; and later, questioned by counsel for the General Counsel, she testified that she let her makeup lady and her hair stylist go, as well. Except for that of the lighting technician, Respondent did not supply precise dates or other details of these several alleged discharges.

Respondent has used percussionists from time to time, but not regularly, since Alexander's discharge. Warwick testified that he was hired specifically for an "Earth, Wind, and Fire" medley; and that, after the discharge, "we did not do that particular medley any longer."

B. *Conclusion and Reasons*

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board stated:

> [We] shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[10]

It is concluded that the General Counsel has made the requisite prima facie showing. Thus:

(a) Alexander's insistence during the Melbourne and Sydney meetings that AF of M scale be paid, asserted in his role as contractor on behalf of the several musicians, was an activity protected by the Act.[11]

(b) Warwick resented that activity mightily, as witnessed by her remarks to Alexander on August 16 that "the union stuff . . . had to go," that Alexander "had nerve" to protest Australian scale since she did not even need a percussionist, and that he could find himself on a plane home if he did not "drop" his insistence on AF of M scale.

(c) Despite Warwick's August 17 apology to Alexander, her resentment of his protected activity persisted, as is shown by her bestowal on him of the carved-wood "finger," together with the let-your-finger-do-the-talking note, more than a month after the Melbourne and

[9] Warwick testified that she meant this literally; i.e., that Alexander indeed had made the physical gesture to her at times. She was unable, however, to recall a specific instance.

[10] This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[11] That Alexander's activities occurred outside the United States did not render them any less protected. Cf. *American President Lines*, 267 NLRB 1198 (1983).

Sydney meetings and about a week before the discharge.[12]

(d) Resolution of the pay issue for purposes of the tour then in progress did not remove Alexander as a likely future irritant on the subject. In the Sydney meeting, Respondent was still looking for ways "to get around" AF of M scale on the coming European tour; and Warwick, aware that Alexander "was not going to perform under any other circumstances, other than what the union said he had to perform under," doubtless viewed him as an impediment to that objective.

(e) Warwick admitted at one point that the discharge decision was made while she "was still in Australia"; and her additional testimony that she was not sure if it was before or after the Don Lane Show indicates probable nexus between the decision and Alexander's protected activity on August 16 and 17.

As concerns Respondent's burden, the discharge seemingly was triggered by the report to Warwick on September 30 that Alexander had protested to Donner that he did not want to "contribute to [her] extravagance"—a protest that hardly can be said to have been protected.[13] Then there was Warwick's testimony that the decision was prompted by Donner's call to her in Australia that "the extravagance of the payroll . . . had gotten beyond control"; and, elswhere, that Alexander was discharged because she "felt that it was time to eliminate" his "negativity."

It is concluded, on consideration of these elements, that Respondent has failed to overcome the General Counsel's prima facie showing that protected conduct was a motivating factor in the discharge; and, therefore, that the discharge did violate Section 8(a)(1) as alleged. The reasons for Respondent's failure are these:

(a) Warwick's admission that the discharge decision was made in Australia reveals that the September 30 report was seized on as a pretext; or, at the very least, would not have provoked the action without the impetus of the earlier protected activity.

(b) Warwick's later testimony that the decision was made October 1, apart from the harm done generally to her credibility, undermined her assertion that the decision was grounded on Donner's call to her in Australia about an untoward economic situation.

(c) The economic defense suffered additional damage from the unconvincing character of Warwick's recital—in terms of both demeanor and testimonial content—about the several discharges and other steps supposedly effected in the name of frugality.[14]

(d) Finally, Warwick's testimony that Alexander was discharged because of his "negativity" further detracted from economics as the motivation. That testimony came across, moreover, as an allusion to Alexander's protected insistence that AF of M standards be observed no less than to his comment about not wanting to contribute to Warwick's extravagance. Indeed, Warwick's depiction of Alexander's comment about her extravagance as "typically Harold" reveals that more was involved than that one comment.[15]

CONCLUSION OF LAW

By discharging Alexander on September 30, 1982, as found herein, Respondent violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, December 12, Inc., Beverly Hills, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for insisting on behalf of themselves and their coworkers that Respondent observe pay scales and other terms and conditions of employment in conformity with the standards of the American Federation of Musicians.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Offer to Harold D. Alexander immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges, and make him whole for any loss of earnings and other benefits suffered as a result of the unlawful discharge of him, with interest on lost earnings.[17]

(b) Expunge from its files any reference to the discharge of Alexander which occurred September 30, 1982, and notify him in writing that this has been done and that evidence of that unlawful discharge will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

---

[12] Warwick's testimony that Alexander "received the finger because he always gave [her] the finger" belied her testimony, elsewhere, that she gave him the carving "in jest."

[13] See *Meyers Industries*, 268 NLRB 493 (1984).

[14] Warwick is believed that the lighting technician was discharged. Her testimony about other discharges, Alexander excluded, was vague, heavily dependent on leading, and thus unconvincing.

[15] In *Winn-Dixie Greenville*, 157 NLRB 657, 662 (1966), the Board found a management reference to a dischargee's "negative attitude" to be an indirect reference to the dischargee's union activity. In *Virginia Metalcrafters*, 158 NLRB 958, 962 (1966), the Board found a like correlation with respect to a dischargee's supposed "bad attitude."

[16] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(d) Post at its offices in Beverly Hills, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for insisting on behalf of themselves and their coworkers that we observe pay scales and other terms and conditions of employment in conformity with the standards of the American Federation of Musicians.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Harold D. Alexander immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the unlawful discharge of him, with interest on lost earnings.

WE WILL expunge from our files any reference to the discharge of Alexander which occurred September 30, 1982, and WE WILL notify him in writing that this has been done and that evidence of that unlawful discharge will not be used as a basis for future personnel action against him.

DECEMBER 12, INC.

Irving Tanning Company *and* Local 592, United Food & Commercial Workers International Union, AFL–CIO. Cases 1–CA–19118 and 1–CA–20877

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 16 August 1984 Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In fn. 5 of his decision, the judge discredited Keith Lawler's testimony that Personnel Manager Gabe Hikel told him at the time of his discharge that "they were going to start weeding out the troublemakers." In so doing, the judge relied on his conclusion that "[i]mportant segments of [Lawler's] testimony seemed internally inconsistent," as well as on his observation of Lawler's demeanor. Although our review of Lawler's testimony reveals no significant inconsistencies, we affirm the judge's credibility resolution on demeanor grounds.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was heard by me in Bangor, Maine, on September 13 and 14, 1983, and March 22, 1984, on an original unfair labor practice charge filed on October 1, 1981, and a consolidated complaint issued on May 26, 1983, alleging that Irving Tanning Company (Respondent) independently violated Section 8(a)(1) of the Act by coercive interrogation, surveillance of union activity, and by threatening employees with various reprisals, including a statement that a prounion employee had been causing trouble and "troublemakers" would be "weeded out." In addition, the complaint alleged that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Keith Lawler and Russell Stackhouse because of their activity on behalf of the Union. In its duly filed answer, Respondent denied that any unfair labor practices were committed. Following close of the hearing briefs were filed by the General Counsel and Respondent.

On the entire record in this proceeding, including my opportunity directly to observe the demeanor of the witnesses while testifying,[1] and consideration of the post-hearing briefs I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with a principal office and place of business in Hartland, Maine, from which it is engaged in the manufacturer and distribution of skins, leather, and related products. In the course of said operation, Respondent annually ships goods valued in excess of $50,000 from the aforesaid facility directly to points located outside the State of Maine.

The complaint alleges, the answer admits, and I find that Respondent is now and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Local 592, United Food & Commercial Workers International Union, AFL–CIO is now and at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

There is no history of collective bargaining for the 500 production and maintenance employees at Respondent's Hartland facility. In August 1981, the Union opened an organization campaign at that location. Thereafter, pursuant to an RC petition filed on February 12, 1982, an election was conducted on May 7, 1982. The Union failed to obtain designation by a vote of 172 for representation and 255 against. On August 11, 1982, the Union's loss at the polls was confirmed, when the Regional Director for Region 1 issued a "Certification of Results."

The instant complaint includes allegations that during the early stages of the campaign in September 1981, some 5 months prior to the filing of the representation petition, Supervisors Keith Bubar and Doug Robinson interfered with the organizational effort by coercive interrogation, threats, and surveillance. Beyond that, the more critical issues of discrimination arose well after the

[1] The fact that credibility resolutions hereinafter made are accompanied by objective rationale does not discount, but merely is intended to reinforce, impressions gained from my first-hand observation of the witnesses. Furthermore, testimony, whether or not contradicted, is rejected to the extent that it includes matter which might not be reconciled with expressly credited evidence. See *Professional Care, Inc.*, 271 NLRB 324 fn. 2 (1984).

termination of the 1981–1982 organization drive.[2] Thus, Keith Lawler was terminated about November 23, 1982, 6 months after the election, while Russell Stackhouse was terminated on March 31, 1983, almost 11 months after the election. Respondent argues that both terminations were legitimately founded upon the failure of the dischargees to comply with attendance policies, while the General Counsel urges that the reasons assigned were pretextual and incredible, with both having been terminated as belated punishment for their union activity.

B. *Concluding Findings*

1. Interference, restraint, and coercion during the organization campaign

a. *By Keith Bubar*

The independent 8(a)(1) allegations imputing misconduct to Supervisor Keith Bubar all occurred in early September 1981 during the early stages of the campaign, some 5 months prior to the filing of the representation petition and 8 months prior to the election held on May 7, 1982.

In this connection, Lester Summerhill, a former employee discharged by Respondent in September 1981, testified that his supervisor, Bubar, following a union meeting held during the prior week, approached Summerhill and coworker Julius Lawrence and inquired as to whether they "heard anything about the Union or seen any of the union cards going around." Bubar allegedly went on to state, "The Union wouldn't help you guys up here," in that they would not clean up the messy working conditions at the tannery. He added that it would hurt, because "they" would cut employees down to 8 hours and require employees to confine themselves to their specific jobs.

Lawrence, who also had not been employed by Respondent for 2-1/2 years prior to his testimony, gave a slightly different version, accusing Bubar of stating: "You know if the union gets in it will cut your hours, you'll lose your overtime, you'll be restricted to one job," and "they will not be able to help us much in cleaning the tannery up with its odors and stuff like that." Bubar also allegedly asked Lawrence if he had any union cards.

Lawrence testified to a further conversation with Bubar in that same month. He claims that after Summerhill was fired, in the presence of two other employees, Bubar stated, "Well, you know the union can hurt you," explaining that "the plant would not be able to pay union scales, it would close down." My assessment of Lawrence's credibility has not overlooked the fact that the complaint includes no allegation suggesting that Bubar at any time threatened that the plant would close in the event of unionization.

Bubar testified that he could not recall ever having discussed the Union with Summerhill or Lawrence. He admits to overhearing a conversation between Lawrence and another employee Stanley Williamson, during which, from Lawrence, he first learned that unions placed restrictions on job performance. He denied ever questioning employees concerning union activity, ever informing employees that the Company would close down if they voted for the Union, or to ever informing Summerhill or Lawrence that the Union would reduce work to 8 hours or eliminate overtime or that it would cause the Company to do so. Though the statements imputed to Bubar were made some 2 years ago, he indicated that if he had made them, he believes he would have recalled having done so. He did not remember the conversation described by Lawrence and Summerhill. Bubar impressed me as straightforward and honest. His implication by the two former employees is not shown by credible evidence to have been associated with any pattern of unlawful interference with employee rights by supervisors during the preelection period. I prefer Bubar's testimony over that of previously terminated employees Summerhill and Lawrence.

b. *By Doug Robinson*

The allegations involving Robinson rest on the uncorroborated testimony of Fred Loubier, whose employment with Respondent ended in December 1981 when he was laid off. Loubier testified that in September 1981 he was unloading a truck when coworker Terry Rowel solicited signatures to union authorization cards from among Loubier's crew. Loubier assertedly signed a card at the time. Respondent is charged with unlawful surveillance under Section 8(a)(1), because, according to Loubier, Robinson stood nearby observing this entire process. However, Loubier admitted that Robinson was standing at that location prior to Rowel's arrival and never moved from said position where "he often stood around . . . and watched us unload the conveyor belt." On the face of Loubier's testimony it is apparent that the presence of Supervisor Robinson was known to employees at the time they opted to suspend work briefly to engage in union activity, a presence dictated by legitimate considerations totally unrelated to union activity. Under established Board precedent, an employer cannot be faulted where union activity is willfully conducted on plant premises under the eyes of company representatives.[3] The allegation that Respondent thereby engaged in surveillance violative of Section 8(a)(1) of the Act shall be dismissed.

Loubier went on to testify that during the same work shift, but later in the day, Robinson unlawfully threatened closure of the plant while Loubier and a coworker were discussing the Union. Loubier described the incident as follows:

> Well, me and Manuel [a coworker] was talking about the Union, and he [Robinson] spoke up, he said, "maybe if the Union—Well if I remember right, he said, "probably if the Union got in that Tanning might close the doors."

[2] See testimony of Robert Perry, a nonemployee union organizer, who related that the recent organization effort ended with the election.

[3] See *Knogo Corp.*, 265 NLRB 935, 945 (1982), and cases cited at fn. 33 thereof.

Although Robinson admitted that he might have expressed to employees that he did not think the Union would help in any way, he denied the closedown threat. Here again, in the face of Loubier's professed uncertainty as to the precise words used, the testimony of Supervisor Robinson is regarded as more reliable. It is preferred over the uncorroborated testimony of this former employee. Hence the allegation that Respondent violated Section 8(a)(1) in this respect shall be dismissed.

2. The alleged discrimination

a. *The discharge of Keith Lawler*

Lawler was among the early supporters of the Union. In August 1981 he executed a union authorization card and distributed designations to coworkers, securing signatures, and returning completed cards and a list of employee names and addresses to the Union. He served on the in-plant organizing committee after its establishment in December 1981, attended union meetings, and distributed literature at plant gates as well as within the plant, on several occasions. He was among the team that attended the postelection vote count on May 7, 1982. Respondent acknowledged that Lawler was a known union adherent.

Lawler was hired in the spring of 1977. At times material his immediate supervisor was Keith Osborne. The decision to discharge him was made on Tuesday, November 23, 1982.[4] Lawler, who had recently separated from his wife, spent the previous weekend establishing a new residence by moving to a cabin he owned in the woods. The cabin was located some 3 miles from the highway and some 12 to 14 miles from the plant. He had neither automobile, nor telephone. In order to get to work, Lawler planned to walk to the highway, and to hitchhike the balance of the trip. He was aware of the Company's requirement that he call in when absent.

Lawler's work hours were from 6 a.m. to 2:30 p.m. He admittedly was absent on Monday, November 22, without calling in. According to his testimony, on Tuesday, November 23, he walked the 3 miles to the highway, then hitched a ride for the 12- to 14-mile trip to the plant, arriving at work about 5:30 a.m., only to find that his timecard was not in the rack. Osborne allegedly told Lawler that it had been pulled because he missed work. Lawler explained that he had been sick and had moved over the weekend. Osborne responded that Lawler would have to take his case to Personnel Manager Gabe Hikel. Lawler did so, and according to the sense of his testimony, Hikel was not aware of the reason for the termination but after telephoning Osborne, told Lawler that "they was letting me go because of absenteeism." Lawler argued that there were others including his estranged wife, that had missed more time than he had and that "a lot of them never called in."[5]

In order to maintain the instant allegation, the General Counsel, by virtue of *Wright Line*, 251 NLRB 1083 (1980), bears the initial burden of presenting evidence "sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." Initially, the General Counsel's theory that Lawler was terminated on grounds proscribed by Section 8(a)(3) and (1) of the Act is complicated by the fact that the timing was remote from any form of protected activity.[6] In addition, there is no evidence that Respondent prior thereto had engaged in any conduct reflecting a propensity on its part to engage in unlawful discrimination.[7] Indeed, on the credible evidence the General Counsel's affirmative proof is limited to establishing that a known union adherent was terminated 5 months after culmination of an organization drive in which employees rejected representation in resounding fashion. The General Counsel's cause is further complicated by the concession that in 1981 Lawler was absent 12 days, 10 of which were either Monday or Friday. During that period he received warnings in June and December 1981. In 1982 prior to his discharge, he declined to report to work on 8 occasions, half of which resulted in extended weekends. Against this background, Lawler engaged in a clear and knowing breach of Respondent's attendance policy by

[4] All dates in this section refer to 1982 unless otherwise indicated. The date that Lawler was informed of his termination is in conflict.

[5] According to Lawler, in response to this plea, Hikel side-stepped the observation, by stating "that they were going to start weeding out the troublemakers." Although Hikel was not questioned concerning this statement, and hence Lawler's testimony stands uncontradicted, I did not believe that any such statement was made. Lawler was considered unreliable. Important segments of his testimony seemed internally inconsistent. As Respondent observes, the remark he attributes to Hikel, being a less than equivocal admission of wrongful motive, is difficult to reconcile with the sole theory of a violation available to the General Counsel on this record. Thus, Lawler's cause rests upon assumption that Respondent, following the termination of union activity, patiently, with predetermination, lay in wait for the development of grounds for discharge in order to eliminate this union protagonist. Yet, if Lawler is to be believed, Hikel betrayed this delicate scheme by admitting to illegality in resisting Lawler's protests during the discharge process. Considering the circumstances, together with my adverse reaction to the demeanor of Lawler in observing him testify, his testimony in this respect is rejected. In all likelihood, failure to examine Hikel in this respect was attributable to oversight. The allegation that Respondent independently violated Sec. 8(a)(1) in this connection is therefore dismissed.

[6] The General Counsel engaged in an unpersuasive effort to establish that Lawler's union activity persisted following the May election. Robert Perry, an organizer employed by the Charging Party Union, testified that following the election, he continued to meet with employees, including Lawler. He also testified that until November 1982 he continued to make contact with Lawler by telephone or visitation. However, he could not recall what was discussed on those occasions. Indeed, on cross-examination, Perry testified the campaign ended on the day of the election. Lawler confirmed that his direct contacts with Perry ended when the latter moved from the area a few weeks after the election. The testimony as to the postelection involvement with the Union is not only vague, but there is no basis for whatever for inferring that employer representatives were aware of it. Also noteworthy is another uncorroborated assertion on the part of Lawler that following the election, he told employees that a pay cut would not have emerged if the Union had gotten in. Testimony as to the frequency of these expressions was exacted through prejudicially leading examination on the part of the General Counsel. In any event Lawler was not regarded as a trustworthy witness, and if he made this point to coworkers, I am unwilling to find that he did so on an other than isolated basis. There clearly is no evidence that any such comment was made within earshot of any representative of Respondent. Here again, there is no basis for inferring that Respondent was aware of any union activity on the part of Lawler at times proximate to his discharge.

[7] Apart from the instant proceeding, there does not appear to be an unfair labor practice history at Respondent's plant. As shall be seen infra, the independent 8(a)(1) allegations herein have been deemed nonmeritorious.

declining to work or call in on Monday, November 22, 1982.[8]

To overcome these shortcomings, the General Counsel attacks the credibility of certain testimony underlying the defense, while claiming that pretext is indicated by evidence that Respondent applied its attendance policy disparately.

This effort at impeachment is made possible by the fact that Respondent's case against Lawler extended beyond his November 22 absence. Thus, Supervisor Osborne and Personnel Director Hikel insist that Lawler, in addition to the Monday absence, also failed to report for work or call in on Tuesday, November 23. As their mutually corroborative account goes, Osborne reported the absence to Hikel on Monday, who in turn told him to issue a warning if Lawler showed up on Tuesday, but if he neither appeared nor called on Tuesday to discharge him. On Tuesday afternoon when Lawler neither reported nor called, after again consulting with Hikel, Osborne asserts that he pulled his card. Osborne claims that he informed Lawler of the discharge when he finally reported on Wednesday morning.

Thus, Respondent's witnesses are emphatic in their assertion that Lawler was terminated on Wednesday, November 24, after having failed to report for work on both Monday, November 22, and Tuesday, November 23, while Lawler insists that he reported for work prior to his shift on Tuesday, November 23, only to find that he had been terminated. Despite my misgivings concerning the truthfulness of Lawler, in this instance, persuasive evidence tends strongly to confirm that he was absent only on Monday, November 22.

Thus, it is documented fact that Lawler on December 6, 1982, within 3 weeks of his termination, filed an unemployment claim. His report, in support thereof, made to Robin Scanlin, a claims deputy with the Maine Bureau of Employment Security, in material part, was summarized by the latter, as follows: "I was absent on Monday 11/22 . . . . I went in Tuesday and my card was pulled."[9] Scanlin further testified that, although she had no independent recollection of the transactions, it would have been her standard procedure to call the Company and speak to the person in charge of the personnel department. She would "usually tell . . . what the claimant has told her," ask for a response, and clarification of anything vague in the claimant's statement. Scanlin related that she would then prepare a written summary of the personnel director's statement. In evidence is her summary of Hikel's response, prepared in connection with Lawler's claim, which in material part, is set forth below: "He was laid off & recalled 11/15/82. He worked five days and was absent 11/22 and did not call in. He was discharged for continuing record of absences."[10]

Scanlin next testified that on the basis of the information collected, she would prepare a written determination as to whether or not the claim is allowed. That prepared in the case of Lawler disqaulified him for benefits, reciting in material part as follows:

> You were laid off in October and recalled in November. You worked 5 days and then you were absent 1 day and did not notify the employer. You were discharged for absenteeism and for failing to notify the employer.[11]

Respondent argued strenuously that the documents prepared by Scanlin in processing Lawler's unemployment claim and their content were improperly received and should have been excluded as incompetent hearsay. Upon further consideration, there is no merit in this claim. In accordance with Section 10(b) of the Act, the "Rules of Evidence applicable in the District Courts of the United States . . ." are the preferred reference point in resolving such issues as they arise in unfair labor practice proceedings. Rule 803(8) of the Federal Rules of Evidence recognizes an exception to the hearsay rule with respect to "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . ." The documents prepared by Scanlin were well within the scope of Section 803(8) and Respondent's objection goes more to the weight, than the admissibility. Accordingly, the ruling fostering receipt of these documents made at the hearing is reaffirmed.[12]

Respondent also seeks to discredit the substantive content of these documents on a number of grounds, challenging specifically the intimation that at the time of the unemployment filing there was no claim that Lawler was absent on Tuesday, November 23. In weighing the import of this documentation it is first noted that the testimony of Osborne and Hikel that Lawler was absent that day is unsubstantiated by any form of business record.[13] On the other hand, payroll records tend to un-

[8] Respondent's employee handbook (G.C. Exh. 2, p. 8) recites as follows:

> You are expected to be on the job everyday for which you have been scheduled to work. When you are unable to report for work for any reason, it is your responsibility to notify your foreman or the main office at least 2 hours after the start of the first shift and one hour before the start of the second and third shift.

[9] See G.C. Exh. 8(b). This representation was affirmed by signature of Lawler on a form which bore the admonition "I Realize That The Law Provides Penalties For Willful Misrepresentation Of Fact."

[10] See G.C. Exh. 8(a).

[11] See G.C. Exh. 8(e).

[12] Contrary to Respondent, *Heal v. Maine Employment Security Commission*, 447 A.2d. 1223 (Me. Sup. Ct., 1982), warrants no different result. Unlike the raw, unsworn, unverified statements involved there, which were unidentified as to how they were prepared, and relied on without benefit of the author's testimony, the sworn accounting by Claim Deputy Scanlin as to her standard operating procedure and as to how she compiled G.C. Exhs. 8(a), (b), and (c) does in fact "supply . . . assurances of reliability," and is properly described as the "kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." See Me. Rev. Stat. Ann. (1979) § 905(2), 447 A.2d. at p. 1226.

[13] Respondent in its posthearing brief suggests that the timecard of Lawler in evidence as R. Exh. 1 is objective documentation corroborative of Osborne and Hikel. I cannot agree. Upon examination of the timecard, the handwritten entry under Tuesday, November 23, of "NC," although normally the entry used to signify a failure to "call in," does not constitute reliable, objective proof that Lawler was absent that day. Apart from the fact that Respondent made no effort to identify when the entry was made or by whose hand, it is also a fact that the authenticity of

Continued

dermine Respondent's position in this respect. One would think that caution would have been exercised in maintaining accuracy of entries pertinent to the discharge of a known union protagonist. The document in question, General Counsel Exhibit 5, includes the familiar "NC," signifying "absent without calling in," on November 22, but does not duplicate that notation under November 23. Instead that document under November 23 simply states "ALL DONE." There is no suggestion that this document was shown to Lawler at any time. Nonetheless, the entries, which according to Personnel Manager Hikel would have been his work,[14] are entirely symmetrical with Lawler's consistently maintained position that he was absent on November 22 and informed of his termination when he reported in on November 23.

Respondent's assault against the content of the aforedescribed documents continued with rebuttal testimony by Hikel who swore to specific recollection of a telephonic conversation with Scanlin about December 9, 1982. He testified that when Scanlin inquired of the circumstances surrounding the Lawler discharge, including previous absences, Hikel informed her "the absence was one day with no call and then a second day we waited until late in the afternoon before we decided to terminate him because we had not received another call." Hikel related that he could "clearly remember" that Scanlin went on to state "well, it doesn't make any difference, one day is enough." His recall of that conversation was admittedly independent, as he made no notes, nor did he have any other basis for refreshing his recollection as what transpired. Contrary to Hikel, it is considered unlikely that Scanlin would have overlooked an absence on November 23 had it been reported. She disqualified Lawler for benefits. That determination was reviewable. I would place greater stock in the probability that a public official in denying an unemployment claim would explore and report every fact tending to support that determination, than the somewhat self-serving testimony of Hikel. I am convinced that the November 23 absence went unnoticed in Scanlin's reports for the same reason that it was not denoted in General Counsel's Exhibit 5, namely, she was never informed thereof, as the absence never occurred.

Based on the confirmation appearing in the reports prepared by an official representative of the State Unemployment Insurance Agency,[15] and the timing of that compilation in relation to the discharge, together with the fact that Respondent's own business records tend to support Lawler's view of the facts, the latter's testimony is accepted over that of Osborne and Hikel.

Unquestionably, the breakdown in the credibility of Osborne and Hikel strengthens the General Counsel's claim of discrimination. However, the pretext issue must be evaluated in the light of other factors, and while the issue is not free from doubt, this discrepancy in light of the overall record is not deemed sufficient to support a fair inference that Respondent resorted to a pretexual discharge.[16] On balance, the credible evidence herein merely indicates that a known union adherent was terminated for admitted violation of company policy. Just why Lawler would have been singled out from any number of known union supporters is left to imagination. The timing of the termination was not inherently suspect, nor was there evidence of any conduct on Respondent's part suggesting a proclivity to engage in reprisals against union adherents. Nor is the claim of discrimination aided by convincing showing that Lawler was a victim of disparate application of Respondent's attendance policy.[17] In short, the claim of discrimination has not been carried beyond the speculative, and on the totality of the record, the General Counsel has not established by a preponderance of the evidence that Lawler was discharged on November 23, 1982, in violation of Section 8(a)(3) and (1) of the Act.

b. *The discharge of Russell Stackhouse*

Stackhouse began his most recent employment with Respondent on May 12, 1980. He was discharged on the assigned ground that he was absent on March 30, 1983, without calling in as required by Respondent's policy.

At the time of his discharge, Stackhouse's immediate supervisor was Richard Emery. Stackhouse was assigned to the second shift, with work hours of 3 to 11 p.m. It will be recalled that under Respondent's published attendance policy, second-shift personnel are required to call in their absence at least 2 hours prior to the commencement of their shift.

---

that notation is of no greater reliability than the truthfulness of the parol testimony of Supervisor Osborne, through whom that document was offered. Thus, R. Exh. 1, at best, presents a collateral question of credibility. It does not stand as an objective factor influencing resolution of the basic conflict in testimony.

[14] It is noted that the "NC" entries on R. Exh. 1 appear to be by the same hand as that inscribed on G.C. Exh. 5.

[15] The Public Records exception is based on the assumption that a public official in the course of his duties will record facts accurately in the proper performance of his duties. See, e.g., *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952), and *Chesapeake & Delaware Canal Co. v. U.S.*, 250 U.S. 123 (1919).

[16] I do not subscribe to the notion that the oath should be enforced through a process whereby the offender is automatically penalized by adverse ruling on the merits. Cf. *Shattuck Denn Mining Corp v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Although a testimonial breakdown will always arouse suspicion, it ought not be dispositive where the surrounding circumstances suggest innocence. There are a number of explanations for false testimony other than guilt. Exaggeration, entailing a disregard of the oath might well be a function of innocently confused perception or relentless desire to win, rather than an admission that one's legal position is unfounded. All of us have encountered those who would lie themselves to trouble even when the truth would absolve. Neither side in this case can claim innocence on this score. Lawler's false assertion as to the "troublemaker" comment, if believed, would have provided "smoking gun" evidence of discriminatory intent. It was no less reprehensible than Respondent's false effort to remove ambiguity and strengthen its defense to unassailable dimensions; for as Hikel was to explain eslewhere: "I don't recall ever having a person out two consecutive days, no call, and still is working and was not terminated as a result."

[17] A number of Respondent's employees had been discharged since 1981 for absenteeism. Testimony of Hikel persuades that there is no consistency in the manner in which attendance is enforced. He offers the entirely credible explanation that supervisors are afforded latitude in this area, and discipline will vary with the needs of individual supervisors, their attitude and their separate evaluation of a number of factors reflecting on the individual employee's performance. In these circumstances, contrary to the General Counsel, no firm conclusion can be drawn from raw attendance data of other employees, for it would be unreasonable to conclude that any were situated identically to Lawler.

It appears that on Monday, March 28, 1983, Stackhouse's wife, also an employee of Respondent, was injured on the job. On Tuesday, March 29, Stackhouse did not go to work. However, he called the plant about 2 p.m., speaking to Ron Tasker, an acknowledged supervisor, reporting that his wife was in severe pain, that he would have to stay home with her to take care of the children, and that she had an appointment the next day to see a specialist. Tasker indicated that he would report the matter to Emery as soon as the latter arrived. Stackhouse testified that he believed that he informed Tasker that he intended to report on Wednesday, March 30.

On Wednesday, March 30, the scheduled medical appointment was canceled. According to Stackhouse, having apparently made up his mind not to work that day, he twice unsuccessfully attempted to reach Supervisor Emery at his home. He later called the plant, attempting to reach Emery but hung up before Emery could be summoned to the phone.[18] For unknown reasons, he did not immediately recall the plant, but drove his wife to seek emergency room treatment at a hospital in Waterville, Maine, some 28 miles from his home. It was not until 4:15 or 4:30 that afternoon that he again attempted to contact the plant. Stackhouse left a message with coworker Bob Richards, informing him, "Well look, I've got to take Becky to the hospital right away." When Richards inquired as to the problem, Stackhouse replied "she had hurt her back and was in a lot of pain and I had to get her to a doctor right away." Richards indicated that he would give the message to Emery as soon as he arrived.

On Thursday, March 31, Stackhouse, prior to the commencement of his shift, called in seeking information as to whether there would be work the next day, which was "Good Friday." He was at that time informed by Emery that he had been fired for failing to call in the previous evening. Stackhouse claims to have thereafter discussed the matter with Hikel and to have appealed again to Emery. Thereafter he met with Hikel who responded to Stackhouse's pleas and explanations, stating: "Well, you should have taken more steps to protect your job." To this, Stackhouse responded "Well . . . I was more worried about my wife than I was anything else." The discharge was allowed to stand.

Emery testified that it was he who recommended the termination of Stackhouse. He claims to have warned Stackhouse twice in 1983 concerning his excessive absenteeism.[19] Emery added that on March 30 he arrived to find that Stackhouse did not show up and there was no call. He claims to have decided, after talking with Hikel, that if Stackhouse failed to show up by 3:30 a.m., his card would be pulled and he would be discharged.[20] Emery admitted that he received Stackhouse's message through Robert Richards, but according to Emery, his records reveal that it was received at 4:45 p.m., after the termination.[21]

Stackhouse, with confirmation from Union Representative Robert Perry, described his efforts on behalf of the Union as extensive. They allegedly included distribution of union literature at a plant gate on one occasion, and his having solicited execution of a union authorization card from the son of his supervisor. Although Stackhouse might well have had union leanings, it was my impression that the testimony defining his activity on the part of the Union was highly exaggerated and I am not persuaded that his sentiment in this respect was ever pursued in a manner likely to come to the attention of management.

Emery and Hikel both denied they regarded Stackhouse as a prounion employee, claiming that they learned of his alleged union activity only in the course of the instant unfair labor practice hearing. Certain action on the part of management shortly after the May 1982 election lends convincing support to their testimony. Thus, Respondent's Exhibit 2 was identified by Hikel as a list of 37 employees known by Respondent to be active on behalf of the Union. That list was furnished the NLRB on June 17, 1982, and was used in this proceeding by the General Counsel in examining witnesses. Although, by its nature, that list would have served Respondent's interests if maintained in the most comprehensive form attainable, Stackhouse was not listed. On balance, it is concluded that there is neither direct nor credible evidence warranting a reasonable inference that management knew or suspected that Stackhouse was a prounion employee. Accordingly, in connection with the termination of Stackhouse, the General Counsel has failed to make a prima facie showing that union activity was to any extent a contributing factor to the discipline imposed. The 8(a)(3) and (1) allegation in his case shall be dismissed.

---

[18] Stackhouse testified that while waiting for Emery to come to the phone, his daughter started to head for the street, and that in order to stop her, he hung up.

[19] Stackhouse could not recall any such warnings. I regarded Emery on this point as the more credible witness.

[20] Stackhouse had no telephone in his home. He lived a quarter of a mile distant from his mother-in-law Catherine Munn. The latter, as a witness for the General Counsel, confirmed that Emery called her approximately a half hour after the scheduled start of Stackhouse's shift on March 30, indicating that it was unnecessary that she make "a special trip" but that if Stackhouse came over, to have him call Emery. Emery confirmed that he made this effort to reach Stackhouse.

[21] In his testimony, Stackhouse asserts that Emery denied that the discharge decision was his own. However, the testimony in this respect was not entirely consistent. Stackhouse first related that Emery did not identify who it was that had instructed him to effect the termination, but that Emery simply stated that it was "the office." Later he testified that Emery expressed disagreement with the discharge, adding that the discharge decision was "out of his hands," stating that it was in the hands of Hikel. He also testified that the next day in a further conversation with Emery, Emery allegedly told him that he had to let him go, that there was nothing he could do, and that Hikel wanted him terminated. Bob Richards tended to corroborate Stackhouse. He testified that after he relayed the message to Emery, the latter responded, "It was a good thing he [Stackhouse] called, because they wanted me to pull his card." Emery credibly denied such a statement. The testimony of Emery that he made the decision is the more probable. For, it is unlikely that Hikel would have had information as to the absence were it not for Emery's having initiated the action resulting in the discharge. Contrary to Stackhouse, it is difficult to believe that Emery would have taken this step if he did not himself contemplate discipline. I believe that the discharge at the least was recommended by him, and that he at no time denied responsibility for that action or expressed disagreement with it.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent did not commit the independent 8(a)(1) violations set forth in the complaint.

3. Respondent did not violate Section 8(a)(3) and (1) of the Act on November 23, 1982, by discharging Keith Lawler and on March 31, 1983, by discharging Russell Stackhouse.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The complaint is dismissed in its entirety.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Painters Local Union No. 64 and Painters District Council No. 5 and International Brotherhood of Painters and Allied Trades, AFL–CIO (Saxon Enterprises, Inc.) *and* Frederick T. Rasmussen. Case 19–CB–4937

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 8 June 1984 Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified.[2]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

"3. By conducting union trials against, and imposing court-collectible fines on, former members of Respondent Painters Local Union No. 64 who had duly resigned, for their postresignation crossing of a sanctioned picket line and working during a strike at Saxon Enterprises, Inc., Respondent Painters District Council No. 5 restrained and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A)."

THE REMEDY

Having found that the Respondents have engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that they cease and desist and take certain affirmative actions designed to effectuate the policies of the Act.

We shall order Respondent Painters District Council No. 5 to rescind all fines illegally imposed against former members of Respondent Painters Local Union No. 64 and to refund any money they may have paid to District Council No. 5 in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

We shall further order that the Respondents expunge from the constitution of Respondent International Brotherhood of Painters and their governing documents those portions of section 125 (Resignation) conditioning a resignation on a vote of the local's membership and prohibiting a resignation during a strike or lockout.

ORDER

The National Labor Relations Board orders that

A. Respondent Painters District Council No. 5, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing persons who have resigned from, and are no longer members of, Respondent Painters Local Union No. 64 in the exercise of the rights guaranteed them by Section 7 of the Act, by trying those persons and imposing court-collectible fines on them because of their postresignation conduct in working at Saxon Enterprises, Inc. during the strike which began on 22 July 1983.

(b) Maintaining in its governing documents those portions of section 125 of the constitution of Respondent International Brotherhood of Painters and Allied Trades, AFL–CIO, reading "by vote of the membership" and "No resignation shall be accepted during a strike or lockout."

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Rescind the fines levied on Respondent Painters Local Union No. 64's former members, Marla

---

[1] We herein correct several inadvertent errors of the judge. The second amended complaint issued on 1 February 1984 not on 17 January 1984. Further, the amended charge was *received* by Respondent International on 19 January 1984 and the amended complaint was *received* by it on 25 January 1984. (The respective dates for the service by mail were 13 and 17 January 1984, as service is defined in Sec. 102.113 of the Board's Rules and Regulations.)

[2] In the absence of evidence revealing any involvement by Respondent Painters Local Union No. 64 in the imposition of illegal fines on former union members by Respondent Painters District Council No. 5 we shall dismiss that portion of the 8(b)(1)(A) complaint as to the Local. We also find merit in Respondent International's exception to the judge's finding that it participated in the imposition of fines. We specifically note that the second amended complaint as amended does not allege such a violation and the evidence does not indicate the International's involvement in the fines. Accordingly we reverse the judge's conclusion that Respondent International violated Sec. 8(b)(1)(A) in this respect.

In adopting the judge's finding of 8(b)(1)(A) violations with respect to maintenance of two provisions of sec. 125 of Respondent International's constitution and his consequent expunction remedy we rely solely on the rationale in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984). We therefore find it unnecessary to pass on the judge's analysis. Further, in the absence of exceptions to the judge's failure to find violations with respect to other portions of sec. 125 we find it unnecessary to pass on the issues as to whether the Respondent's maintenance of those provisions constitute an unfair labor practice.

Member Zimmerman agrees with the violations found by his colleagues, but in reaching this result relies on the analysis used by the judge, and, to the extent that it is applicable, his partial dissent in *Neufeld Porsche-Audi*.

Sanders, Maynard Linman, Mack Hombel, David Watson, Steven Linman, and Ron Bogle, and refund to those individuals any money they may have paid pursuant to any fine found herein to have been illegal, with interest, in the manner set forth in the remedy section of this Decision and Order.

(b) Expunge from its governing documents those portions of section 125 of the constitution of Respondent International Brotherhood of Painters and Allied Trades, AFL–CIO, reading "by vote of the membership" and "No resignation shall be accepted during a strike or lockout."

(c) Post at its business office and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix A."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondents Painters Local Union No. 64 and International Brotherhood of Painters and Allied Trades, AFL–CIO, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in its governing documents and constitution those portions of section 125 reading "by vote of the membership" and "No resignation shall be accepted during a strike or lockout."

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Expunge from its governing documents and constitution those portions of section 125 reading "by vote of the membership" and "No resignation shall be accepted during a strike or lockout."

(b) Post at their business offices and other places where notices to members are customarily posted copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce persons who have resigned from, and no longer are members of, our labor organizations in the exercise of rights guaranteed them by Section 7 of the Act, by trying those persons and imposing court collectible fines on them because of their postresignation conduct in working at Saxon Enterprises, Inc. during the strike which began 22 July 1983.

WE WILL NOT maintain in our governing documents those portions of section 125 of the constitution of the International Brotherhood of Painters and Allied Trades, AFL–CIO, reading "by vote of the membership," and "No resignation shall be accepted during a strike or lockout."

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the fines levied on our former members, Marla Sanders, Maynard Linman, Mack Hombel, David Watson, Steven Linman, and Ron Bogle, and refund to those individuals any money they may have paid pursuant to any fine found to have been illegal, with interest.

WE WILL expunge from our governing documents those portions of section 125 of the constitution of the International Brotherhood of Painters and Allied Trades, AFL–CIO, reading "by vote of the membership" and "No resignation shall be accepted during a strike or lockout."

PAINTERS DISTRICT COUNCIL NO. 5

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[4] See fn. 3, above.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our governing documents and constitution those portions of section 125 reading "by vote of the membership" and "No resignation shall be accepted during a strike or lockout."

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL expunge from our governing documents and constitution those portions of section 125 reading "by vote of the membership" and "No resignation shall be accepted during a strike or lockout."

PAINTERS LOCAL UNION NO. 64

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL–CIO

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. The original complaint, issued November 16, 1983, was based on a charge filed October 9, 1983, by Frederick T. Rasmussen. The complaint alleged that Painters Local Union No. 64 (Local) and Painters District Council No. 5 (Council)[1] had violated, inter alia, Section 8(b)(1)(A) of the National Labor Relations Act (Act) by illegally imposing court collectible fines on certain employees of Saxon Enterprises, Inc. (Saxon) a client of Rasmussen. On November 17, 1983, counsel for Respondents filed an answer to the complaint, admitting some allegations and denying others, and setting forth an affirmative defense that the proceeding was a nullity because it was supported, directed, or financed, directly or indirectly, by the Employer (Saxon). On January 17, 1984, a first amended complaint was issued based on an amended charge filed by Rasmussen on January 12, 1984, making minor changes in the original complaint, including the addition of International Brotherhood of Painters and Allied Trades, AFL–CIO (International) as a party Respondent. On January 17, 1984, a second amended complaint was issued[2] which basically was the same as the first amended complaint, but which contained some minor changes. On February 7, 1984, counsel for Respondents answered the second amended complaint. Some allegations were admitted, and some were denied. The answer included five affirmative defenses. The fourth affirmative defense stated, inter alia, that the alleged unfair labor practice "was directly solicited by counsel for general counsel." The fifth affirmative defense stated, inter alia, that the Employer "is directly or indirectly financing, encouraging or participating in this case," in violation of Title I of the Labor Management Reporting and Disclosure Act (LMRDA).

Trial of this controversy was scheduled for March 13, 1984, in Seattle, Washington. Prior to the trial date counsel for Respondents attempted to obtain by subpoena duces tecum certain information in support of Respondent's fifth affirmative defense. Counsel Saxon filed a petition to revoke the subpoena duces tecum, and counsel for the General Counsel filed a petition in support of the Charging Party's petition to revoke subpoena. The subpoena controversy was referred to the Administrative Law Judge for disposition. On March 9 a telephone pretrial conference was held between counsel for the General Counsel, counsel for Respondents, and myself. During the conference it was agreed that, if the subpoena were to be revoked, a trial would not be necessary since the facts controlling the basic issues were not in dispute, and could be submitted by stipulation. By order dated March 9, 1984, I revoked Respondents' subpoena duces tecum, set aside the trial, established a date for stipulation of facts, and established a date (April 9, 1984) for submission of briefs. Briefs, which have been carefully considered, were submitted by counsel for the General Counsel, Respondents, and the Charging Party.

On the entire record, and stipulations of fact submitted by counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Saxon Enterprises, Inc. is a State of Washington corporation with an office and place of business on Federal Way, Washington, where it is engaged in the business of industrial and commercial painting and contracting. During the past 12 months, which period is representative of all times material herein, in the course and conduct of its business operations, Saxon had gross sales of goods and services valued in excess of $300,000, and provided services from its facilities within the State of Washington to customers within the State, including but not limited to McChord Air Force Base, Daringold Farms, and Zidell Marine Corporation, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000.

Respondents admit, and I find, that Saxon, at all times material, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Local, Council, and International jointly are referred to as Respondents.

[2] The second amended complaint further was amended, in minor detail, by stipulation of the parties.

II. THE LABOR ORGANIZATIONS INVOLVED

Painters Local Union No. 64 and Painters District Council No. 5 and International are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The following facts are admitted by Respondents in their pleadings:

About July 22, 1983, under direction of Respondent Local 64, members of Respondents engaged in an economic strike against Saxon. About July 14, 1983, and prior to the economic strike, the following members of Respondent Local 64 tendered resignations from Respondent Local 64 membership: Marla Sanders, Maynard Linman, Mack Hombel, David Watson, Steven Linman, and Ron Bogle, and continued to work thereafter at Saxon's jobsites performing painting functions during the strike referred to above.

At all times material Respondents jointly and individually have maintained the following rule, contained in the International constitution of Respondent International Brotherhood, which reads in relevant part:

> Sec. 125. (RESIGNATION) Any member may sever his connections with the Brotherhood by written resignation, provided he has paid all dues and arrearages, he does not continue to work as a journeyman at any branch of the trade, and his Local Union accepts his resignation by vote of the membership. No resignation shall be accepted during a strike or lockout. A member who resigns shall not thereafter be entitled to any Brotherhood Benefits.

Respondent International Brotherhood adopted the rule more than 6 months prior to the filing of the charges herein. The rule at all times material herein has been, and presently is, a part of the constitution.

About August 3, 1983, Robert Goodwin, the business agent of Respondent, District Council, brought charges against employees Marla Sanders, Maynard Linman, Mack Hombel, David Watson, Steven Linman, and Ron Bogle because they continued to work during the strike after their resignation from Respondent Local 64. About August 3, 1983, Respondent District Council accepted and processed the charges brought by Robert Goodwin.

About September 1, Respondent District Council imposed court collectible fines on employees Marla Sanders, Maynard Linman, Mack Hombel, David Watson, Steve Linman, and Ron Bogle because they continued to work during the strike after their resignation from Respondent Local 64.

The following facts are stipulated by the parties:

Respondent International Brotherhood adopted the provision identified in paragraph 6(a) of the second amended complaint more than 6 months prior to the filing of the charges. Said provision has been a part of the constitution and is presently part of the constitution.

On January 13, 1984, a true copy of the amended charge filed was deposited in the United States mail, addressed to Respondent International Brotherhood, by certified mail, and was received in the office of Respondent International Brotherhood on January 19, 1984.

The amended complaint and notice of hearing was issued by the Regional Director on January 17, 1984, and on January 17, 1984, a true copy of the amended complaint and notice of hearing was deposited in the United States mail, addressed to Respondent International Brotherhood, sent by certified mail, and was received in the office of Respondent International Brotherhood on January 25, 1984.

Immediately prior to the filing of the amended charge, the Charging Party was informed by the General Counsel of the Board's holding in *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983), and informed of its right to file an amended charge covering the question, whether or not it is legal for a union to maintain a constitutional provision presented herein, and recommended that an amended charge be filed, in light of Respondents Local No. 64 and District Council's inability to modify or amend the constitutional provision adopted by Respondent International Brotherhood.

Frederick T. Rasmussen, at all times relevant, for purposes of the proceedings herein, and continuing to date, has been, and is, counsel for the Employer, Saxon Enterprises, Inc.

This stipulation is made without prejudice to any objection that any party may have as to the materiality, relevancy, or competency of any facts stated.

Discussion

A. *Restrictions on Employees' Right to Resign*

The constitutional provision quoted above runs afoul of Board law in two ways. First, the proscription against resigning from union membership only during nonstrike periods is an unreasonable restriction of employee rights under Section 7 of the Act. Second, the requirement that employee resignations are dependent on vote of the union membership imposes an illegal restriction on resignation even during nonstrike periods.

It is noted at the outset, prior to discussion of the two restrictions mentioned above, that the employees here involved resigned during a nonstrike period. Their resignations were tendered to the Union on July 14, 1983. The strike did not commence until July 22, 1983. An otherwise valid resignation is effective on its receipt by the Union.[3] The resignations of July 14, 1983, were valid, whether or not the union membership agreed to the resignations. (See discussion infra.) It is further noted that, regardless of union constitutional restrictions, there is no evidence that those restrictions were communicated to members of the two Respondent Unions. Absent such communication, the restrictions could not be enforced.[4]

---

[3] *Carpenters San Diego Council (Campbell Industries)*, 243 NLRB 147, 148 (1979); *TKB International Corp.*, 240 NLRB 1082, 1098 fn. 3 (1979), and cases cited therein. The fact that the Union received the resignations on July 14, 1983, is not in dispute.

[4] *Menasco, Inc.*, 267 NLRB 1147 (1983); *Electrical Workers Local 1012 (General Electric)*, 187 NLRB 375 (1970).

1. The resignation clause disallows resignations during a strike or lockout. Such language leaves the inference that the Union will permit its members to resign only during nonstrike periods. The Board has held that a member's right to resign from a union applies both to strike and nonstrike situations. Therefore, "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign."[5] The Board's rationale in *Dalmo Victor* was that there is an overriding interest of the employee's right to refrain from concerted activities. Such a right "encompasses the right of a member to resign from a union having once joined. [T]his right to resign is not forever and irrevocably lost merely because an employee chooses to become a union member."[6]

In addition, in a recent case,[7] the Board held that "the mere maintenance of such a constitutional provision restrains and coerces employees, who may be unaware of the provision's unenforceability, from exercising their Section 7 rights. [E]mployees who wanted to resign from the Union and return to work during the strike may have been discouraged from doing so by [the] . . . section . . . in the Union's constitution." Id.

Applying the rationale and the holding of the Board in *Dalmo Victor* and *Engineers & Scientists Guild* to the case at hand, I find that Respondents' constitutional provision which states "no resignation shall be accepted during a strike or lockout" is an unreasonable restriction on a member's Section 7 right to resign, as it permits members to resign only during nonstrike periods.

2. In addition to the restriction of resignations mentioned above, the Union's constitution imposes an additional restriction which requires that no resignation will be effective until "his Local Union accepts his resignation by vote of the membership." Such a restriction has been held invalid by prior Board law.[8] In *Carpenters San Diego Council*, the Board looked at the Union's constitution which stated that "[a] member can withdraw or sever his connection with the United Brotherhood by resigning in writing, and it shall require a majority of the members present at a regular meeting to accept a resignation."[9] The Board in its decision held "that the resignation procedure which requires membership approval without setting standards for such approval is unduly restrictive and, therefore, presents no bar to resignation at any time."[10]

The case at hand requires such membership approval before a member's resignation will become effective. However, the Union's constitution sets forth no standards to be used in making such approval. As a result, I find that the requirement of membership approval is unduly restrictive. As such, the resignations tendered about July 14 were valid at that time.[11]

B. *Respondents' Affirmative Defense*

1. Respondents argue that Section 411(a)(4) of the Labor Management Reporting and Disclosure Act (LMRDA), which prohibits nonparty interested employers, such as Saxon, from indirectly encouraging employee litigation, bars this action.

Respondents base their argument on *NLRB v. Shipbuilders*, 391 U.S. 418 (1968), and some other cases of similar vein, but none of those cases is applicable to the argument. *NLRB v. Shipbuilders* was a case of narrow application involving a section of LMRDA[12] concerning exhaustion of administrative remedies before filing an action in court. The holding of the Supreme Court was:

> We conclude that unions were authorized to have hearing procedures for processing grievances of members, provided those procedures did not consume more than four months of time; but that a court or agency might consider whether a particular procedure was "reasonable" and entertain the complaint even though those procedures had not been "exhausted." We also conclude, for reasons stated earlier in this opinion, that where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not grounds for expulsion from a union. We hold that the Board properly entertained the complaint of the Holder and that its order should be enforced.

The question here is quite different. Respondents were charged with illegally fining former union members, in violation of their rights under Section 7 of the Act. A complaint was issued and, as found herein, the charge was substantiated—Respondents did fine former union members over whom they no longer exercised any control. The proceeding here involved was limited to an alleged unfair labor practice. The duty of the administrative law judge is "to inquire fully into the facts as to whether the Respondent has engaged in or is engaging in unfair labor practices affecting commerce as set forth in the complaint or amended complaint."[13] Assuming, arguendo, that Saxon indirectly encouraged this litigation, such a fact would not be a defense to the commission of unfair labor practices. Possibly such a fact would be cause for proceeding in some other forum, under some other statute, against persons or firms not party to this

[5] *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982), enf. denied 725 F.2d 1212 (9th Cir. 1984). Although the Ninth Circuit denied enforcement of the Board's Order, the Board to date has not changed its position, and its decision remains as controlling precedent in this case.

[6] Id. at 986.

[7] *Engineers & Scientists Guild*, supra.

[8] *Carpenters San Diego Council*, 243 NLRB 147, 148 (1979).

[9] Id. at 152.

[10] Id. at 148, citing *Machinists Local 405 (Boeing Co.) v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Textile Workers Local 1029, Granite State Joint Board*, 409 U.S. 213 (1972).

[11] Since such resignations were valid prior to the strike that took place about July 22, the fines levied on the employees are unenforceable. In addition, by fining such members, Respondent Union committed an unfair labor practice under Sec. 8(b)(1)(A). See *NLRB v. Textile Workers Local 1029*, supra at 217, wherein it was held that "[w]here a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street."

[12] 73 Stat. 522, 29 U.S.C. Sec. 411(a)(4).

[13] NLRB Rules and Regulations, Sec. 102.35.

controversy, but that fact would be collateral, and irrelevant, to the complaint involved in this controversy. This argument is without merit.[14]

Respondents state in brief that "Since the above facts give rise to an inference that Saxon has employed its attorney as a surrogate participant, Respondents respectfully request that upon reconsideration this action should be dismissed." Such an inference is not warranted. A charge may be made under the Act "by any person."[15]

2. Respondents argue that the International has engaged in no actions within the 6-month period established by Section 10(b) which are in any way connected with the unfair labor practice charges at issue in this case.

The authorities cited by Respondents deal with different factual situations, and shed no light on the issue at hand. Respondents cite *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 515 (1980), for the proposition that a complaint predicated on the execution of an agreement is barred by Section 10(b) if the execution occurred more than 6 months before the charge was filed. That holding, however, is applied only when the contract in question is lawful on its face.[16]

The issue here deals with a different factual situation. The provision of the International's constitution (sec. 125) is unlawful on its face, since it allows resignations only during nonstrike periods, and only after the union membership has voted to accept the resignations. (See discussion, supra.) Therefore, since the provision in question is unlawful on its face, the continued maintenance of an adherence to the clause constitutes an alleged unfair labor practice which continued up to and even after the filing of the charge and the complaint. Accordingly, the limitations set by Section 10(b) of the Act are not applicable.[17]

This argument is without merit.

3. Respondents argue that, since the International enacted its resignation rule, it has had no involvement of any kind with the fines in issue, hence, the International has not violated the Act.

As discussed above, the resignation rule is invalid; Section 10(b) of the Act does not preclude a finding of invalidity; continued maintenance of the rule is a violation of the Act. Thus, this argument is without validity.[18]

Respondents argue that the Board solicited the Charging Party to file an amended charge to name the International as a party; that the amended charge therefore is invalid; and that such facts present a litigable issue that invalidates the administrative law judge's order revoking Respondents' subpoena.

As noted supra the fact that Rasmussen filed the original and amended charges is immaterial, in and of itself. Respondents argue that the reason for the alleged solicitation was that the Board legally cannot, of its own volition, initiate a charge. The alleged initiation was launched, according to Respondents, because of "a new legal theory derived from a recent Board case." (Stipulated fact 4.) Respondents acknowledge that "this second requested charge was not based on new facts discovered during an investigation." Therefore, according to Respondents, the second charge was invalid, and "the Board lacks jurisdiction to proceed against the International." Respondents cite as their authority *Tabernacle Sand & Gravel Corp.*, 232 NLRB 957 (1977), and cases cited therein.

Respondents' reliance on *Tabernacle Sand & Gravel* is misplaced. There, as here, Respondents argued that evidence of solicitation of a charge was improperly excluded. There, the administrative law judge, with Board concurrence, concluded that since all the facts surrounding the reason for the amended charge were known to the respondents, the excluded testimony was irrelevant. Stipulated facts and pleading admissions here also show that the International was aware of all the facts relied on by the General Counsel. The administrative law judge concluded, in *Tabernacle Sand & Gravel*, supra at 961:

> In sum, I find that the context surrounding the filing of the first amended charge herein reveals nothing which would show, even if Waldron would have been permitted to testify further on the subject, that the amendment was improperly solicited. Moreover, I find that, in the circumstances herein, the excluded testimony is irrelevant. Accordingly, I conclude there is no merit to Respondent's third affirmative defense.

Respondents complain that counsel for the General Counsel conferred with Rasmussen concerning the International, but that matter also is irrelevant. As the administrative law judge stated in *Tabernacle Sand & Gravel*:

> An effective remedial order can be issued only against employers and labor organizations who are named as Respondents in a case, and only those persons against whom charges are filed may be made respondents to a complaint. (*Hod Carriers, Local 783, supra* at 972.) Even if Waldron had been advised that Pasquale Nalbone earlier gave evidence contradicting Waldron's, what was said by the Board agent to Waldron is irrelevant, for it is quite proper for such differences to be resolved at a hearing. Even the dissent in *Hod Carriers, Local 783, supra* at 982, acknowledges that "Regional personnel should acquaint a Charging Party with his rights, assist him in the formulation of his charges and, where investigation reveals that additional charges can be made or that additional parties should be added as Respondents, advise him of his right to do so." Insofar as Respondent herein asserts that the investigating agent exceeded the bounds of giving advice to Waldron of his right to file an amended charge, in the face of Waldron's personal knowledge of facts as depicted in paragraph 4 of his affidavit, it is illogical, and straining, to conceive that anything else of which he may have been in-

---

[14] *Menasco, Inc.*, supra.

[15] NLRB Rules and Regulations, Sec. 102.9.

[16] *Local 1424*, supra at 416, 417.

[17] *Prestige Bedding Co.*, 212 NLRB 690, 698 (1974), wherein the Board affirmed the administrative law judge's interpretation of *Local No. 1424*, supra.

[18] *Engineers & Scientists Guild (Lockheed-California Co.)*, supra; *Computer Sciences Corp.*, 258 NLRB 641 (1981).

formed placed the Board in a position tantamount to becoming the initiator of the amendments.[19]

This argument is without merit.

4. Finally, Respondents argue that International did not have a reasonable time within which to respond to the charge against it. That argument does not have the support of the record. The amended charge was served on the International January 19, 1984. The amended complaint was served on International January 25, 1984. The charge against the International was that it was maintaining an invalid rule in its constitution. That rule was at the core of this controversy. No complicated or extensive set of facts was at issue. The International was well aware of all facts at issue, had notice well in advance of proposal litigation, and had ample opportunity to defend itself. Notice is taken of the Board's common practice of permitting amendments of complaints, even so late as trial date, and even when new facts are involved, if, as here, no surprise or undue disadvantage is involved.

CONCLUSIONS OF LAW

1. Saxon Enterprises, Inc. is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Painters Local Union No. 64, Painters District Council No. 5 and International Brotherhood of Painters and Allied Trades, AFL–CIO are, and each of them is, and at all times material have been, labor organizations within the meaning of Section 2(5) of the Act.

3. By conducting union trials against, and imposing court-collectible fines on, former members of the Unions, who had duly resigned from the Unions, for their postresignation crossing of a sanctioned picket line and working during a strike at Saxon Enterprises, Inc., Respondents restrained and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. By maintaining in their constitution in Section 125 thereof a resignation proviso "by vote of the membership" and a proviso reaching "No resignation shall be accepted during a strike or lockout," Respondents have violated Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) of the Act.

THE REMEDY

Having found that Respondents have engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, I shall recommend that they be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the act.

It is recommended that fines illegally imposed against former union members be ordered rescinded, and that any money they may have paid to Respondents be refunded to those members, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

It is further recommended that Respondents be ordered to expunge from their constitution the two provisos in Section 125 quoted above.[20]

[Recommended Order omitted from publication.]

[19] Id. at 961.

[20] *Engineers & Scientists Guild*, supra.

Houshang Vazin, an Individual, d/b/a Super Save; Parviz Paul Vazin, an Individual, d/b/a Super Save; Houshang Vazin and Pariz Paul Vazin, a Partnership, d/b/a Super Save; and Shelun Company, Inc. d/b/a Super Saver *and* United Food and Commercial Workers, Local 1167, United Food and Commercial Workers International Union, AFL–CIO–CLC. Case 21–CA–22021

30 November 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 15 February 1984 Administrative Law Judge Earldean V. S. Robbins issued the attached decision. The Respondents filed exceptions and a supporting statement, and the Charging Party filed a brief in opposition to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, statement, and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order[2] as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Houshang Vazin, an individual, d/b/a Super Save; Parviz Paul Vazin, an individual, d/b/a Super Save; Houshang Vazin and Parviz Paul Vazin, a partnership, d/b/a Super Save; and Shelun Company, Inc. d/b/a Super Saver, Riverside, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following to paragraph 2(c).

"Any backpay due the employees under this provision shall bear interest to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977) (see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962))."

2. Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

"(e) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way."

3. Add the following as paragraph 2(h).

"(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize United Food and Commercial Workers, Local 1167, United Food and Commercial Workers International Union, AFL–CIO–CLC as the exclusive bargaining representative of our employees in the unit found appropriate.

WE WILL NOT fail and refuse to execute our collective-bargaining agreement with the Union agreed to on 8 September 1982.

WE WILL NOT repudiate our obligation to abide by the terms of the collective-bargaining agreement.

WE WILL NOT fail and refuse to make contractually required contributions to the various benefit trust funds nor fail and refuse to grant the cost-of-living increases as provided for in the collective-bargaining agreement.

WE WILL NOT unilaterally reduce wage rates nor eliminate any of the fringe benefits provided for in the collective-bargaining agreement.

[1] The Charging Party's motion to strike the Respondent's exceptions is denied as the exceptions conform to the requirements of the Board's Rules and Regulations.

The Charging Party's motion for attorneys fees and expenses is denied as an award of such fees and expenses is appropriate only when a respondent has raised patently frivolous defenses. *Tiidee Products*, 194 NLRB 1234 (1972). Our review of the record reveals that the Respondents' defenses, while unpersuasive, are not patently frivolous.

[2] We correct the judge's inadvertent reference in her remedy and recommended Order to "September 8, 1983," rather than "September 8, 1982," as the date on which the Respondents and the Union reached agreement on the contract.

[3] We shall modify the recommended Order to require that the Respondents provide interest on all backpay due the employees, expunge the discharged employees' files, and notify the Regional Director of its compliance efforts.

WE WILL NOT bypass the Union and bargain directly with our employees with regard to the terms and conditions of their continued employment.

WE WILL NOT discharge employees in an attempt to avoid our obligation to abide by the collective-bargaining agreement and our obligation to recognize and bargain with the Union.

WE WILL NOT tell employees that we can only hire a certain percentage of the Super Save employees in order to keep our Riverside store from being a union shop.

WE WILL NOT tell employees that they cannot be rehired for at least 30 days in order to avoid having our Riverside store become a union shop.

WE WILL NOT tell employees that they will have to obtain withdrawal cards from the Union as a condition of their continued employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize the above-named Union as the exclusive collective-bargaining representative of our employees in the appropriate unit described below and, on request, meet and bargain with the Union concerning wages, hours, pension and welfare benefits, and other terms and conditions of employment; and. if an understanding is reached, WE WILL embody it in a signed document. The appropriate unit is:

> All food clerks, bakery, health and beauty aides, and household hardware clerks, general merchandise clerks, clerk's helpers, and snack bar and take-out food department employees employed by us at our 3981 Chicago Avenue, Riverside, California facility; excluding all office clerical employees, meat department employees, janitorial employees, maintenance employees, professional employees, guards and supervisors as defined in the Act.

WE WILL acknowledge that we are bound by the Retail Food, Bakery, Candy, and General Merchandise Agreement between the Union and certain other unions and Food Employers Council, Inc. and Independent Retail Operators effective by its terms from 27 July 1981 to 29 July 1984 as modified by us and the Union on 8 September 1982 and WE WILL abide by the terms of the agreement both retroactively and prospectively.

WE WILL make our employees whole by paying retroactively the wage rate and health welfare trust fund contributions as provided in the collective-bargaining agreement with the Union which have not been paid, and which would have been paid absent our unlawful reduction and/or unilateral discontinuance of these payments, and WE WILL pay interest on any retroactive wages due our employees.

WE WILL offer the employees named below immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and WE WILL make each of them whole for any loss of earnings they may have suffered by reason of the discrimination against them, plus interest:

Robert Blair	Miles Tilghman
Michael Elder	Robert Robbins
Diane Ferneding	Richard Heimstra
Verna Fuches	Jack McMillan
Luis Guerrero	Stephen Wakeman
Ed Horne	Anthony Bullock
Barbara Luce	Michele Gracia
Denise Martin	Jack Summers
Sue Ellen Mott	Barry Swift
Mary Snyder	Roy Webb
Larry Delgado	Joseph Vargas
Leo Smith Jr.	Mark McCoy
Anna Guzman	Kenya Tapscott

WE WILL notify each of the above-named employees that we have removed from our files any reference to his or her discharge and that the discharge will not be used against him or her in any way.

HOUSHANG VAZIN, AN INDIVIDUAL, D/B/A SUPER SAVE; PARVIZ PAUL VAZIN, AN INDIVIDUAL, D/B/A SUPER SAVE; HOUSHANG VAZIN AND PARVIZ PAUL VAZIN, A PARTNERSHIP, D/B/A SUPER SAVE; AND SHELUN COMPANY, INC. D/B/A SUPER SAVER

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge. This matter was heard before me in Riverside, California, on October 11, 12, and 13, 1983. The charge was filed by United Food and Commercial Workers, Local 1167, United Food and Commercial Workers International Union, AFL–CIO–CLC (the Union) on March 3, 1983, and served on Houshang Vazin, an individual, d/b/a Super Save, and Parviz Paul Vazin, an individual, d/b/a Super Save, and Houshang Vazin and Parviz Paul Vazin, a partnership, d/b/a Super Save (Respondent Vazin) on March 4, 1983; and a first amended charge was filed by the Union on April 25, 1983 and served on Respondent Vazin and Shelun Company, Inc., d/b/a Super Saver (Respondent Shelun and collectively Respondents) on April 27, 1983. The amended complaint, which issued on July 8, 1983, alleges that Respondent

violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The basic issues are:

1. Whether Respondent Vazin is a successor employer to Market Basket obligated to recognize and bargain with the Union and whether Respondent Shelun is the alter ego of Respondent Vazin.

2. Whether Respondents unlawfully refused to bargain by unilaterally reducing wage rates and ceasing to make contributions into the various trust funds as required by the collective-bargaining agreement.

3. Whether Respondents unlawfully refused to bargain by refusing to execute a written contract embodying an agreement reached with the Union.

4. Whether Respondents repudiated their collective-bargaining agreement with the Union and bypassed the Union and dealt directly with the employees concerning their wage rates and other terms and conditions of employment.

5. Whether Respondents unlawfully discharged and refused to reinstate a majority of the unit employees.

6. Whether Respondent unlawfully restrained and coerced employees by various statements and by conditioning continued employment on the employees' obtaining withdrawal cards from the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material since about the middle of September 1982, and continuing through about February 19, 1983, Respondent Vazin, doing business under the trade name Super Save, was engaged in the business of operating a supermarket located at 3981 Chicago Avenue, Riverside, California (Riverside Market). At all times material, since about February 21, 1983, and continuing to date, Respondent Shelun, a California corporation, doing business under the trade name Super Saver, has been engaged in the business of operating the Riverside Market. In the normal course and conduct of the business operations, it is projected that Respondents will, within the 12-month period commencing about September 12, 1982, derive gross revenues in excess of $500,000 from the operation of the Riverside facility and will, during the same period of time, purchase and receive products originating from outside the State of California valued in excess of $50,000.

The complaint alleges and on the foregoing I find that at all times material Respondent Vazin and Respondent Shelun have been employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, and I find, that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Purchase of the Riverside Market and Respondent Vazin's Status as a Successor to Market Basket*

The owners and most of the agents of Respondent involved are of Iranian descent and are members of the same family. Houshang Vazin, referred to as Houshang, Harry, or H. Vazin, came to the United States about July 1982.[1] On his arrival in the United States, he and his family lived with his brother Parviz Paul Vazin, referred to as Paul Vazin, at Paul Vazin's home in Palos Verdes, California, for approximately 1 month. Thereafter, Harry Vazin lived with Mohammad Afsari, referred to as Afsari, and his wife Shahnaz, who is the sister of Harry and Paul Vazin, at their home in Riverside, California, until at least February 1983.

Darioush Khaledi is married to the sister of Paul Vazin's wife. Khaledi and Paul Vazin have lived in the United States for some period of time prior to July and at all times material herein have been co-owners and president and vice president, respectively, of K.V. Mart, a company which operates a chain of retail grocery stores under the name of Top Value.

Afsari has lived in the United States since 1974, attended college here, and worked for 2 years as an engineer in the employ of an electrical firm. In mid-1979, Harry and Paul Vazin's brother, Nader Vazin, the owner of a Manhattan Beach, California restaurant called the House of Ribs, returned to Iran and left Afsari with the full power of attorney to operate or dispose of the House of Ribs. Afsari managed the House of Ribs until it was sold in the latter part of 1982 or the first part of 1983. Mohammad Vazin, the brother of Harry, Paul, and Nader Vazin, worked at the House of Ribs as Afsari's assistant manager until the House of Ribs was sold, or shortly before, at which time he began working at the K. V. Mart produce warehouse.

Harry Vazin, who spoke some English but was not fluent, came to the United States with the intent of investing in some business venture. Within the first month or two of his arrival, he discussed with Paul Vazin the nature of such investment. He admits that, in view of Paul Vazin's business experience in this country, he relied heavily on him to decide in what business he should invest.

At some time prior to September 12, 1982, Paul Vazin learned that the Riverside Market, which was then owned by the Kroger Company and operated as one of the Market Basket chain of grocery stores in Southern California, was for sale; and it was decided that Harry Vazin should invest in the purchase of the Riverside Market. Khaledi was to be president and Harry Vazin was to be either vice president or secretary. Harry Vazin agreed that Khaledi and Paul Vazin would handle all of the negotiations for the purchase of the Riverside Market and the lease agreement for the property where the market is located.

[1] Unless otherwise indicated, all dates in July through December are in 1982 and in January through June are in 1983.

The purchase and sale agreement names Houshang Vazin as purchaser within the body of the agreement; however, the agreement is signed both by Houshang Vazin and Darioush Khaledi on August 31, and by a representative of the Kroger Company on September 1. The agreement provides for a closing date of no later than September 11 and further provides, inter alia:

> 5. *ASSUMPTION OF LIABILITIES*
>
> . . . .
>
> (b) Seller, as a member of the Southern California Food Employers' [sp.] Council, Inc., is a party to the various labor contracts covering the Store(s) which are described herein and more particularly described below: (See Exhibit E).
>
> Purchaser agrees to become a successor to all of said applicable contracts and to abide by all relevant terms and conditions thereof.
>
> . . . .
>
> Further, Purchaser agrees to contribute to the multi-employer pension plan(s) listed on Exhibit F for those employees who are currently participants in said plan(s) and who are retained and employed by Purchaser in accordance with the terms and conditions of the labor agreement(s) listed in Exhibit E.
>
> . . . .
>
> *EXHIBIT E*
>
> (LABOR CONTRACTS)
>
> 1. Collective bargaining agreement between Food Employers Council, Inc. and UCFW, Retail Clerks covering clerks, stockers, box people, and general merchandise clerks at the stores currently or to be operated by Seller at the store location(s) which expires on or about July 29, 1984.
>
> . . . .
>
> *EXHIBIT F*
>
> (PENSION PLANS)
>
> The following Pension Plans covering union employees at the store location(s):
>
> 1. The Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund.

The lease names Houshang Vazin as the lessee. However, Khaledi and Paul Vazin signed the lease as guarantors both individually and as K.V. Mart Co. At some point between the signing of the lease and the purchase and sale agreement on September 1 and the closing of escrow on September 11, Khaledi withdrew from the partnership arrangement. Thereafter, insofar as the record reveals, he had no involvement with Respondent's operations. Prior to this withdrawal, however, in late August he instructed Ed Gund of Gund, Gund & Associates, the labor consultant for K.V. Mart, to negotiate with the Union in an attempt to secure some modifications in the collective-bargaining agreement. Gund was able to secure some concessions from the Union which were embodied in a letter of understanding signed by Gund on September 9, and by Kenneth M. Schwartz, the Union's attorney, on September 20.

The body of this letter reads:

> This letter is to confirm our telephone conversation of September 8, 1982 regarding the above-captioned market.
>
> Mr. Houshang Vazin, the purchaser, has agreed to the terms we discussed. They are as follows:
>
> 1. The seniority of all employees (present and future) will start as of the take-over of the market.
> 2. All holidays (which under the terms of the contract would be triple time) will be paid at the rate of double time.
> 3. Present contract shall run until July 29, 1984.
>
> If this letter correctly states your understanding, please sign on the line provided and return to us. Please retain the enclosed executed copy for your files.

After the withdrawal of Khaledi from the partnership arrangement,[2] Paul Vazin continued to act on behalf of Respondent Vazin; and, although the record contains no formal partnership agreement between Harry Vazin and Paul Vazin, the application for, and subsequent transfer of, alcoholic beverage license is in the names of Houshang Vazin and Parviz P. Vazin. The business tax certificate, dated September 7, 1982, is in the names of Houshang Vazin and Paul Vazin. Respondent's account with the State Employment Development Department is also in the names of Parviz Paul and Houshang Vazin. A county of Riverside health permit, dated January 27, is issued in the names of Houshang and Paul Vazin, d/b/a Super Save Market. On the other hand, a fictitious business name statement was filed on September 7 naming Houshang Vazin as the registrant for the fictitious business name Super Save Market and the original application for alcoholic beverage license was filed in the name of Houshang Vazin only, but was later modified to include Paul Vazin.

The Riverside Market was open to the public until 4 p.m. on September 11 under the name of Market Basket. After 4 p.m., an inventory was taken and the store was opened to the public on the morning of September 12 under the operation of Respondent Vazin with substantially the same employees,[3] substantially the same inventory and the same store manager as had been utilized by Market Basket. Essentially the only changes in the operation of the Riverside market were its ownership and its name.[4] In these circumstances, I find that Paul Vazin is a co-owner of Respondent Vazin and that Respondent Vazin is a successor to Kroger Company. *NLRB v. Burns Security Service*, 406 U.S. 272 (1972).

---

[2] Harry Vazin places the date of Khaledi's withdrawal as September 11. Khaledi places it as 3 to 5 days prior to September 11.

[3] With the exception of four or five employees, the entire Market Basket staff was retained by Respondent Vazin.

[4] I find that the record does not support Respondent's argument that Market Basket did not have a meat department and did not have a produce department. The record indicates only that the inventory in these departments was substantially depleted at the time of the takeover.

B. *The Refusal to Execute the Collective-Bargaining Agreement*

Union attorney Arnold Schwartz testified without contradiction that in early December, during a telephone conversation, he told Gund that he would like for Respondent Vazin to execute a copy of the contract and that he would send him three copies of the current agreement signed by the Union. In accordance therewith, Schwartz sent Gund copies of the contract with the cover letter dated December 7, the body of which reads:

> Re: Super Save Market and
> *UFCW, Local 1167*
>
> Dear Ed:
>
> Pursuant to our discussions, enclosed please find three (3) copies of the current Food Agreement which has been agreed upon by your client and UFCW, Local 770.
>
> So that our records are complete, please execute all three (3) copies and return two (2) of the executed copies for our files.[5]

Sometime later Schwartz telephoned Gund and asked why he had not received copies of the contract. According to Schwartz' undenied testimony, Gund replied, "I sent them to the client. Apparently he refuses to sign them."

Schwartz then sent another letter to Gund, the body of which reads:

> Re: Super Save Market and
> *UFCW, Local 1167*
>
> Dear Ed:
>
> On December 7, 1982, we sent you three (3) copies of the Industry Food Agreement to be executed by your client. As we both know, an executed copy is not required in that your client has agreed to be bound by its terms until July 29, 1984, with the exception of the items listed in your letter of September 9, 1982.
>
> Nonetheless, we feel that in order to have our files complete, it was believed it would be helpful if a formal copy were executed.
>
> It would be appreciated if you could have two (2) copies executed by you or your client and have same returned to our office for our files.
>
> Season's Greetings.

Schwartz had no further communication with Gund or with Respondents regarding this matter, nor was Schwartz or the Union ever notified, insofar as the record reveals, that Gund no longer represented Respondent Vazin.

[5] Schwartz testified that the reference to Local 770 in the body of the letter was inadvertent.

C. *Afsari's Status at the Riverside Market Prior to February 20*

Within a few days after Respondent Vazin commenced the operation of the Riverside Market, Afsari began working in the market full time. In view of his lack of experience in the grocery business, he worked in all areas in an attempt to gain experience. Harry Vazin testified that although Afsari worked in the store, he was not an officially employed person, but rather assisted him. According to Harry Vazin, Afsari conducted some of the business of the store for him and he consulted Afsari regarding matters relating to the operation of the store. Also, Afsari could sign checks for the store, and did so.

Afsari testified that Harry Vazin requested that Afsari assist him in operating the Riverside Market since Harry Vazin had a language barrier and that Afsari look after Harry Vazin's interests to see that things ran smoothly. According to Afsari, sometimes he worked 40 to 50 hours a week at the Riverside Market and sometimes he was just there walking around and he continued in that kind of arrangement from a few days after the store opened until February when Respondent Shelun purchased the store. Afsari was not paid a salary, but Harry Vazin paid the rent on the house shared by them and took care of some of Afsari's other living expenses.

Harry Vazin testified that he had a draw of $1000 a week, $500 for himself and $500 for Afsari, but that this was not as a salary; rather it was the total of their living expenses. He did not actually give Afsari $500 a week; he just used the $1,000 weekly to pay the expenses of the two families and, if Afsari needed money for other things, he would give it to him. He denies that Afsari had any direct responsibilities for performing any duties in the market but, rather, was mostly helping him with the language. It is undisputed that Afsari was the spokesman and interpreter for Harry Vazin.

However, employee witnesses testified, without contradiction, that Afsari made work assignments, worked in the cashier's office, approved customer checks, picked up money drawers from checkers, closed the store and was generally in charge of the night shift, granted time off to employees, signed checks for the store to buy cash from the bank, authorized customer refunds, resolved disputes when the cashier felt a customer was not entitled to a refund, authorized employees to take groceries from the store on an IOU basis, and directed the day-to-day work of employees. They further testified they considered him as a boss and felt obligated to follow his orders. Employee Anna Guzman testified that when she complained that she was receiving conflicting orders from Munt and Afsari, Munt told her to follow Afsari's orders. Employee Luis Guerrero testified that Afsari told him he owned a small interest in the store.

Harry Vazin admits that Afsari spoke to the union representatives who came to the store but denied that he spoke to them on Harry Vazin's behalf. According to him, he told Afsari to tell the union representatives that Respondent Vazin had not signed any contract or agreement with the Union and were not bound to the Union. However, the record is clear that Afsari was Respondent Vazin's spokesman in dealings with the Union. Thus,

when the Union filed grievances in November and December regarding contractually guaranteed minimum pay for holidays and weekends, it was Afsari who resolved the grievances with the Union. It was also Afsari who resolved the grievances concerning the persons who were employed in violation of the employment procedures provision of the collective-bargaining agreement and the failure to schedule employees as required by the agreement. When the Union demanded in November that Afsari's wife, Shahnaz, join the Union as required by the union-security provision of the contract, the demand was addressed to Afsari and, in compliance with the demand, Shahnaz did join the Union.

In late December, the Union learned that Respondent had not been making the contractually required contributions to the health and welfare funds. Further, they had reports that there was a clerk working in the store who was not receiving the contractual rate of pay. About January 18, Union Representatives Susie Prior and Frank Mott visited the store. First, they requested that bookkeeper Waldo Foltz permit them to audit the books. Foltz said he could not do that without authorization from Afsari or Harry Vazin. Prior and Mott then discussed the matter with Munt and advised him of what Foltz had said. Munt agreed to show them the timecards. During their discussion, Afsari came into the office and Prior and Mott began discussing with Afsari and Munt the requirements of the collective-bargaining agreement. They discussed the benefits and the rate of pay and at some point, according to Mott's undenied testimony, Afsari said, "Well, I know what you're telling me, or I understand what you are telling me, but that certainly makes it hard to run a business. When I have my restaurant, we don't have to do it that way. I call my relatives when I want. I bring them in when I want, and it's much easier to run it on that basis." Mott replied, "But this is not the House of Ribs. This is the grocery store, and you've got to do it a different way." They continued to discuss the contractual wage and benefit requirement and the difference in the operation at the House of Ribs. Some remark was made regarding Afsari's wife being a member of the Union and Afsari asked if he would have to join the Union. Mott said he did not know, they would have to check it out, but if he was an owner he probably would not have to. Afsari did not respond but, as Prior and Mott were leaving, Prior jokingly said, "Come on, Mo,[6] you can really tell us. Don't you own some of this?" Afsari laughed and replied, "Well, yeah, but it's not on paper."

On February 18, Prior and Munt returned to the market and spoke to Afsari. Mott asked Afsari if he was paying the health and welfare contributions. Afsari replied that they would have to talk to his attorney. Mott asked, "Who is your attorney?" Afsari said, "Mr. Jones of Jones, Jones & Jones." Mott asked several times whether Afsari was making the required contributions to the fund. Each time Afsari said he did not know, that they would have to talk to his attorney. Mott then asked if they could reach his attorney. Afsari said he had a telephone number but it was difficult to reach him. Prior and Mott left the office, called the Union's attorney and asked him to call Jones. The attorney called back 5 or 10 minutes later and said he could not reach Jones.

Prior and Mott then went back to Afsari, told him they could not reach Jones and that this was a serious problem. Afsari said, "I know. We don't want to do anything wrong, but you know, I can't say anything more about it until you talk to my attorney on it." According to Mott, he replied, "Mohammad, you are telling me, and you've told me before, what good employees you've got here, what a good job they do, and how nice people they are. But you are not paying the insurance." Afsari said, "I can't talk about it. You'll have to talk to my attorney." Mott said, "Mo, if you're not paying those benefits, you're shafting those people." Again Afsari said, "I can't talk to you about it." Mott replied, "Okay, fine. Is your attorney going to be in?" Afsari said, "He should be here this afternoon about 3:00." Munt said, "We'll come back." Afsari said, "I don't think he's going to want to talk to you." Mott said, "We'll be back." At some point during the conversation, Mott asked to look at the records and Afsari said he did not have the records, that they were in Los Angeles.

D. *The Termination of Respondent Vazin's Employees*

As Mott and Prior were leaving the store following their February 18 conversation with Afsari, employee Ed Horne approached them and said, "What the heck does this mean? The store is closing down." According to Mott, since Afsari had made no mention of closing the store, he thought Horne was kidding, so he started to laugh and said, "Yeah, tell us another one." Horne said, "No," and pulled out an unsigned letter which read:

> February 17, 1983
>
> H.V., A partnership dba
> Super Save
> 3981 Chicago Avenue
> Riverside, CA 92507
>
> Ladies and Gentlemen:
>
> We are sorry to report that we are going out of business as of midnight, February 19, 1983.
>
> Any monies due you from working and not paid for in the check will be available on Thursday. (They will be mailed to your home.)
>
> There might be a company that will lease the building and be in the Retail Food Business, but as of today we are not sure.
>
> Should a new business start-up, then if you are interested in working for them you can contact them directly for employment.
>
> Thank you for your help, but conditions are such as we have no other choice but to go out of business.

All of Respondent Vazin's employees received identical letters with their paychecks on either February 18 or February 19.

Immediately following their conversation with Horne, Prior and Mott reentered the store and asked Afsari

[6] Afsari is sometimes referred to as "Big Mo" and Mohammed Vazin is referred to as "Little Mo."

what this was all about. Afsari replied, "What can I tell you? We're closing down. We're not doing any business." Mott then walked away because other employees were approaching them with letters that they had just received with their paychecks. After some conversation with employees, Mott returned to Afsari and asked, "What are you doing?" Afsari replied, "You know what we're doing. We can't make any money. We are closing down." Mott asked, "Are you terminating these people or what?" Afsari said, "There is no work for them." Mott asked, "Are you terminating them, laying them off?" Afsari said, "There's no work for them." Mott said, "That's not an answer. What's happening?"

After a short interchange of a similar nature, Mott asked, "Are you going to open up again?" Afsari said, "I don't know. It's a new company." Mott asked, "What are they going to do?" Afsari said, "I don't know." Mott asked, "Are they going to open up?" Afsari replied, "They may, they may not. It may be a retail establishment. It may not be." Mott said, "At this point in time, I'm telling you, if you're going to open up a retail business here or a grocery business, I'm telling you, every one of these employees is willing to come back to work for you." Afsari said, "Well, fine, they can fill out an application if a new company comes in." At some point during the conversation, according to Mott's undenied testimony, he asked Afsari who the new owners of the company would be. To which Afsari replied, "I don't know anything about it."

E. *The Formation of Respondent Shelun and the Operation of the Riverside Market Subsequent to February 20*

Harry Vazin testified that he decided to sell the Riverside Market about 2 or 3 months after Respondent Vazin began operating the market because he was losing money. He admits that one of the reasons he was losing money was because the payroll was too high. He also admits that he did not advertise that the store was for sale and did not receive offers from anyone other than Afsari and Mohammad Vazin. Afsari testified that sometime in mid-January he and Mohammad Vazin decided to purchase the Riverside Market for themselves and on behalf of a friend, Mehdi Loloee, who was attempting to enter the United States. At the time Mohammad Vazin was working at the K.V. Mart produce warehouse.

At the beginning of February, Afsari sold the House of Ribs for $60,000; $50,000 was cleared from the sale of which Afsari received $15,000 and Mohammad Vazin $35,000. Mohammad Vazin and Afsari formed the corporation Shelun Company, Inc., on January 24, 1983. According to individual financial affidavits filed with Shelun's application for an alcoholic beverage license, Afsari stated that his total financial contribution was $24,000 for the purchase of 1,000 shares of stock which sum was obtained as a gift from his family in Iran. Afsari's affidavit also listed him as vice president, secretary, and chief financial officer. Mohammad Vazin's affidavit lists him as president and states that his financial contribution was $48,000 for the purchase of 2000 shares of stock which sum was obtained as a loan from his brothers.

As of April 13, according to a corporate questionnaire signed by Afsari for the State Department of Alcoholic Beverage Control, Shelun had outstanding only the 3000 shares of stock owned by Mohammad Vazin and Afsari with no stock pending issuance. According to the purchase and sales agreement, and the testimony of Harry Vazin, the grocery portion of the Riverside Market was sold to Shelun for $10,000 in cash, a $20,000 promissory note and assumption of a $70,000 loan. The liquor portion of the market was also to be sold to Shelun for a purchase price of $84,000. However, that purchase and sale was never consummated and Respondent Vazin still owns the liquor department of the Riverside Market.

Afsari testified that in the beginning of February he and Mohammad Vazin sought advice from Norman Jones, labor consultant, who is representing Respondents because they were interested in purchasing the Riverside Market and wanted to operate it as a nonunion store. After several discussions with Jones, they determined that they could avoid becoming a union operation by not hiring union employees. Specifically, they determined that they would hire no more than 30 percent of Respondent Vazin's employees. At that time Respondent Vazin had about 34 employees, all members of the Union except for possibly 4 or 5 employees who had been hired within the preceding 30 days. Respondent Shelun hired about eight of them.

Although Respondent Vazin retained its ownership of the liquor department and Respondent Shelun was the nominal owner of the grocery departments, it is undisputed that the Riverside Market continued to operate much as it had prior to February 9. The store was closed for one day on February 20 and reopened on February 21. Sandy McKovitch replaced Munt as store manager. No inventory of merchandise was taken at the time of the sale. According to Afsari this was because Shelun had assumed Respondent Vazin's liabilities. Afsari admits that he continued to manage the liquor department; further, he also did the bookkeeping for the liquor department. A paid bookkeeper did the bookkeeping for the grocery department. The liquor department employees were on Shelun's payroll. However, according to Harry Vazin and Afsari, Respondent Vazin reimbursed Shelun for their wages.

According to the undenied testimony of Leeper, who was the produce manager, after February 21, Harry Vazin continued to give him orders. If Harry Vazin found merchandise that he thought was unsatisfactory he would tell Leeper to send it back or to write credits on it or not to receive it at all. He would inspect the produce and give Leeper orders as to removing certain produce that he considered unsatisfactory and putting out new produce. Leeper also testified that on February 21, Harry Vazin asked him, "Don, what's the matter? You're not happy." Leeper said, "No, Harry, six months ago when I started to work for this company your brother, Paul, introduced us and said you would be my new boss. Now nobody will tell me anything: who my new boss is, who I'm working for, or anything." Harry Vazin replied, "Don, I'm still your boss. Don't be unhappy. Everything will be okay." Also after February 21, Harry

Vazin told Leeper to continue to buy produce from different people he knew at warehouses in Riverside.

Elder testified that on February 19, Harry Vazin told him they liked him and the way he worked. Elder said that he liked working there. Harry Vazin said they would like for Elder to work for them but they could not do it then and he did not know at what time in the future Elder could be rehired. Elder was rehired on February 24 and, according to him, from that time until he left in August 1983, Harry Vazin was continuing to give orders and work assignments, he was in the office overseeing the books and the cashier and he stocked, unloaded trucks and received goods at the back door. According to him, Afsari also continued to do the same things he had before except that he was in the office more.

Elder also testified that in August McKovitch asked him to come to the office, which he did. At that time McKovitch told him he was going to have to let him go. Elder asked what the problem was, what he had done. McKovitch said that Harry and Frank (Loloee) and Afsari did not particularly like the job he was doing, feeling he would be happier some place else. Elder further testified that after February 21, Harry Vazin continued to give him orders such as stocking the milk case or the shelves. McMillan, who worked for Respondent Vazin as a liquor clerk, testified that on February 22, when he returned to the market to turn in a key, Harry Vazin told him that in approximately 3 to 5 months there was a possibility he would be hired back. Edgar Horne testified that on February 19 he turned his keys in to Harry Vazin, Harry thanked him for the job he did, and said he would call Horne in 2 weeks.

On March 28, the Union established an informational picket line which continued at least through the date of the hearing. According to Mott, he usually visits the picket line 6 days a week during which time he has an opportunity to observe duties that Harry Vazin performs on the outside. According to him, the market receives one or two grocery loads a week and, at least once a week, he has observed Harry Vazin assist in unloading a grocery truck with the forklift and about once every 2 weeks he would observe him assisting in moving meat around in the back area. Richard Hiemstra testified that sometime in about May when he was on the picket line he asked Harry Vazin why he had not been recalled to work. Harry Vazin replied they were going to call everyone back in 30 days but "because of all this, I can't call you back." As he said this he pointed to the picketers.

F. *The Alleged Unlawful Statements*

Afsari admits that prior to Shelun taking over the operation of the Riverside Market, he told several unit employees that he could only hire 30 percent of Respondent Vazin employees when the store reopened. He also admits that he asked all eight of the employees of Respondent Vazin hired by Respondent Shelun to withdraw from the Union; that he offered a job to one box person, in part, because he was not a member of the Union; and that he discussed with employees the terms and conditions of their continued employment by Shelun. Some were told that they would receive less wages and no benefits, one employee was told he would receive a wage increase, and some employees were told that insurance benefits would be provided in the near future. Other unit employees were told by Afsari that he would have jobs for them after 30 days.

On February 18, according to the undenied testimony of employee Don Leeper, Afsari told him that the company was on the verge of going bankrupt but a new company would probably open the following Monday, that he would like for Leeper to work for the new company as produce manager, but that it would be nonunion and he would receive a 10-cent-an-hour raise in pay. Afsari further told Leeper that at a future time the employees would receive health and welfare coverage. Leeper was required to fill out a new application.

Employee Robert Blair testified that on February 18, after he received his termination letter, Munt told him that the store was closing because they did not want to pay union wages, that Paul did not want the Union in there, that they were paying less wages in Los Angeles for the same kind of work.[7] Blair further testified that on February 19 Afsari asked him if he wanted to remain in Respondent Shelun's employ. Blair said, no, that Munt had told him it would be a nonunion store and he needed the benefits. Afsari said they were going to have an insurance plan available to the new employees. Blair asked if it would be a nonunion store; Afsari said it would.

Employee Luis Guerrero testified that on February 19 Afsari told him he would have to wait 30 days before they would let him know if he would be employed again. Afsari said their lawyers advised that they could only keep a certain percentage of the employees so they would have to wait 30 days. Employee Richard Hiemstra testified that on February 19 he asked Afsari what the deal was, if they were going to be called back. Afsari said not to worry about it, they would probably call everyone back, or most everyone, in 30 days.

Employee Diane Ferneding testified that on February 19, when she asked Afsari what they should do, he said to come back in and apply; they would be given a call. Afsari further said they could only hire a percentage of the Super Save employees at that time but after 30 days they could rehire all they wanted. He said, if they recalled more than a certain percentage, the market would be considered a union store again. The following week, according to Ferneding's undenied testimony, she returned to the store to fill out an application. At that time Front End Supervisor Denise McCormick, in the presence of Afsari, told her she would be called back after 30 days at a quoted wage rate which was roughly half the rate she had received at Super Save and that there would be no benefits.

Employee Mary Snyder testified that on February 19, after she had received her termination notice, she asked Afsari what was going to happen. He replied, "Don't worry, it will be okay." He then told her to come in on Monday and fill out an application. He further said he was sorry but they had to close the store because they

[7] This conversation may have been immediately after Munt left Respondent's employ.

were just not making it; the business was not what they had expected it to be and it was costing too much money. At some point in the conversation, when they were discussing why it cost so much money, Snyder said she had been surprised that Respondent Vazin retained the Union when they bought the store. Afsari said that was the only way it could be purchased. He further said they owed $50,000 to the Union and they were going to have to pay it.

Employee Verna Fuches testified that on February 21, she asked Manager Sandy McKovitch what was going on. McKovitch said he did not know. Fuches asked what was going to happen with the employees who had not been rehired. McKovitch said they could only keep a certain percentage and the rest would probably be called back within 30 days. Fuches asked if it were going to be a union store and McKovitch said no.

Employee Michael Elder testified that on Tuesday, February 22, he and three other Super Save employees applied for work with Respondent Shelun. On February 24, Mohammad Vazin hired him to work for Respondent Shelun. At that time, Mohammad Vazin told Elder his rate of pay, which was $3 to $4 less than he was paid by Respondent Vazin. When Elder asked if there were going to be any benefits, Vazin said, "Not at this time." When Elder asked if the store was going to be union or nonunion, Vazin said, "nonunion" and that Elder would need to get a withdrawal card from the Union. Several months later, according to Elder, Store Manager Sandy McKovitch told him, "they" said he needed to send a registered letter to the Union requesting a withdrawal card. McKovitch said those employees who did not get a withdrawal card were not going to be able to work.

G. *The Alter Ego Issue*

Although a determination as to whether two employers are alter egos, of necessity, must turn on the facts of the particular case, it is well established that the factors to be considered are: (1) interrelation of operations; (2) common management; (3) common ownership; and (4) centralized control of labor relations. *Sakrete of Northern California*, 137 NLRB 1220, 1222 (1962), enfd. 332 F.2d 902 (9th Cir. 1964), cert. denied 380 U.S. 255 (1964).

Thus, the Board has generally found alter ego status where the two enterprises have substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Denzil S. Alkire*, 259 NLRB 1323 (1982). No one factor is controlling and all need not be present. Complete identity in ownership is not a requisite, particularly when ownership resides in members of the same family. *Crawford Door Sales Co.*, supra; *Shield-Pacific*, 245 NLRB 409 (1979); *Nabco Corp*,. 266 NLRB 687 (1983). However, centralized control of labor relations is the most important single factor. *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029 (9th Cir. 1982).

Here, prior to February 20, Respondent Vazin owned and operated the Riverside Market which included two major departments—liquor and grocery. Although Munt was the store manager, it is clear from the record that Afsari's authority superseded that of Munt, that Munt deferred to him in matters of labor relations, management, and supervision, and that Afsari in fact exercised control in these areas.

Further, although it appears that Harry Vazin remained in the background to a certain extent, he was in the store regularly and, in his relationship with the employees, did exercise supervisory control. The extent to which he had actual, as opposed to potential, management control of the operations is unclear from the record. There is no convincing evidence in the record that he maintained actual control, with Afsari merely serving as a conduit for the relay of instructions and decisions.

After a hiatus of 1 day, Respondent Shelun ostensibly took over the operation of the grocery department on February 21. Although the store had a new manager, Sandy McKovitch, Afsari, now openly an owner of the market, continued in much the same management and supervisory role. The evidence establishes that Afsari and Mohammad Vazin established labor relations policy. Respondent Vazin continued to operate the liquor department. However, it is undisputed that the Riverside Market continued to operate much as it had prior to February 20. Afsari admits that he continued to manage the liquor department. He did most of the bookkeeping for the liquor department, a paid bookkeeper did most of the bookkeeping for the grocery department. The liquor department employees were on Shelun's payroll, although allegedly Respondent Vazin reimbursed Respondent Shelun for these wages. Shelun employees staffed the liquor department when the regular liquor clerks were out.

Outwardly, Harry Vazin's role remained unchanged. He continued to inspect produce and to give instructions to the produce manager as to the removal from display in the store, and the return to the supplier, of produce considered by him to be unsatisfactory. He also instructed the manager of the produce department as to what suppliers he should utilize. He continued to give orders and assignments to grocery department employees, to stock, unload trucks, and receive goods for the grocery department. When an employee complained of the uncertainty engendered by the change of ownership, Harry Vazin assured the employee that he was still the employees' boss.

These circumstances all indicate an interrelation of Respondent Vazin and Respondent Shelun operations, common supervision and management, and common control of labor relations. Further, it is clear that their combined operations at the Riverside Market had the same business purpose, equipment, and customers as had Respondent Vazin prior to February 20 and that the Riverside Market, both before and after February 20, had management and supervision which, though somewhat different, had a substantial thread of commonality and that the same person continued in active, if not sole, control of labor relations.

When these circumstances are viewed in the context of the less than arm's-length transaction[8] and the familial

[8] The business was sold at a loss, with no attempt being made to advertise that the market was for sale or to secure other prospective buyers.

relationship involved, it is apparent that Respondent Shelun is a disguised continuance of Respondent Vazin. All of the owners involved here are members of the same family—a family which has a history of some family members operating enterprises for the benefit of other family members without regard to the niceties of legal ownership. In this regard, Harry Vazin testified that it is the custom in his country that business arrangements between members of the immediate family—father, mother, sister and brother and sometimes the spouse of the sister and brother—are not reduced to writing. Thus, even though he was not a legal owner of the family business because he was in the military and such ownership was prohibited in the military, he did have an unwritten business arrangement with his family. When he retired from the military, he worked in the family business. He received no salary but drew money from the business as he needed it.

Similarly, Paul Vazin invested no money in Respondent Vazin but, as found above, had an ownership interest therein. Afsari was not a legal owner of the House of Ribs; yet he had Nader Vazin's power of attorney to operate and dispose of that business. He did sell it and distributed 70 percent of the proceeds of the sale to Mohammad Vazin, who also was not a legal owner of the restaurant. Further, though Afsari had no legal ownership in Respondent Vazin, he worked full time for Respondent Vazin without salary. Rather, Harry Vazin gave him half of Vazin's regular draw from the business and whatever other funds he needed. Also, at the time that Respondent Vazin was operating the Riverside Market, Harry Vazin and his family lived with Afsari and his family.

In all of the circumstances, I find that Respondent Shelun is an alter ego of Respondent Vazin. Further, in the circumstances set forth above, coupled with Harry Vazin's admission that he wanted to divest himself of the ownership of the market because the union contract was causing Respondent to lose money, and the statements of Afsari and Mohammad Vazin that they would hire no more than 30 percent of Respondent Vazin's employees because they wanted to avoid becoming a union operation, that those hired would have to withdraw from the Union and the other employees of Respondent Vazin would be hired after 30 days when their hire would not affect Respondent Shelun's nonunion status, I find that Respondent Shelun was created in an attempt to evade and avoid Respondent Vazin's contractual and statutory bargaining obligations.

H. *Conclusions as to the Alleged Unfair Labor Practices*

The complaint alleges that Respondents unlawfully refused to execute the September 8 agreement with the Union. Respondents do not deny that Gund and Schwartz reached such an agreement. Rather, Respondents argue that Gund represented Khaledi and/or K.V. Mart Co., but never represented Respondent Vazin, and that the agreement reached by Gund was on behalf of a proposed corporation which never came into being. I find no merit in this contention. In this regard, I note that Harry Vazin admits that Khaledi and Paul Vazin had full authority to negotiate the purchase of the market, and that they negotiated a discount of $25,000 from the purchase price because of the requirement that the purchaser adopt the union contract, that Khaledi retained Gund to negotiate some modification of that agreement, and that in so doing Gund purported to represent the purchaser of the market and specifically named Harry Vazin as having agreed to the terms of the modification. Further, although Respondent never made any contribution to the various benefit funds as required by the agreement, Respondent Vazin made no attempt to repudiate the agreement and, in fact, implemented it in a number of regards, including grievance provisions. Accordingly, in view of the terms of the purchase and sale agreement and the modification agreement signed by Schwartz and Gund, and Respondent Vazin's subsequent implementation of the wage and grievance provisions of the agreement, I find that Respondent Vazin adopted Market Basket's collective-bargaining agreement with the Union and was therefore obligated to execute and abide by the agreement. I therefore find that by refusing to execute the agreement reached with the Union on September 8, Respondents have violated Section 8(a)(5) and (1) of the Act. *NLRB v. Burns*, supra. I further find that by failing to grant employees the contractually required cost-of-living wage increase on January 31, 1983, by failing to make the contractually required contributions to the benefit trust funds, by bypassing the Union and dealing directly with employees as to their wages and other terms and conditions of employment, and by withdrawing recognition from the Union and repudiating its collective-bargaining agreement with the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.

I also find that the employees terminated by Respondents on February 18 and 19 were terminated because they were represented by the Union in an attempt by Respondents to evade their contractual and statutory obligation. Accordingly, I find that they were unlawfully terminated in violation of Section 8(a)(3) and (1) of the Act.

I further find that Respondent has violated Section 8(a)(1) of the Act by telling employees that, in order to avoid being a union store, Respondent could only hire a certain percentage of Respondent Vazin's employees; that they could not be hired for 30 days in order to avoid having the Riverside store remain a union store and that they would have to obtain withdrawal cards from the Union in order to continue their employment.

CONCLUSIONS OF LAW

1. Houshang Vazin, an Individual, d/b/a Super Save; and Parviz Paul Vazin, an Individual, d/b/a Super Save; and Houshang Vazin and Parviz Paul Vazin, a partnership, d/b/a Super Save; and Shelun Company, Inc. d/b/a Super Saver are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers, Local 1167, United Food and Commercial Workers International Union, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Vazin is a successor to Kroger Company, obligated to recognize and bargain with the Union and to abide by the terms of Kroger's collective-bargaining agreement with the Union as modified by the Union and Respondent Vazin.

4. Respondent Shelun is the alter ego of Respondent Vazin established for the purpose of evading Respondent Vazin's obligation to bargain with the Union and to abide by the terms of its collective-bargaining agreement with the Union.

5. The following employees of Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All food clerks, bakery, health and beauty aids, and household hardware clerks, general merchandise clerks, clerk's helpers, and snack bar and take-out food department employees employed by Respondents at their 3981 Chicago Avenue, Riverside, California facility; excluding all office clerical employees, meat department employees, janitorial employees, maintenance employees, professional employees, guards and supervisors as defined in the Act.

6. At all times material, the Union has been, and is now, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. On or about September 8, 1982, Respondents and the Union reached full and complete agreement with respect to terms and conditions of employment of the employees in the appropriate unit described above.

8. Respondents violated Section 8(a)(5) and (l) of the Act by:

(a) Failing and refusing to execute the collective-bargaining agreement with the Union.

(b) Failing and refusing to make the contractually required contributions to the various benefit trust funds and by failing and refusing to grant the January 31, 1983, cost-of-living increase as provided for in the collective-bargaining agreement with the Union.

(c) On and after February 18, 1983, bypassing the Union and bargaining directly with the employees with regard to the terms and conditions of their continued employment.

(d) Unilaterally changing wage rates and eliminating certain fringe benefits on February 21, 1983.

(e) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of the employees in the unit described above and repudiating its collective-bargaining agreement with the Union.

9. By discharging the following employees and failing and refusing to reinstate them to their former positions of employment, because said employees were members of, or represented by the Union, and in an attempt to evade its bargaining obligation with the Union and its obligation to abide by the terms of its collective-bargaining agreement with the Union, Respondent has violated Section 8(a)(3) and (1) of the Act:

Robert Blair	Miles Tilghman
Michael Elder	Robert Robbins
Diane Ferneding	Richard Heimstra
Verna Fuches	Jack McMillan
Luis Guerrero	Stephen Wakeman
Ed Horne	Anthony Bullock
Barbara Luce	Michele Gracia
Denise Martin	Jack Summers
Sue Ellen Mott	Barry Swift
Mary Snyder	Roy Webb
Larry Delgado	Joseph Vargas
Leo Smith Jr.	Mark McCoy
Anna Guzman	Kenya Tapscott

10. Respondent has violated Section 8(a)(1) of the Act by:

(a) Telling employees they could only hire a certain percentage of Respondent Vazin's employees in order to keep it from being a union shop.

(b) Telling employees they could not be rehired for at least 30 days in order to avoid having the Riverside Market remain a union store.

(c) Telling employees that they would have to obtain withdrawal cards from the Union as a condition of their continued employment.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent Vazin and Respondent Shelun are alter egos and that Respondents have unlawfully withdrawn recognition from the Union, have unlawfully repudiated its collective-bargaining agreement with the Union, and have unlawfully unilaterally reduced the wage rates of employees and failed and refused to make contractually required contributions to the various benefit trust funds, I shall recommend that Respondent recognize and, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, that Respondent acknowledge that it is bound by the collective-bargaining agreement agreed to with the Union on about September 8, 1983, that it abide by the agreement and that it make the employees in the appropriate unit whole by paying retroactively the wage rates provided for in its collective-bargaining agreement with the Union and by paying all contractually required contributions to the various trust funds which have not been paid and which would have been paid absent Respondents' unlawful unilateral discontinuance of such payments.[9]

[9] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 at fn. 7 (1979).

Having found that Respondent unlawfully discharged its employees named below in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer each of them immediate and full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other right and privilege previously enjoyed, and make each of them whole for any loss of earnings he or she may have suffered by reason of the discrimination against them, plus interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1961):[10]

Robert Blair	Miles Tilghman
Michael Elder	Robert Robbins
Diane Ferneding	Richard Heimstra
Verna Fuches	Jack McMillan
Luis Guerrero	Stephen Wakeman
Ed Horne	Anthony Bullock
Barbara Luce	Michele Gracia
Denise Martin	Jack Summers
Sue Ellen Mott	Barry Swift
Mary Snyder	Roy Webb
Larry Delgado	Joseph Vargas
Leo Smith Jr.	Mark McCoy
Anna Guzman	Kenya Tapscott

As the unfair labor practices committed by the Respondent are of a character striking at the very heart of the Act, I shall recommend that Respondent be ordered to cease and desist from infringing in any other manner on the rights guaranteed in Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondents, Houshang Vazin, an Individual, d/b/a Super Save; Parviz Paul Vazin, an Individual, d/b/a Super Save; Houshang Vazin and Pariz Paul Vazin, a Partnership, d/b/a Super Save; and Shelun Company, Inc. d/b/a Super Saver, Riverside, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Union as the exclusive bargaining representative of its employees in the unit found appropriate herein.

(b) Failing and refusing to execute its collective-bargaining agreement with the Union agreed to on September 8, 1983.

(c) Repudiating its obligation to abide by the terms of the collective-bargaining agreement.

(d) Failing and refusing to make contractually required contributions to the various benefit trust funds and failing and refusing to grant the January 31, 1983, cost-of-living increase as provided for in the collective-bargaining agreement.

(e) Unilaterally reducing wage rates and eliminating certain fringe benefits provided for in said collective-bargaining agreement.

(f) Bypassing the Union and bargaining directly with the employees with regard to the terms and conditions of their continued employment.

(g) Discharging employees in an attempt to avoid its obligation to abide by said collective-bargaining agreement and its obligation to recognize and bargain with the Union.

(h) Telling employees that Respondent could only hire a certain percentage of Respondent Vazin's employees in order to keep the Riverside Market from being a union shop.

(i) Telling employees that they could not be rehired for at least 30 days in order to avoid having the Riverside Market remain a union shop.

(j) Telling employees that they would have to obtain withdrawal cards from the Union as a condition of their continued employment.

(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the above-named Union as the exclusive collective-bargaining representative of its employees in the appropriate unit described below and, upon request, meet and bargain with the aforesaid Union concerning wages, hours, pension, and welfare benefits, and other terms and conditions of employment; and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

> All food clerks, bakery, health and beauty aids, and household hardware clerks, general merchandise clerks, clerk's helpers, and snack bar and takeout food department employees employed by Respondents at their 3981 Chicago Avenue, Riverside, California facility; excluding all office clerical employees, meat department employees, janitorial employees, maintenance employees, professional employees, guards and supervisors as defined in the Act.

(b) Acknowledge that it is bound by the Retail Food, Bakery, Candy, and General Merchandise Agreement between the Union and certain other unions and Food Employers Council, Inc., and Independent Retail Operators effective by its terms from July 27, 1981, to July 29, 1984, as modified by Respondents and the Union on September 8, 1983; and abide by the terms of said agreement both retroactively and prospectively.

(c) Make its employees whole by paying retroactively the wage rate and health and welfare trust contributions as provided in said collective-bargaining agreement with the Union which have not been paid, and which would have been paid absent its unlawful reduction and/or unilateral discontinuance of such payment.

(d) Offer the employees named below immediate and full reinstatement to their former jobs or, if such posi-

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges; and make each of them whole for any loss of earnings suffered by reason of the discrimination against them in the manner set forth in the section entitled "The Remedy."

Robert Blair	Miles Tilghman
Michael Elder	Robert Robbins
Diane Ferneding	Richard Heimstra
Verna Fuches	Jack McMillan
Luis Guerrero	Stephen Wakeman
Ed Horne	Anthony Bullock
Barbara Luce	Michele Gracia
Denise Martin	Jack Summers
Sue Ellen Mott	Barry Swift
Mary Snyder	Roy Webb
Larry Delgado	Joseph Vargas
Leo Smith Jr.	Mark McCoy
Anna Guzman	Kenya Tapscott

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its place of business in Riverside, California, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 21, after being signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

---

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

John P. Bell & Sons, Inc. *and* **Local Union No. 13, an affiliate of the United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.** Case 3–CA–10679

30 November 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 16 February 1984 the United States Court of Appeals for the Second Circuit enforced an Order issued by the National Labor Relations Board on 8 April 1983[1] directing the Respondent, inter alia, to make whole discriminatee Darcy Farrell for any losses resulting from the Respondent's unfair labor practices. A controversy having arisen over the amount of backpay owed Farrell, the Regional Director for Region 3, on 12 April 1984, issued and caused to be served on the parties a backpay specification and notice of hearing alleging the amount of backpay due under the terms of the Board's Order. On 21 May 1984 the Regional Director issued and caused to be served on the parties an amendment to the backpay specification and notice of hearing. On 25 April and 1 June 1984 the Respondent filed an answer to the backpay specification and an answer to the amended specification, respectively.

On 13 July 1984 the General Counsel filed with the Board a Motion to Strike Respondent's Answer as to Gross Backpay Computations; to Strike Certain Affirmative Defenses; for Summary Judgment as to Computations of Gross Backpay. On 16 July 1984 the General Counsel filed an amended motion. On 19 July 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. Thereafter, the Respondent filed a statement in opposition to the General Counsel's motion.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

Section 102.54(b) and (c) of the Board's Rules and Regulations provides as follows:

> (b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

In the underlying unfair labor practice proceeding, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Darcy Farrell on 28 September 1981 because he was designated as union steward when he was referred by the Union in response to the Respondent's request for steamfitters. The backpay period alleged in the backpay specification is 28 September 1981 through 7 January 1983, excluding the period between 2 June and 21 July 1982 during which time the Respondent employed no steamfitters because of an economic strike by the Union.

[1] 266 NLRB 607.

In its answer to the backpay specification, the Respondent offered general denials to the allegations concerning the formula used to compute gross backpay, the method of computing net backpay, the computation of gross backpay for Farrell, interim earnings, and the fringe benefit funds payments due on behalf of Farrell under the collective-bargaining agreement. In addition, the Respondent contended that Farrell is not entitled to any backpay for the period after the conclusion of the strike on 21 July 1982 because he would not have been rehired when work resumed in view of his prior unsatisfactory work record and the Respondent's practice of seeking referrals from the Union only as a last resort when it could not hire sufficient numbers of steamfitters through its own recruitment. The Respondent claimed that, in fact, it did not obtain referrals from the Union after the strike.

The General Counsel asserts that the Respondent's general denials regarding certain allegations of the backpay specification do not comply with the specificity requirements of Section 102.54(b) and (c). As to the Respondent's affirmative defense that Farrell would not have been rehired after the strike, the General Counsel contends that this allegation raises issues which were litigated and adjudicated by the Board and reviewed by the Second Circuit in the underlying unfair labor practice proceeding. Further, the General Counsel argues that if there is uncertainty regarding the backpay period, the claimant should receive the benefit of any doubt, not the Respondent. Accordingly, the General Counsel asserts that the allegations of the backpay specification relating to gross backpay should be deemed admitted as true and that the Board should grant summary judgment as to the computation of gross backpay.

We agree with the General Counsel's contentions, except we will not at this time order the Respondent to make payments into the industry advancement program because the Board has generally found that such programs are nonmandatory subjects of bargaining.[2] Inasmuch as the data at issue covering the period between the unlawful refusal to hire Farrell and the commencement of the June 1982 strike is within the Respondent's knowledge and control, its failure to set forth fully its position regarding the applicable premises or to furnish appropriate supporting figures is contrary to the specificity requirements of Section 102.54(b).

We also find that the Respondent's answer fails to raise a genuine issue of material fact concerning whether Farrell is entitled to backpay for the period after the cessation of the Union's strike, i.e., between 21 July 1982 and 7 January 1983. As mentioned above, the Respondent contends that Farrell would not have been recalled after the strike because of his prior unsatisfactory work record and the Respondent's practice of seeking referrals from the Union only as a last resort. We agree with the General Counsel that the Respondent cannot rely on Farrell's alleged unsatisfactory work record in this backpay proceeding since that allegation was litigated and rejected in the unfair labor practice proceeding. Specifically, the Board found pretextual the Respondent's contention that Farrell was not hired on 28 September 1981 because he was not a dependable worker. Inasmuch as Farrell was not employed by the Respondent subsequent to that date, the Respondent's claim that Farrell was an unsatisfactory worker fails to raise a new issue warranting a hearing in this compliance proceeding.

The Respondent's contention that Farrell is not entitled to poststrike backpay because it did not obtain referrals from the Union after the strike also fails to raise any litigable issue. There is no evidence or contention that the Respondent offered to hire Farrell before the strike. Thus, the Respondent has not yet complied with the Board's order that it offer him immediate employment in a job he would have received had it not unlawfully discriminated against him in September 1981. Further, it is uncontroverted that the Respondent employed steamfitters after the strike. Accordingly, even accepting as true the Respondent's asserted referral practices as to new poststrike hires, those practices have no relevance to the Respondent's continuing obligation to offer Farrell the job he should have held before and after the strike, nor could they operate to toll the Respondent's backpay obligation prior to such an offer of employment.

Thus, we shall grant the General Counsel's motion to strike the Respondent's answer as to gross backpay computations and to strike certain affirmative defenses, and we shall grant the General Counsel's Motion for Summary Judgment as to computations of gross backpay, except insofar as they relate to payments into the industry advancement program. We find, however, that the Respondent's general denial is sufficient to place interim earnings into issue because that information is generally not within the knowledge of the Respondent.[3] Accordingly, we shall order a hearing to determine Farrell's interim earnings, including the availability to him of interim employment and

[2] *Finger Lakes Plumbing Co.*, 254 NLRB 1399 (1981); *Fox Painting Co.*, 263 NLRB 437 (1982). The General Counsel may demonstrate at the hearing that this particular program was a mandatory subject of bargaining.

[3] *Dews Construction Corp.*, 246 NLRB 945 (1979).

his failure to seek and/or retain such interim employment.

ORDER

It is ordered that the General Counsel's motion to strike the Respondent's answer is granted in part.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment as to computations of gross backpay and fringe benefit funds payments, excluding industry advancement program payments, is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 3 for the purpose of arranging and giving notice of a hearing before an administrative law judge, at which hearing the interim earnings of Darcy Farrell shall be determined.[4]

[4] At this hearing, the General Counsel may also adduce evidence demonstrating that the industry advancement program constituted a mandatory subject of bargaining. See fn. 2, supra.

The Goodyear Tire and Rubber Company *and* United Rubber, Cork, Linoleum and Plastic Workers of America. Cases 16–CA–11335 and 16–RC–8611

30 November 1984

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 20 April 1984 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Goodyear Tire and Rubber Company, San Angelo, Texas, its officer, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held on 30 September 1983 in Case 16–RC–8611 is set aside and that the case is remanded to the Regional Director to conduct another election when he deems the circumstances permit the free choice of bargaining representative.[2]

[Direction of Second Election omitted from publication.]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt, pro forma, the judge's recommendation to overrule the Union's Objections 5, 9, and 10.

We agree with the judge that Supervisor Hoover violated Sec. 8(a)(1) of the Act by threatening an employee that if the Union won the election the Respondent would close, the Respondent could rehire employees at minimum wage, and the employees could lose their present level of benefits. Member Hunter, who would dismiss the latter two violations because the General Counsel allegedly failed to show the "context" in which the latter two remarks were made, ignores the fact that these remarks were made in the same conversation, thus establishing that the latter two remarks were made in the context of an unlawful threat of plant closure.

Member Hunter agrees with the judge's finding that Supervisor Hoover violated Sec. 8(a)(1) of the Act by stating in the presence of an employee that the Respondent could close down the plant if employees voted for the Union, but finds the evidence insufficient to establish that Hoover threatened employees with loss of benefits, replacement, and rehiring at the Federal minimum wage given the General Counsel's failure to show the context in which Hoover's other statements were made.

In so finding, Member Hunter notes that, contrary to the implication of his colleagues, the record fails to show that Hoover's plant closing remark was directed to the employee rather than to a fellow supervisor present in the same room. In addition, while the employee recounted Hoover's remaining statements as if made in succession, it is clear, as found by the judge, that the employee's version "runs several topics together," and fails to describe the specific topics addressed by Hoover's remarks or the transition from topic to topic. Under the circumstances, Hoover's comments may be lawful or unlawful depending on the subject matter at issue. As the record does not reveal the specific subject matter to which Hoover's remarks were directed, the General Counsel has failed to carry his burden of showing that Hoover's remarks would reasonably coerce employees in the exercise of rights under the Act.

[2] We agree with the judge that the Notice of Second Election should include language in accord with the Board's decision in *Lufkin Rule Co.*, 147 NLRB 341 (1964).

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. These consolidated cases were tried before me in San Angelo, Texas, on January 23, 1984, pursuant to the November 16, 1983 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board in Case 16–CA–11335, and the November 18, 1983 report on objections, order consolidating cases, and notice of hearing issued by the Regional Director in Case 16–RC–8611.

The complaint is based on a charge filed October 7, 1983, by United Rubber, Cork, Linoleum and Plastic Workers of America (Charging Party, Union, or URW) against The Goodyear Tire and Rubber Company (Respondent or Goodyear).[1]

In the complaint the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by the conduct of Plant Manager Richard J. Olsen and Shift Supervisor John H. Hoover. On or about September 7, 9, and 13, Olsen allegedly threatened Respondent's employees with loss of benefits, plant closure, and subcontracting work then being performed by Goodyear's employees, in the event the Union was successful in its organizational attempt.[2]

Hoover, it is alleged, on or about September 15 orally threatened Respondent's employees with loss of benefits, plant closure, replacing them on their jobs and rehiring them at the Federal minimum wage in the event the Union was successful in its organizational attempt.[3]

By its answer Respondent admits certain factual matters but denies violating the Act.

The petition was filed on August 18, 1983. That date opens the preelection "critical" period. *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962). Pursuant to a stipulation for certification upon consent election approved on September 1, an election by secret ballot was conducted on September 30, under the supervision of the Regional Director for the employees in the following unit stipulated to be appropriate:

[1] All dates are for 1983 unless otherwise indicated.
[2] Complaint par. 7(a).
[3] Complaint par. 7(b).

> All drivers, mechanics, tire and test technicians, janitors and building/groundkeepers employed by the Employer at its facility in San Angelo, Texas, but excluding all office clerical employees, guards working leaders, and supervisors as defined in the Act.

The tally of ballots reflected that of approximately 235 eligible voters, all but 1 cast a ballot. None was challenged, and there were no void ballots. Of the 234 valid votes counted, 86 votes were cast for the Union, and 148 were cast against it. On October 7 the Union filed timely objections.

In his November 18 report on objections, the Regional Director overruled some objections and consolidated others (1, 2, 5, 9, 10, and 12) for hearing with the complaint allegations. Objections 1 and 2 are included within the complaint allegations. Objection 5 (the portion not overruled) relates to an announcement by Goodyear that it was dropping a potential 7-day rotation schedule. Objections 9 and 10 pertain to a party given by Goodyear the day of the election, and Objection 12 is that Goodyear failed to comply with the requirements of *Excelsior Underwear*, 156 NLRB 1236 (1966), regarding timely submission of a list of the names and addresses of eligible voters.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Goodyear, an Ohio corporation with its principal office and headquarters located in Akron, Ohio, operates a proving grounds near San Angelo, Texas, where it is engaged in testing rubber products. During the past 12 months Respondent purchased and received goods valued in excess of $50,000 at its San Angelo, Texas facility directly from points located outside the State of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The record does not reflect the precise date the Union began its current campaign at Respondent's San Angelo proving grounds, but it seems clear that by May 1983 URW authorization cards were being distributed among employees. By his May 20 memo to the employees, Richard J. Olsen, manager of the proving grounds, acknowledged this fact and cautioned employees to ask themselves some questions before jumping on any band wagon (C.P. Exh. 2).[4]

As the memo not only shows the background tone of the campaign, but also makes reference to the 7-day rotation schedule, the full text is set forth here:

> Dear Fellow Employees:
>
> Our goal here at the Goodyear Proving Grounds is to provide a work place that all of us can be proud of. Besides the excellent pay and benefits, we have all worked hard to build a team effort in solving and overcoming the daily challenges of operating a facility like ours.
>
> Unfortunately, sometimes in our efforts to build this team and improve the job security for all of us, we make mistakes, or our communication breaks down. Two such examples involve the 30 minute "lap over" time and the seven day work schedule. Hopefully, in the recent department meetings which Bill Vandiver and I attended, we have answered all the questions concerning these two items. However, if any questions still remain unanswered, please don't hesitate to discuss them with supervisors, Bill Vandiver, or myself.
>
> We realize there is a union organizing card signing campaign underway, and before you jump on the "band-wagon" and sign a union organization card, ask yourself these questions:
>
> 1) Can this union guarantee me that my wages and benefits will go up?
> 2) Can this union guarantee me that my wages and benefits won't go down?
> 3) Can the union officials guarantee me that they will solve my problems on the job?
> 4) Can the union guarantee me a wage substitute equal to my present pay if they take us out on strike?
>
> The answer to each of these important questions is "NO." So let's not get swept up into this union organization drive because when you stop to think about it, you're better off without the union. You don't have to worry about union dues and fines being taken from your paycheck. You can speak for yourself when you have a problem. You don't have to worry about losing your paycheck during a strike. You can count on your job.
>
> I know we have some problems in our plant. Every plant does. But we've made progress, and we'll continue to make more progress. As you know, we have had a lot of discussions on cost reductions for the Proving Grounds, and a union campaign certainly is an added cost to the Proving Grounds operation. We don't need an outsider to come in here and drive a wedge between us. We can settle our

[4] Olsen testified without contradiction that the election of September 30, 1983, was the fourth in 8 years at the San Angelo facility, and that the *Excelsior* list furnished for the previous election was submitted about April 1982 (Tr. 84–85).

problems by ourselves, without the cost and disruptions a union would bring.

Sincerely,
Rich Olsen
Manager

Olsen testimonially explained that the 7-day rotation schedule for the drivers arose at a brainstorming meeting, held in March 1983 attended by a committee of supervisors and nonsupervisors (Tr. 99–100). One of the ideas the committee generated for possibly improving efficiency related to alternate work schedules. One suggestion on this topic was to have a 6-day workweek, and the other idea was for a 7-day week.[5] A volunteer committee was chosen to pursue the modified workweek topic (Tr. 100). Olsen testified that the matter seemed to languish, so when Bill Vandiver arrived in about May as the new personnel manager, Olsen assigned him the task of getting the volunteer committees together and bringing forth decisions for them (Tr. 100–101). Olsen testified that after Vandiver held his first meeting with the workweek committee, Vandiver reported that the committee recommended that the subject be dropped (Tr. 101). Haston Fields, a driver called as a witness by the URW, testified that he expressed his disapproval of the work schedule changes to Vandiver at the meeting, that the topic was tabled, and the members were told that Vandiver would look into it further (Tr. 78–80). Thereafter, Fields testified, a notice was posted on the bulletin board that the idea for a modified workweek had been dropped (Tr. 80). No copy of the bulletin board notice was offered in evidence. Olsen testified that on receiving Vandiver's report in mid-May he decided to drop the matter and informed supervision of his decision (Tr. 109). He testified that he mentioned the subject in a "25th hour" speech he gave to employees on Wednesday, September 28 (Tr. 92, 99, 109).[6]

The record fails to reflect what campaign events transpired in June and July, but apparently in early August the URW mailed or distributed a legal-size report to the employees ending with a notice of a meeting to be held at a Holiday Inn on Saturday, August 13 (R. Exh. 11). Four of the paragraphs are particularly relevant in this description of the background. They read:

> Many of you have told us that certain members of management have made statements that once you win your election and begin to bargain, "You will start from scratch," "with a blank sheet of paper." This is utter NONSENSE!! NOTHING could be further from the truth. IT IS AGAINST THE LAW FOR THE COMPANY TO TAKE AWAY OR TO THREATEN TO TAKE AWAY ANY OF THE EXISTING BENEFITS THAT YOU NOW HAVE.
>
> When you have your legal right to bargain by winning your election, *you will be* in the same position as an established Local Union negotiating a new agreement. You will put the wages that you now have, including, all other benefits, into a written agreement and then make the other improvements that you feel are needed. Remember . . . without a written agreement signed by the Union (YOU) and the company (Goodyear), YOU HAVE NOTHING!!
>
> Management has demonstrated to you time and again that without a contract they *CAN* take *AWAY* benefits, do away with your COLA (cost of living allowance) and change rules, to say nothing about your sick leave benefit, which has been turned into a state of confusion. They harass you and bully you without a reason. Ask yourselves. WHERE CAN I GO FOR HELP? NOWHERE NOW . . . But with a UNION under the U.R.W. you will have all the resources for help with your problems at your disposal.
>
> We understand that some RUMORS are being circulated at the grounds that the company made some statements about closing the plant if you are successful in forming your UNION. Let me assure you that IT IS AGAINST THE LAW FOR THE COMPANY THROUGH ANY OF ITS OFFICIALS TO THREATEN TO CLOSE THE GROUNDS SIMPLY BECAUSE YOU CHOSE TO ORGANIZE!!! We doubt that the company would be foolish enough to make such threats.

This sparked a reply from Olsen who testified that a number of employees gave copies of the URW's Holiday Inn notice to supervision (Tr. 89). Olsen's letter of August 9, mailed to the employees' homes, reads (R. Exh. 2):

> Dear Fellow Employees:
>
> After reading the letter the union mailed to employees' homes recently, I'm sure the same basic question came to your mind as it did mine—what is the real goal of the statements they made about threatening to reduce benefits, harassing and bullying employees, sick leave being in a state of confusion, and statements about plant closure? Certainly those comments were not made by any member of management. Nor is management responsible for any rumors such as those alluded to in the union's letter.
>
> As you know, many unions attempt to convince employees that they are somewhat being abused and need the union's protection. The union's letter seems to me to be just an effort to create need where none exists.
>
> Surely you do not need to take anyone's word (from management or the union) about working conditions at the Goodyear Proving Grounds. You are quite capable of evaluating the place where you work every day and I'm confident that your judgment will be a wise one.
>
> No workplace, including ours, is perfect—and that would continue to be the case if a union were to

[5] As the record reflects, drivers work on three different shifts around the clock.

[6] Olsen's speech of September 28, 1983, held 2 days before the election, is covered in more detail later.

> enter the picture. On the other hand, I can assure you that your management team will continue to work with you, as we have in the past, to address ourselves to the real needs of both the business and its employees.
>
> Richard Olsen, Manager
> Proving Grounds

As earlier noted, the URW filed its petition on August 18, and the election agreement, approved by the Acting Regional Director on September 1, scheduled an election date of Friday, September 30. Hours set for the election were 5:45 to 6:45 a.m., and 1:45 to 2:45 p.m. (C.P. Exh. 4.)

By a "special invitation" flyer, the URW invited employees to attend a picnic to be held at nearby Lake Nasworthy on Saturday, September 24 (R. Exh. 3). Presumably the leaflet was distributed within a week or so before the picnic. Apparently between then and the picnic the URW distributed another flyer. This one also undated, bears the headline title of "MORE THAN WAGES." (R. Exh. 4.) Two paragraphs which refer to the subcontracting issue read:

> All things stand right now, the company has the right to sub contract your work or even hire new employees to do the same work for less pay and benefits. They don't need your agreement to do these things.
>
> Once you are organized however, the issue of sub contracting becomes a subject for negotiations, and you can take the steps you feel are necessary to protect your jobs. Don't you think it would be better to have the legal right to deal with these problems, rather than to live with the threat always hanging over your head?

If Respondent made a specific written reply to the URW's undated flyer, it is not mentioned in the evidence.[7]

As we prepare to turn to the allegations, it may be helpful to note Olsen's uncontradicted testimony that he left the plant shortly after lunch on Wednesday, September 7, for the airport where he boarded a plane and flew to the corporate headquarters at Akron, Ohio. After attending meetings there on Thursday and Friday he arrived back in San Angelo about 8 p.m. on Friday, September 9, but did not go to the plant until Monday morning, September 12 (Tr.111–112).[8] On Tuesday, September 13, Olsen attended a Chamber of Commerce breakfast in San Angelo and arrived for work about 9 a.m. (Tr. 114).

[7] Attached to the Regional Director's November 18, 1983 report on objections are several documents, including three letters from Olsen to employees. The letters are dated August 24, 1983, September 14, 1983, and September 23, 1983. They discuss campaign issues. None was offered as an independent exhibit in this proceeding. No party contends that the letters are of any particular relevance to our issues here.

[8] Respondent did not offer in evidence a copy of Olsen's air travel ticket, motel receipt, or any other documentary evidence concerning the trip.

B. *Manager Olsen's Breaktime Remarks*

1. The testimony

As earlier noted, paragraph 7(a) of the complaint alleges (with emphasis added) that "*On or about* September 7, 9, and 13, R. J. Olsen orally threatened" Respondent's employees "with loss of benefits, plant closure, and subcontracting work then being performed" by Respondent's employees in the event the URW was successful in organizing.

Called by the General Counsel as witnesses in support of this allegation were drivers H. L. Braziel and Billy F. Brown. Employed 29 years at Respondent's San Angelo Proving Grounds, Braziel testified that he was working the second shift, 6 a.m. to 2:30 p.m., in September (Tr. 13–14). He testified that at either the 8:20 or 10:35 morning break about Tuesday, September 13,[9] Shift Foreman Earl Kennedy made some remarks to about 25 to 30 employees in the lunchroom (Tr. 15). Braziel testified without contradiction that it was normal for the foreman to hold meetings with employees at breaks (Tr. 19).[10]

Olsen was present and seated in the reverse position on a chair (Tr. 20). Kennedy discussed several topics, unspecified by Braziel, and then remarked that a rumor had been circulating that union cards were being distributed to hold another election (Tr. 19). At that point, according to Braziel, Olsen spoke up by saying, "If this place goes union, I'll close the goddamn gates."[11] Pointing first to himself and then to the employees, Olsen stated that he had a job "tomorrow," but "what about you?" Olsen added that Respondent could farm the work out to outsiders for about a third of what Goodyear was paying the drivers, and that the employees had more to lose than to gain by going union (Tr. 16, 20–21). Braziel testified that, although Olsen made further remarks, he could not describe them because at that point in the meeting Braziel bowed his head while considering these "thanks" of Goodyear for working half his life at all hours in all kinds of weather conditions (Tr. 21, 24). Braziel described the "thanks" as his perception of Goodyear's indifference to his long service, "that it didn't make a damn if I had a paycheck coming next week or if my job was terminated tomorrow or whether the election was over."

Driver R. T. Allard also testified that he was working the second shift in September (Tr. 50). According to Allard, about September 9, at a morning break, Olsen spoke for some 5 to 6 minutes to 25 or 30 employees gathered in the lunchroom (Tr. 50, 58).[12] Allard testified

[9] On cross-examination Braziel admitted that he could not fix the exact date and placed the event as occurring sometime between September 7 and 15 (Tr. 17, 23). Olsen testified that there is only one break before and one break after the lunch period.

[10] Kennedy did not testify.

[11] Braziel testified, without contradiction, that Olsen frequently used profanity (Tr. 22).

[12] The name of any foreman present is not given in the record. Although Allard testified in response to a question about September 9, I note that his own phrasing describes the meeting as being 2 to 3 weeks before the election of September 30 (Tr.–59). That time frame would be September 9, 1983 to September 16, 1983. It is unclear whether this meeting is the same or different from the one described by Braziel. The General Counsel makes no contention either way.

that on this occasion Olsen told employees that economic conditions made it an extremely poor time to organize, that unemployment was very high, and that anyone employed should be proud of it. Olsen reminded employees that Goodyear already subcontracted some of the work at $7 an hour, and that such a figure was much cheaper than the amount it cost Goodyear for its own drivers. According to Allard, Olsen stated that he was the only one who had job security, and that if the gates were closed right then he still had a job and the employees would be the ones out in the cold. Olsen added that he felt he could almost guarantee that the gates would be shut if the employees organized, and that there was no possible way employees could be guaranteed that employees would keep the benefits they presently enjoyed (Tr. 51–52).

Driver Billy F. Brown apparently was working the third shift, 2 to 10:30 p.m. in September. He testified that about 7 p.m. on Wednesday, September 7, or Thursday, September 8,[13] Shift Foreman Wilbur Brown (who did not testify) called a meeting at breaktime. After discussing a few items, Brown "introduced" Olsen who made some remarks about the union campaign to the approximately 25 employees present. Olsen reminded everyone of the pending election, said he wanted everyone to vote, remarked that Goodyear did not want the Union, reminded them that Goodyear had been farming out some of the work, that it was cheaper to do so, that Goodyear could do so with all of it if the employees voted in the Union, and warned that the employees had more to lose than to gain by going union (Tr. 26, 28–29).

At the time of the hearing, Olsen had been manager for 2-1/2 years. He was present during the 1982 election campaign, and he testified that he was familiar with the documents of the first two election campaigns (Tr. 84). Olsen testified that Respondent's supervision has received extensive training in the campaigning regarding TIPS—an acronym meaning no threats, interrogation, promises, or spying (Tr. 90).

When asked if he ever utilized breaktime to deliver business messages to employees, Olsen testified, "Not to the best of my recollection." Other than making himself available in his office when employees would have questions, Olsen has never, "to the best of my recollection," gone into the lunchroom and addressed a group of employees on their break. Consistent with the position expressed in his letter of August 9 (R. Exh. 2), Olsen specificially denies making the statements attributed to him (Tr. 88).

The General Counsel requests that an adverse inference be drawn from the failure of Shift Foreman Earl Kennedy to testify (Br. at 5). I shall not draw any inferences. I note that the evidence of both sides could have been aided by additional weight.

[13] Brown testified that he was positive it was a Wednesday or Thursday in "early" September (Tr. 29). As a calendar shows, September 1, 1983, fell on a Thursday. Thus, the first Wednesday and Thursday in September were September 7 and 8, and the second occurrence of such days fell on September 14 and 15. Respondent also contends that Braziel and Allard do not corroborate each other.

2. Conclusions

Notwithstanding certain discrepancies in the testimony, I credit the General Counsel's witnesses. The demeanor of each was satisfactory. This is particularly true as to Braziel whose deep and sincere emotion was obvious as he described Olsen's words.

Respondent contends that Braziel's credibility particularly suffers from his testimony that Shift Foreman Kennedy stated that there was a rumor of union cards being distributed "to go union again," to have another election. Respondent argues that it is "incredulous" that in September any foreman would have made such a comment since the election agreement had been approved on September 1 (Br. at 24). Goodyear's argument would carry more weight if Kennedy had denied making such a remark. There is nothing inherently improbable about Braziel's testimony, for it could well be that the URW continued to distribute cards even after September 1 as a locking-in psychology.

Respondent also contends that Braziel and Allard do not corroborate each other. However, the General Counsel does not contend that they attended the same meeting, nor do they. Although the dates of the meetings they described are rather general, the time frame of early to mid-September allows several potential dates outside the days that Olsen was absent.

Finally, I note that Olsen did not unequivocally deny ever speaking to employees on their breaks in the lunchroom. I do not credit his denial that he made these remarks.

In light of the foregoing, I find that Respondent, through Plant Manager Olsen, threatened employees as alleged in complaint paragraph 7(a) and that by so doing Goodyear violated Section 8(a)(1) of the Act.

C. Supervisor Hoover's Remarks

1. The testimony

About September 15, complaint paragraph 7(b) alleges, John Hoover (admitted to be a statutory supervisor) orally threatened Respondent's employees "with loss of benefits, plant closure, replacing them on their jobs, and rehiring them at the federal minimum wage in the event the Union was successful in its organizational attempts." Test driver Andrew I. Anderson testified as the General Counsel's witness in support of this allegation, and Supervisor Hoover testified as Respondent's witness in denial.

In September Anderson worked the third shift, 2 until 10:30 p.m. At that time he was working in the supervisor's building as part of a voluntary 90-day program to familiarize employees, selected by seniority, with the work of the supervisors (Tr. 31, 42, 47). The building is nicknamed the Sugar Shack (Tr. 31).

Anderson testified that about Thursday, September 15, he was seated at a desk in the Sugar Shack, a small office with dimensions of about 8 feet by 10 feet, with Supervisors Hoover and Bill Wallace (Tr. 31, 43, 45, 48). The men were discussing various topics, and eventually they took up the union subject. At the hearing Anderson could not recall who raised it, but testified that he did

not think he had done so (Tr. 44). Supervisor Hoover remarked that, if the Union got in, Goodyear would close down the plant, the employees could lose more than they could gain, that "we could start with a blank sheet of paper," and that Goodyear could rehire employees at minimum wage or could hire new employees at minimum wage. Hoover added that employees could lose what benefits they then enjoyed (Tr. 32). When asked on cross-examination whether Hoover was speaking to him or Supervisor Wallace, Anderson responded by observing that the room was very small and the statements could have been made directly to him or for his benefit, but they were made. "I was bound to hear it." (Tr. 45.)[14]

Supervisor Hoover testified that he listened to Anderson's testimony, that he had been trained not to make any such remarks, and denied making the statements attributed to him by Anderson (Tr. 68–69). Supervisor Wallace did not testify. In the circumstances here, I draw an inference adverse to Goodyear's position from Respondent's failure to call Supervisor Wallace.

Instead of calling Wallace, Respondent called drivers Ray Fisher, James Hall, and Teddy J. Holt who testified that they had never heard Hoover or any supervisor making threats of the nature attributed to Hoover. Such evidence, even if credited, is of extremely slight value. The material question is whether Hoover spoke in the Sugar Shack as described by Anderson. Respondent does not contend that Fisher and Hall were present in the Sugar Shack. Supervisor Wallace was, yet Respondent did not call him as a witness. That other employees never heard Hoover or other supervisors making threats on other occasions may have some remote relevance to the question of whether Hoover spoke in the Sugar Shack as alleged, but the weight of such evidence is so slight as to be just about without any probative value.

2. Conclusions

Anderson's demeanor in testifying was satisfactory, and I credit him. It seems clear that his account of Hoover's remarks runs several topics together. A perfect reconstruction of the remarks very likely would show more context and clarify the transition from topic to topic. On the surface it would seem inconsistent for Hoover to begin with a statement about the plant closing if the Union were selected, then shifting, without a transition context, to what could happen in negotiations or as a result of unionization.[15] But these are attributes of ordinary human recollection. The law does not require employees to possess tape recorder memories.

The plant closing threat is a clear violation of Section 8(a)(1). In a context explaining the negotiating process, a statement that employees "could" lose their present benefits might not be unlawful. Here, however, the tenor of Hoover's brief remarks is that Goodyear would penalize employees if they voted for the Union. I find that Respondent violated Section 8(a)(1) as alleged in complaint paragraph 7(b).

IV. PETITIONER'S OBJECTIONS TO THE ELECTION

A. *Introduction*

The URW's Objections 1 and 2 are covered by the evidence treated under complaint paragraphs 7(a) and (b), and I recommend that these objections be sustained. Objections 5, 9–10, and 12 present additional issues.

B. *Manager Olsen's Speech of September 28, 1983*

The portion of Objection 5 set for hearing relates to Plant Manager Olsen's speech of September 28 in which he made reference to the 7-day rotation schedule. The Union's contention regarding this topic seems to be that Respondent held up a decision on whether to change to a rotation schedule, and then announced that decision on September 28 in a manner calculated to persuade employees that they did not need a union for management to listen to them.

The initial problem with the URW's position is that driver Haston Fields credibly testified that he observed a bulletin board memo announcing Goodyear's decision to drop the rotation idea.[16] Fields could not recall the date he saw the memo (Tr. 80–81). It would seem to have been at least as far back as early to midsummer, however. Driver Andrew I. Anderson recalled that Olsen stated in his September 28 speech that the 7-day rotation idea was being shelved (Tr. 34–35). I find Anderson's recollection of this point to be unreliable.

Driver Ernest M. Aguero quoted Olsen as saying on September 28 that as the employees did not want the 7-day rotation schedule, "We *dropped* it." (Tr. 65, emphasis added.)

During cross-examination by the URW, Olsen testified that he mentioned the subject in his September 28 speech as an example of how employees and management can work together without need for a third party (Tr. 110).[17] As Olsen's decision previously had been posted on the bulletin board, and as Aguero's testimony of "dropped," indicating a decision made in the past, is consistent with Olsen's testimony, I shall recommend that Objection 5 be overruled in its entirety.

C. *Goodyear's Election Party*

Olsen authorized supervisors to hold a party for employees about 6:30 p.m. on September 30, following the

[14] On redirect examination Anderson testified that Hoover was "more or less" pointed in his direction (Tr. 48). That adds little, however, for the evidence does not describe the location of the three individuals in the small room in relation to each other.

[15] Anderson's testimony about rehiring employees at the minimum wage supports a finding, which I make, that Hoover said Goodyear could reduce the wages of current employees to the Federal minimum in the event the employees voted in the Union.

[16] Driver R. T. Allard recalled that the announcement came from Personnel Manager Vandiver at some meeting held at some unspecified time (Tr. 53).

[17] When Respondent sought to introduce written excerpts from the text of Olsen's September 29, 1983 speech, the URW objected unless the entire written text be offered in order to show the full context and nature of the limited excerpts (Tr. 94–97, 103). I sustained the objection. A credibility issue was raised concerning whether Olsen referred to the excerpted topics elsewhere in his speech. The rule of completeness supports my ruling. Fed.R.Evid.106. Moreover, Respondent did not offer to produce the entire text for the URW's inspection. The excerpts are included in the rejected exhibit file as R. Exhs. 8 and 9.

close of the polls (Tr. 107, Olsen). The issues raised by Objections 9 and 10 are whether supervisors invited employees before the polls closed and whether a map was posted by Respondent before the polls closed.

Driver Anderson testified that he observed a map, showing directions to the San Angelo Boat Club at Lake Nasworthy, posted on the lunchroom bulletin board around 6 to 6:30 p.m. (Tr. 36–39; C.P. Exh. 5.) Anderson testified that on September 30, at a time subsequent to Anderson's observing the map, Supervisor Hoover invited him to the party and told him he would be paid for the time (Tr. 36, 39). Anderson testified that he voted about 2 p.m. (Tr. 40). This establishes no objectionable conduct inasmuch as all events occurred after the polls closed.

Driver Allard testified that he observed the map posted around 10:30 a.m. on election day (Tr. 55), and Driver Aguero testified that he observed it on the bulletin board about 12:30 p.m. (Tr. 66). Allard testified that "supervisor" J. D. Martin invited him to the party (Tr. 55), and Aguero testified that an unidentified "supervisor" likewise invited him (Tr. 66). There is no pleading, evidence, or stipulation establishing that Martin and the other "supervisor" are statutory supervisors or otherwise agents of Goodyear.

Olsen testified that he did his best to assure that the bulletin boards were kept free of campaign literature (Tr. 86–87). That may well be, but it does not directly contradict the positive evidence that the map was in fact posted over several hours on election day.

However, the fact that the map was posted does not show objectionable conduct by Goodyear. The map is unsigned, and there is no evidence that an agent of Goodyear posted it. I shall recommend that Objections 9 and 10 be overruled.

D. *The Excelsior List Objection*

Objection 12 is that Goodyear failed to submit the list of eligible voters and their addresses in a timely manner, and that the URW did not receive the list until September 13.

The parties stipulated that the URW received a copy of the list on Tuesday, September 13, 1983, at 9 a.m. (Tr. 81–82; C.P. Exh. 1.)[18] The URW contends that Respondent's failure to comply with the 7-day deadline established by the Board in *Excelsior Underwear*, 156 NLRB 1236 (1966), is objectionable as a matter of law.

As the Board recently noted, the *Excelsior* rule requires an employer, within 7 days after the approval of an election agreement, or after an order directing an election, to submit to the Regional Director a list of the names and addresses of the eligible voters. Such list is then forwarded to the union. *Red Carpet Building Maintenance Corp.*, 263 NLRB 1285 fn. 3 (1982). In this case, Goodyear furnished the list, due no later than Thursday, September 8, a little over 4 days late—on the morning of the fifth day after the due date. This gave the URW 16 days' use of the list before election day. Correspondence between Goodyear and Region 16 reflects that Respondent deliberately delivered the list to the Union without regard to the 7-day requirement on the asserted basis that the only material time requirement is that the Union have the list for 10 days prior to the election (R. Exh. 5; C.P. Exh. 3).

The Board has found that a 1-day delay in delivery of the list to a Regional Director constituted substantial compliance with *Excelsior* where it appeared that the delay wa s caused by the Postal Service, the Board's Regional Office, or factors other than a design by the employer. See, for example, *Chance Collar Co.*, 265 NLRB 1213 (1982). Here, however, Respondent intentionally delayed delivery of the *Excelsior* list.[19] I find Respondent did not substantially comply with the *Excelsior* rule, and that, by its deliberate delay, Respondent committed objectionable conduct. I therefore shall recommend that Objection 12 be sustained.

E. *Summary of Findings*

Based on the findings sustaining Objections 1, 2, and 12, I shall recommend that the election held September 30, 1983, be set aside, that the Regional Director conduct a second election to determine the question of representation, and that the Regional Director include in the notice of election the *Lufkin Rule*[20] paragraph set forth below:

Notice To All Voters

> The election conducted on September 30, 1983, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

I further recommend that Objections 5, 9, and 10 be overruled.

CONCLUSIONS OF LAW

1. Goodyear is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The URW is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with loss of benefits, subcontracting of all work, plant closure, or reducing wage rates to the Federal minimum in the event the em-

[18] Olsen testified that there were only a few changes from the 1982 list with about 2 names being added and 10 names deleted which were not on the 1982 list (Tr. 85–86). Such testimony is irrelevant to the issue of compliance with the obligation to furnish a list of names and addresses of the voters.

[19] Region 16 also apparently received a copy of the list about September 13, 1983 (C.P. Exh. 1).

[20] *Lufkin Rule Co.*, 147 NLRB 341 (1964); *Oklahoma City Collection District*, 263 NLRB 79 (1982); *Fisher-Haynes Corp.*, 262 NLRB 1274 (1982).

ployees voted in the URW, Respondent has violated Section 8(a)(1) of the Act.

4. Goodyear's unlawful conduct affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. By engaging in the objectionable conduct described in part IV of this Decision, Respondent has interfered with its employees' freedom of choice in the election conducted September 30, 1983.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended[21]

ORDER

The Respondent, The Goodyear Tire and Rubber Company, San Angelo, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with loss of benefits, subcontracting of all work, plant closure, or reducing wage rates to the Federal minimum in the event the employees vote in the URW or any other labor organization.[22]

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at San Angelo, Texas Proving Ground copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held September 13, 1983, in Case 16–RC–8611 is set aside and the case is remanded to the Regional Director for the purpose of conducting a new election, and that the *Lufkin Rule* paragraph, quoted in part IV, E, of this decision, be included in the Notice of Second Election to be issued by the Regional Director, and that Objections 5, 9, and 10 are overruled.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had the opportunity to present their evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, and the Board has ordered us to post this notice and to comply with its provisions.

The National Labor Relations Act gives you, as employees, these rights.

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of you own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances.

WE WILL NOT threaten you with loss of benefits, subcontracting of all work, plant closure, or reduction of wage rates to the Federal minimum in the event you vote in the United Rubber, Cork, Linoleum and Plastic Workers of America, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you with respect to your rights guaranteed by Section 7 of the National Labor Relations Act.

THE GOODYEAR TIRE AND RUBBER COMPANY

---

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] The phrase "or any other labor organization" is appropriately included. *Riley-Beaird, Inc.*, 259 NLRB 1339, 1372 fn. 144 (1982); *Elk Brand Mfg. Co.*, 253 NLRB 1038 (1981).

[23] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Yellow Freight Systems, Inc. *and* Frederick Foster.
Case 39–CA–1640

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 3 May 1984 Administrative Law Judge James F. Morton issued the attached decision. The Charging Party filed exceptions and a letter in support of these exceptions. The General Counsel and the Respondent filed briefs in answer to the Charging Party's exceptions and in support of the judge's decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, and for the reasons set forth in my dissenting opinion in *Olin Corp.*, 268 NLRB 573 (1984), I would not defer to the award of the arbitration panel.

The panel's award, issued shortly after the close of the 2-hour arbitration hearing, consists in its entirety of the following two sentences:

> Based on the facts presented and the testimony submitted, case of the Union is denied. The discharge of Mr. Fred Foster was for just cause.

There is no showing that the unfair labor practice issue, i.e., whether the Charging Party was discharged because he asserted certain rights under the collective-bargaining agreement,[1] was presented to or considered by, much less resolved by, the arbitration panel. In the absence of such a showing, I would not defer to the arbitration award.

[1] The Respondent also filed a statement opposing the Charging Party's 11 July 1984 request that a transcript of proceedings before the Occupational Safety and Health Administration be received in evidence.

[2] The Charging Party has requested oral argument and that the transcript of a hearing held on 10 and 11 May 1984 before the Occupational Safety and Health Administration be received as evidence. These requests are hereby denied, as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[1] See *NLRB v. City Disposal Systems*, 104 S.Ct. 1505 (1984).

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. After the hearing had closed in this case, counsel for the General Counsel filed a motion to withdraw the complaint, discussed in detail below. The Charging Party opposed the motion. I shall grant the motion for the following reasons.

The complaint which issued on June 30, 1983 (all dates are in 1983 unless stated otherwise), alleged that the Charging Party, Frederick Foster, had been discharged on April 6 by Yellow Freight Systems, Inc. (Respondent) because he asserted certain rights under the collective-bargaining agreement Respondent had with Teamsters and Chauffeurs Local 443 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union). Respondent filed its answer which averred, inter alia, that the Board should defer to an arbitration award which upheld Respondent's discharge of the Charging Party. At the hearing, the General Counsel, relying on the Board's holding in *American Freight Systems*, 264 NLRB 126 (1982), contended that deferral was inappropriate as the arbitration panel had not considered the unfair labor practice issue raised by the allegation of the complaint that Respondent's discharge of Foster violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). After the hearing closed, the Board issued its decision in *Olin Corp.*, 268 NLRB 573 (1984), which overruled the holdings in *American Freight*, supra and in earlier cases. The Board, in *Olin*, held that an arbitrator will have adequately considered the unfair labor practice issue if the contract issue is factually parallel to the unfair labor practice issue and if the arbitrator was generally presented with those facts. The General Counsel, after weighing the impact of *Olin* on the facts in the instant case, concluded that there was merit to Respondent's deferral defense and, on the basis, moved to withdraw the complaint. The Charging Party's views thereon were solicited. He opposed deferral but did not contest the rationale underlying the General Counsel's motion to withdraw. Thus, the Charging Party's opposition was based on his assertion that, in the proceeding before me, perjured testimony was given respecting the merits of the case itself.

In order to rule on the General Counsel's motion, it is necessary to make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is a corporation of the State of Indiana, that it is engaged in the business of providing transportation services, and that its operations annually meet the applicable Board standard for the assertion of its jurisdiction.

II. LABOR ORGANIZATION

The pleadings further establish that the Union is a labor organization as defined in Section 2(5) of the Act.

III. THE PROCEDURE ISSUE

The essential facts are not in material dispute.

Respondent has a truck terminal in Milford, Connecticut, and has a collective-bargaining agreement with the Union covering the drivers employed there.

The Charging Party, Foster, has worked at the terminal as a driver beginning August 1981. In 1982 he and other full-time drivers protested Respondent's assigning to them a certain truck they considered unsafe, tractor B7696. The terminal manager orally agreed then not to assign tractor B7696 to the regular drivers. It appears that in 1983 a new terminal manager was hired and that, in early 1983, Foster, more than once and without further incident, rejected assignments to operate tractor B7696.

On April 6, Foster was operating a truck which became disabled because of defective brakes. A relief driver who had been operating tractor B7696 was instructed to bring it to Foster so that he could use it to complete his route. Foster called the dispatcher and objected to driving tractor B7696; he reminded the dispatcher of the oral understanding that had been reached in 1982 with the previous terminal manager. The dispatcher informed him that the new terminal manager had decided, a month or two previously, that any driver who refused to operate a truck that management deemed safe would be considered to be "an automatic quit." Foster was also told, in effect, that Respondent was satisfied that tractor B7696 was safe to operate. Foster then began to drive it. About 10 minutes later and 6 miles distant, however, he stopped and telephoned the dispatcher. He stated that he had problems with the brakes and with other operating aspects of that vehicle. The dispatcher told him the complaints he had were not valid and that, if he refused to drive that truck, he would be considered a voluntary quit. Foster declined to operate it and was discharged.

Foster filed a grievance with the Union to protest his discharge, relying on contractual language that permitted a driver to refuse to operate unsafe equipment. The matter went to arbitration. The arbitration hearing was held on April 20 and lasted about 2 hours. Foster testified before me that he related to the arbitration panel, in substance, the same testimony he gave before me, as summarized above. Respondent called a union official as its witness and he related that he also had testified before the arbitration panel as to how Foster told him he drove tractor B7696 on April 6. After the hearing on Foster's case was completed before the arbitration panel on April 20, it issued later that same day an award which, in its entirety, read:

> Based on the facts presented and the testimony submitted, case of the Union is denied. The discharge of Mr. Fred Foster was for just cause.

It is evident, under the *Olin* rationale, that the arbitration panel has considered the statutory issue as it was presented with generally the same facts on which the alleged unfair labor practice was predicated. It is clear, too, that the other deferral criteria set out in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), have been met. The opposition by Foster to the General Counsel's motion is not addressed to any of those concerns but instead would have me render a separate judgment on the merits based on my view of the evidence. I am not permitted to do so, as there is no basis on which it can be found that the arbitration award was "palpably wrong."

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization as defined in Section 2(5) of the Act.
3. It will effectuate the purposes and policies of the Act to defer to the April 20 arbitration award and to grant the posthearing motion by counsel for the General Counsel to withdraw the complaint in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The General Counsel's motion to withdraw the complaint in its entirety is granted.

---

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Hospital of St. Raphael *and* New England Health Care Employees Union, District 1199, a/w National Union of Hospital and Health Care Employees, RWDSU, AFL–CIO. Cases 39–CA–539 and 39–CA–839

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 3 September 1982 Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge's findings that the Respondent did not violate Section 8(a)(3) and (1) of the Act by revising employee Rosen's work schedule effective 8 September 1980 or by issuing a written warning to her on 13 October 1980. We also agree with the judge's findings that the adverse personnel actions taken against Rosen after she filed a grievance over the warning were not motivated by Rosen's union activities and therefore were not violative of Section 8(a)(3) and (1). Contrary to the judge, however, we further find that Rosen's conduct in filing and pursuing the grievance did not constitute protected concerted activity and therefore the adverse personnel actions taken by the Respondent did not violate Section 8(a)(1).

The relevant facts, as more fully set forth in the judge's decision, are as follows. Rosen was employed for about 6 years as a part-time clerk-typist in the Department of Respiratory Therapy, which was headed by Mazzacane starting in July 1980. On 13 October 1980 Rosen received a written warning from Mazzacane for "leaving work without authorization." Rosen immediately complained about the warning to Mazzacane, advising him that she was doing so pursuant to the Respondent's internal grievance procedure[2] and claiming that the warning was harassment for her union activities.[3] In the course of processing her grievance, Rosen also protested to several of the Respondent's officials that Mazzacane had committed certain technical violations of the grievance procedure itself.[4] Ultimately, on 13 January 1981, Executive Vice President Beeman advised Rosen in writing that the warning would be removed from her personnel file. He also stated that the grievance procedure had been reviewed and would be "further clarified" in the near future. On 17 February 1981 Rosen received from Mazzacane her first negative performance appraisal. Other adverse personnel actions followed, including a second negative performance appraisal on 30 July 1981,[5] before Rosen submitted her resignation from work effective 9 October 1981.

The judge found that Rosen's conduct in pursuing her grievance was protected concerted activity. Finding *NLRB v. Interboro Contractors*[6] applicable even though no collective-bargaining agreement was involved, and citing *Alleluia Cushion Co.*,[7] she found that Rosen's protest "was designed, at least in part, to vindicate rights guaranteed to all employees, by Section 7 of the Act" and that Rosen "set in motion a process which could only inure to the benefit of her co-workers." The judge went on to find that many of the subsequent adverse personnel actions taken against Rosen were part of a continuing pattern of retaliation for the manner in which she pursued her grievance.

Contrary to the judge, we find that Rosen's pursuit of her grievance did not constitute concerted activity within the meaning of Section 7 of the Act. Following the judge's decision herein, the Board issued *Meyers Industries*,[8] in which it overruled *Alleluia Cushion* and its progeny and held:[9]

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other em-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The grievance procedure, as set forth in the employee handbook, consists of three steps: at step 1 the employee must present the complaint to his or her supervisor; at step 2 the employee may present the complaint in writing to the department head; and at step 3 the employee may take the matter to the administrator, whose decision is final and binding.

[3] It is undisputed that Rosen was a known, active supporter of the Union both before and after the representation election on 8 September 1980, which the Union lost.

[4] Because Mazzacane at that time was Rosen's supervisor as well as the department head, there apparently was some confusion as to meeting the requirements of steps 1 and 2.

[5] The judge inadvertently erred in referring to February and July 1980 rather than 1981.

[6] 388 F.2d 495 (2d Cir. 1967), enfg. 157 NLRB 1295 (1966).

[7] 221 NLRB 999 (1975).

[8] 268 NLRB 493 (1984).

[9] Id.

> ployees, and not solely by and on behalf of the employee himself.

Thus, the Board will no longer presume that an individual employee's activity is concerted simply because the matter complained about is of interest to other employees. Moreover, although the Board has held that an individual employee's filing of a grievance based on a collective-bargaining agreement constitutes protected concerted activity—see, e.g., *Interboro Contractors*, above—the Board has not extended its holding to an individual employee's filing of a grievance pursuant to an employer's noncontractual grievance procedure. Thus, in *Alcan Cable*,[10] the Board specifically held:[11]

> An employee's action in filing an internal complaint cannot constitute concerted activity if, as Lawson's action undisputedly was, it is done solely by and on behalf of the employee himself and is not done in reliance on any collective-bargaining agreement. See *Snap-On Tools Corp.*, 207 NLRB 238 (1973).

In the instant case, the record establishes that Rosen's grievance was, at bottom, an individual and purely personal complaint, and that Rosen's pursuit of the grievance did not constitute concerted activity.[12] Rosen challenged a written warning directed at herself alone. As found by the judge, the written warning arose out of a misunderstanding between Rosen and her supervisor and was not motivated by her union activities. Further, although Rosen also, in the course of processing her grievance, protested certain technical aspects of the Respondent's internal grievance procedure, no other employee joined her protests. Thus, in accordance with *Meyers Industries* and *Alcan Cable*, we find that Rosen's complaints were not "concerted" because they were made solely by and on behalf of herself and not in reliance on any collective-bargaining agreement. Therefore, we further find that any adverse personnel actions taken against Rosen in retaliation for her grievance activities were not violative of Section 8(a)(1).[13] Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

---

[10] 269 NLRB 184 (1984).

[11] Id. at 184.

[12] We note that the U.S. Supreme Court in *NLRB v. City Disposal Systems*, 104 S.Ct. 1505 at fn. 6 (1984), in sustaining the Board's "*Interboro* doctrine," also recognized the Board's distinction in *Meyers Industries*, above, between cases based on the existence of a collective-bargaining agreement—e.g., *Interboro*—and those that are not—e.g., the instant case.

[13] Although the finding that the Respondent's actions were retaliatory makes Rosen's situation a sympathetic one, we note that the Board in *Meyers Industries* stated the following in response to a similar concern (268 NLRB 493, 499):

> We do not believe, however, that Section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid or protection, was intended to encompass the case of individual activity presented here . . . . [W]e are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. This matter was heard in Hartford, Connecticut, on February 1, 2, and 3, and in New Haven, Connecticut, on March 15 and 16, 1982. Pursuant to charges filed on February 17 and September 21, 1981, as amended on October 27, 1981, a consolidated complaint issued on November 4, 1981, alleging that the Hospital of St. Raphael (the Hospital or Respondent) unlawfully discriminated against its employee, Sandra Rosen, for engaging in union and other concerted protected activity in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent's timely answers deny the allegations of the complaint as amended.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. On the record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by counsel for the General Counsel and for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION: THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Respondent, a Connecticut corporation with an office and place of business in New Haven, Connecticut, has been at all material times engaged as a health care institution operating a hospital which provides in-patient and out-patient medical and professional health care services. During the calendar year ending December 31, 1980, in the course and conduct of its business operations, Respondent purchased and received at its New Haven facility products, goods, and materials valued in excess of $50,000 directly from points outside the State and derived gross revenues in excess of $250,000. Accordingly, I find that Respondent is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

New England Health Care Employees Union, District 1199 (the Union) is now, and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

The issues presented in this case are whether: (1) Respondent engaged in the following conduct in order to discriminate against Sandra Rosen because of her union or otherwise concerted protected activity: (a) revised her work schedule on September 8, 1980; (b) issued her a written warning on October 13, 1980; (c) issued adverse performance appraisals to her on February 5 and July 30, 1980; (d) denied her an annual merit increase in February 1981; and (e) denied her request for a revised summer work schedule, and (2) these measures, together with other actions involving criticism of her performance as an employee, compelled Rosen to resign and thereby constituted a constructive discharge in violation of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Sandra Rosen was first employed by the Hospital in February 1974. For approximately 6 years prior to her termination on October 9, 1981, she served as a part-time clerk in the Hospital's respiratory therapy department. During her first 5 years in this position, under then Department Chief Peter Pagliari, Rosen maintained an unblemished work record and regularly received annual merit increases. Pagliari evidently valued her efforts, for in January 1980 he gave her a glowing evaluation commenting that "she has the ability to handle almost anything that is assigned." In October of the same year, she received a 17-percent pay raise as part of a hospitalwide program designed to revise job descriptions and upgrade wages.

B. *Rosen's Union Activity*

The record shows that Rosen became involved in union activity as early as December 1979 when Local 1199 began an organizational drive among the service employees at the Hospital. From March, when the Union's campaign surfaced and quickened, through September when the election was held, Rosen was among the staunchest of union advocates. She distributed leaflets at hospital entrances and in the cafeteria between shifts, served as spokesperson for the group of employees who requested recognition for the Local, posted union notices on the departmental bulletin board, was one of several speakers at the Union's rally on August 15 shortly before the election, attended the meeting at which the list of eligible employees was devised, and served as an observer for the Union at the September election. Her efforts on behalf of the Union did not go unnoticed, as several of Respondent's witnesses conceded.

The Hospital responded to the Union's drive with a countercampaign of its own. At considerable expense, a management consulting firm was hired which had among its responsibilities the preparation of numerous antiunion letters which were issued to employees. Although the letters were not alleged by the Union to be unlawful, they nevertheless unmistakably revealed Respondent's antipathy to unionism and to the value of collective bargaining by outside interventionists as a means of redressing employee problems. Telling evidence of antiunion bias may also be found in an admission reluctantly offered by John Bimonte, Respondent's vice president of human resources,[1] that he instructed his staff to be wary of hiring "union plants," and from a comment to Rosen by the current chief of the respiratory therapy department, John Mazzacane, that "people must be desperate to go to a union."[2]

The Union lost the election held on September 8, 1980, and thereafter filed no objections as to Respondent's conduct during the organizational drive. Even after the Union's defeat, however, and throughout the duration of her employment, Rosen continued to wear the Union's button as a sign of her commitment.

1. Alleged harassment

In June 1980, John Mazzacane, formerly head of the school of respiratory therapy, became acting chief of the respiratory therapy department, replacing Pagliari who left for a new post. In August, he became chief. Under Mazzacane's administration, Rosen suffered a series of adverse employment actions which ultimately led her to quit her job. These are the source of the unfair labor practice allegations in this case.

a. *Schedule change*

The first conflict between Mazzacane and Rosen arose over her work schedule. Under Pagliari, Rosen worked four 5-hour days per week: Monday, Wednesday, Thursday, and Friday. Her day usually commenced at 10 a.m., although her starting time was variable.

Rosen testified that on August 24, without prior notice, Mazzacane informed her that her schedule would be altered effective September 8 to a 5-day workweek. On August 25, Rosen sent Mazzacane a memo in which she stated she would accept the work schedule revision, but only under protest.

Respondent's account of this matter varies widely from that offered by the General Counsel. Mazzacane related that prior to becoming chief, he and others in the department were troubled by Rosen's erratic hours and were never sure of precisely when she would be available. Therefore, he determined to regularize her work schedule. He chose the hours of 1 to 5 p.m. out of a desire to have the clerk-typist available at times which suited his own work schedule, to insure coverage of the telephone during a shift change between 3 and 3:30 p.m., and to make way for a second part-time clerk typist. Mazzacane stated that he told Rosen early in July that it would be necessary to stabilize her work schedule. In the latter part of July, he was more definite, telling Rosen that he wished her to work a 5-day workweek from 1 to 5 p.m. On August 1, shortly before Rosen left for a 2-week vacation, Mazzacane further maintained that he told her the new schedule would take effect on Septem-

[1] Bimonte served as director of personnel in 1980 and 1981 when the events giving rise to the instant complaint occurred.

[2] Rosen impressed me as a sincere witness, who testified in a forthright manner, whereas Mazzacane frequently offered shifting and inconsistent explanations for his actions and of events. Therefore, I am inclined to credit Rosen's assertion that Mazzacane made such a remark.

ber 8. In an effort to accommodate Rosen's interests somewhat, Mazzacane agreed to a 12-to-4 shift for her. He subsequently confirmed the schedule change by memo dated August 8. Since Rosen was on leave at that time, she could not have received the memo until she returned to work about August 20.

Minutes taken at a supervisory staff meeting held on August 6 indicate that Mazzacane announced inter alia that "the new schedule was discussed with clerk-typist and will begin soon. It will provide employees with coverage 5 days/week. The same hours each day. In addition we will try to expand that position to 40 hours." On August 22, the entire department was notified by memo that Rosen would commence a 5-day schedule from 12 to 4 p.m. on September 8.

Documentary proof entered into the record of this case provides a convenient means of resolving the dispute as to when Rosen was advised of a schedule change. Turning first to the August 6 memo, I note that it refers only to the prospect of 5-day workweek for the clerk-typist; it makes no mention of specific hours or of the effective date for the new schedule. Although the memo of August 8 is more specific as to the details of the schedule change, this memo could not have been transmitted to Rosen until she returned from vacation. From this I infer that, although Mazzacane probably mentioned the possibility of a 5-day workweek to Rosen, she was not given notice of the express hours she would work or the date that the new schedule would be implemented until about August 20 when she returned from her vacation.

b. *Warning*

The next clash between Mazzacane and Rosen occurred when she left work an hour early on October 10. Here, too, the parties' accounts of this contretemps differ sharply. Rosen testified that on October 3 she asked Mazzacane how she should deal with medical appointments previously scheduled for her children on October 13 and 17 which conflicted with her new working hours. Mazzacane allegedly assured her that she could leave work an hour early on these occasions. Accordingly, on October 10, she punched out at 3 p.m.

Mazzacane acknowledged that, approximately a week before October 10, Rosen asked him in a general way, what procedure she should follow if prescheduled medical appointments conflicted with her new work schedule. He denied that she referred to any specific dates. Mazzacane stated that, during the same conversation, Rosen urged him to permit her to resume her former working hours. The following Friday afternoon, when Mazzacane was unable to locate Rosen, he feared that she was reverting to her former irregular work pattern without authorization, and issued a written warning to her on October 13. This was the first disciplinary measure she had received throughout the course of her employment with Respondent.

Rosen's reaction to the warning was immediate: she accused Mazzacane of harassing her for union activity and filed a written grievance the same day.[3] Rosen pursued her grievance zealously through each step of the grievance procedure. In an effort to clarify the process, particularly with regard to the distinction between step 1 and 2,[4] Rosen telephoned, met with, and wrote memos to various members of the administrative hierarchy including Personnel Director Bimonte, Departmental Co-Director Dr. Sekand, the Hospital's Associate Administrator Skopac, and finally Respondent's Executive Vice President Beeman. Her memos forcefully set forth her position, adamantly denied Mazzacane's version of the incident, and accused him of issuing the warning as union harassment, repeatedly criticized the handling of her grievance as violative of hospital policy and requested that the warning be rescinded. Ultimately, on January 13, 1981, Beeman issued a written decision in which he ruled that the warning would be rescinded. His decision was based on "a review of the events . . . leading up to the invalid warning together with a review of your work at the Hospital." Further, Beeman wrote that "the Grievance Procedure process which was followed in this case was also reviewed, and will be further clarified by Mr. Skopac in the near future."

c. *Performance appraisals*

In accordance with the Hospital's evaluation system, Rosen received written employee performance appraisals on February 17 and again on July 30, 1980. In contrast to Pagliari's very favorable assessment of October 1980, Mazzacane's February evaluation found Rosen severely deficient in each of the areas identified on the form. Specifically, Mazzacane noted that her typewritten work was unacceptable in that it contained frequent errors, that her productive output was poor, that she was unwilling to handle difficult and undesirable assignments, had occasional conflicts with her supervisor and "is extremely defensive making implausible excuses for errors." As a result of this negative appraisal, Rosen failed to receive a merit pay increase.

Mazzacane testified at length about shortcomings in Rosen's performance which he believed warranted his harsh appraisal. Numerous letters, memos, and other materials which Rosen typed were introduced in evidence to demonstrate alleged errors or omissions. For example, Mazzacane testified with respect to a memo to another department chief he had prepared as one of his first administrative acts. Although the final copy of the memo did not contain errors, he nevertheless was concerned that erasures might be evident on the original copy. Mazzacane therefore opted not to send the original and, instead, sent his colleague a clean xeroxed copy which did not reveal the corrections. Mazzacane further testified

[3] The Hospital's employee handbook describes a three-step grievance procedure: step 1 calls for presentation of a written grievance to the employee's supervisor who is to provide a decision within 2 working days; step 2 provides that thereafter the complaint shall be forwarded to the department head who shall issue a decision within 1 week; at step 3 the matter goes forward to the hospital administrator who is required to issue a final decision in writing "as soon as possible."

[4] Some of the confusion in processing Rosen's grievance arose from the fact that Mazzacane was both her supervisor and the departmental head, thereby obscuring the distinction between step 1 and step 2.

that because Rosen failed to type one page of a three-page memo, he had to type it himself. Rosen denied any connection with this memo, recalling specifically that, when it was posted, she remarked to a coworker that the word "opinion" on the second page had been typed as "opion," a mistake she would have corrected. Mazzacane offered another memo, typed in January 1981, to show that even on a corrected version, Rosen had omitted certain phrases. On returning the corrected copy of this memo to Rosen, Mazzacane circled in red the portions of the letter which were omitted. According to Mazzacane, Rosen remonstrated that he should not encircle matters in red since it made it impossible for her to correct them. Mazzacane responded that he did not wish such a large omission to be inserted, but rather wanted the entire page to be redone. Kalkreuth, having cosigned the February evaluation, concurred with Mazzacane's assessment of Rosen's typing skills. He estimated that during the August to February evaluation period, during a bad week, out of approximately 20 documents, 5 to 6 might have to be returned to Rosen for correction; while during a good week, only 2 or 3 might need revision.

Mazzacane also testified as to Rosen's purported inability to complete her work accurately. For instance, he asserted that she failed to identify and record in her notes the salient topics at departmental meetings. As a consequence, he was compelled to completely revise minutes of a September 30 meeting. On October 23, Mazzacane sent Rosen a memo pointing out that certain monthly reports titled "Efficiency Work Sheets" contained errors. The memo stated that henceforth the reports first were to be submitted to Kalkreuth. Rosen did not deny making these errors. Mazzacane also testified that because Rosen failed to fill in three pieces of information on forms designated "Retrospective Analysis," a report which identifies the various kinds of treatments administered to patients in the department, he had to enter the data himself. He acknowledged that, after bringing this matter to Rosen's attention in November 1980, he had no further problems with the manner in which she completed these forms. Nevertheless, on January 16, 3 days after Rosen's grievance was resolved in her favor, Mazzacane complained in a written memo to Kalkreuth that the analyses were not being submitted in a timely manner. This was the first occasion that Rosen was advised that the reports were considered late.

A significant portion of Rosen's work involved filing various computer printouts which were received on a weekly or monthly basis. Mazzacane testified that he found the sheets filed so that the printed material was folded inside out or upside down, making them difficult to read. Contrary to Mazzacane's assertion that he brought this problem to Rosen's attention on at least six occasions between August and January 1981, she recalled that the first such criticism occurred about January 20.

Mazzacane also asked Rosen to prepare a catalog of reference books and alleged that he gave her a sample to follow which showed book titles listed in numerical order. Rosen denied having been given any sample and simply prepared a catalog in which the books were not listed sequentially. She added that, when she turned in her work product, Mazzacane merely thanked her and never registered any dissatisfaction. Moreover, she pointed out that, several weeks prior to her termination, he asked her to add other books to those previously listed.

Mazzacane further charged Rosen with responsibility for incorrectly assembling forms used by the billing department. Normally, such forms were preprinted and automatically assembled. However, when the supply of such forms was exhausted, Mazzacane requested a number of staff members to help assemble them manually. Five identical pages in each form had to be carefully stapled together so that billing entries appeared in the same grid on each of the five pages. Mazzacane testified that after the billing department rejected many of the forms because charges appeared in inappropriate grids, he asked each staff member with the exception of Rosen to initial the forms they were assembling. Thereafter, when forms were returned which were not initialed, Mazzacane concluded that Rosen was responsible for the assembling errors. Mazzacane observed that Rosen resented having to undertake this task, and faulted him for failing to order a sufficient supply before they ran out. Kalkreuth, whose desk was adjacent to Rosen's, observed that she had difficulty in properly aligning the forms.

Also in the month of January 1981, Mazzacane asked Rosen to chart the attendance records for department members for the previous year. On reviewing her work, Mazzacane found approximately 70 errors and spent some 3 hours preparing a corrected version. Rosen acknowledged her errors on this project and on one or two other pieces of work she did in one week in January but attributed her poor performance to the stress she felt at awaiting a final decision on her grievance and also because of concern with certain personal problems.

Mazzacane described other problems he perceived in Rosen's peformance. For example, he faulted her ability to distinguish between important and less important assignments. To resolve this problem, he established a priority system designating each piece of work as having either first, second, or third priority. He instructed her to sandwich telephone calls in between her work if they did not interrupt and interfere with her productivity. Further, he testified that he tried on two occasions to have her maintain his appointment book but withdrew this task when she did not perform the job to his satisfaction. He alleged that Rosen misfiled catalogs from various supply houses and failed to file certain forms titled "Unreported Therapy Reports" in chronological order. Additionally, Mazzacane testified that others in the department expressed to him their discontent with Rosen's performance. Thus, Mazzacane alleged that a former day-shift supervisor, Dorrance Johnson, complained to him about Rosen's irregular hours; that she failed to page personnel properly or to repage them; and that she neglected to complete priority work promptly. However, when Johnson was called by the Respondent to testify he flatly contradicted Mazzacane. His dissatisfaction lay not at all with Rosen's performance. Rather, Johnson's concern was with the fact that no telephone dispatcher was available throughout the day. He pointed out that a

high percentage of telephone calls to the department were of an urgent nature and commended Rosen's responsible manner in handling the dispatching functions. He made no mention of Rosen's alleged failure to complete priority work.

Mazzacane also testified that Dorothy Freel, formerly a clinical coordinator and then head of the school of respiratory therapy, on one occasion returned some material to him for correction which Rosen had typed. When Respondent called Freel as a witness, however, she expressed satisfaction with Rosen's work. In fact, Rosen typed not only departmental materials for her but prepared private term papers as well. In addition, Freel found nothing wanting in Rosen's services as registrar to the school. Freel expressed approval of Rosen's revised work schedule since its regularity helped her to plan her own work accordingly.

d. *The July evaluation*

Although Rosen should have been reevaluted within 3 months of the February appraisal in accordance with hospital procedure, Kalkreuth, then her immediate supervisor, did not prepare another evaluation until July 30. At this time, he was as critical of her work as Mazzacane had been. Thus, he noted that, although her typing improved during this period, it continued to be of an unacceptable quality. He further commented that she completed priority work in a timely manner but that her productivity suffered. At the hearing, Kalkreuth did not provide any documentary support for this evaluation other than to point to one memo which Rosen typed on a full rather than half sheet of paper as he had instructed. The only samples of Rosen's alleged poor typing during this second evaluation period were introduced into evidence by Mazzacane. In two instances, letters to sales representatives contained misspellings, but were mailed out over Mazzacane's signature anyway. As a result of the July evaluation, Rosen again was denied a pay increase.

e. *Denial of revised summer schedule*

Each summer prior to 1981, Rosen was permitted to work an earlier schedule than she did during the balance of the year. In June 1981, Rosen requested Kalkreuth's permission to revise her summer hours so that she could commence working at 11 a.m. rather than at noon. Kalkreuth and Mazzacane both refused to consent. Initially, Kalkreuth's response was that she would have to choose between her family and her job. However, at the hearing, Kalkreuth and Mazzacane both maintained that her request was denied because the department had benefited significantly from the regularity of her schedule.

2. Rosen's termination

In May, Rosen began to suffer premature or skipped heart beats. Her family physician prescribed Inderol,[5] performed a number of tests and suggested she take some time off from work. Consequently, between June and July she took the maximum allowable sick leave. While on vacation in August, these symptoms disappeared, but recurred when she returned to work toward the end of the month. In the latter part of August, two incidents occurred which Rosen alleged exacerbated the stress she was feeling on the job. One such episode concerned a project which Mazzacane gave to her several hours before she was to leave on vacation, stating that it had the highest priority. She began the assignment, but left the balance of it on her desk to be completed after her vacation. When she returned to her job, she found that many of the materials she was using for the project were missing and then learned from Mazzacane that the project no longer had a high priority. Mazzacane explained that it was his superior who in fact determined that the project no longer had the significance originally attached to it. The second incident occurred when Rosen found certain computer printouts on her desk with instructions to file them. Having never seen these printouts before, she entered Mazzacane's office to ask him where they should be filed. According to Rosen, Mazzacane became furious with her, and began pacing around his office saying that she should know where the documents were to be filed. Dorothy Freel, who was present in Mazzacane's office during this encounter, recalled that Rosen appeared quite distraught, but had no recollection of Mazzacane raising his voice to her at any time.

Toward the end of August, Rosen returned to her physician for new tests. In mid-September, the test results revealed that her symptoms were not related to a physical impairment.[6] Concluding that her problems were generated by work-related stress, Rosen tendered written resignations on September 18, effective October 9.

C. *Discussion*

1. The schedule change and warning were not unlawfully motivated

The General Counsel contends that the Respondent revised Rosen's work schedule, issued a written warning and two unjust performance appraisals, withheld a pay increase, and denied special summer hours to penalize her for her involvement in union and other protected concerted activities. In addition, these acts together with other forms of alleged harassment were designed to make Rosen's working environment so intolerable as to compel her resignation. The Respondent contends, to the contrary, that its conduct toward Rosen was justified by her poor performance and by legitimate business considerations. Thus, a resolution of the issues in this case poses the recurring problem of discerning the true rea-

[5] A drug prescribed for the treatment of a variety of cardiac conditions. See *Physicians Desk Reference* (Medical Economics Co., 1982 ed.).

[6] At the hearing, I rejected for hearsay reasons G.C. Exh. 26, a medical report from Rosen's physician. I have decided to reverse that ruling sua sponte, for after reconsidering this matter, I conclude that the document was not being offered for the truth of the matters asserted therein, but rather to provide the basis for Rosen's belief that her symptoms were not physiologic, and also to explain why her resignation was not tendered until mid-September. Accordingly, G.C. Exh. 26 is admitted into evidence.

sons underlying Respondent's treatment of Rosen. In cases such as this, where alleged violations of Section 8(a)(3) and (1) of the Act turn on an employer's mixed motives, the Board has devised a two-part analytic approach. First, the General Counsel has the initial burden of proving that protected activity was a substantial factor in the discipline imposed by the employer. Once the General Counsel has made this prima facie case, the burden shifts to the employer to prove as an affirmative defense that the decision would have been the same in the absence of the protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980).[7]

Here, several essential ingredients requisite to establishing a prima facie case are easily satisfied. The record clearly shows that the Hospital was opposed to the organization of its employees and was well aware of Rosen's tireless efforts on behalf of the Union. Against this backdrop, the General Counsel relies heavily on the element of timing to establish the impropriety of Respondent's decision to change Rosen's work schedule. Thus, he argues that Rosen was not advised of the schedule change until shortly after her prominent participation in the Union's August 15 rally. However, as I found above, Mazzacane did mention the schedule revision to Rosen toward the latter part of July or early August, albeit in unspecific terms. Further, he advised the supervisory staff in early August, prior to the union rally, that the change would occur. This announcement tends to negate a causal link between Rosen's appearance at the rally and the subsequent alteration of her working hours.[8]

The General Counsel further submits that Respondent's proffered business justification for the schedule change is wholly lacking in merit. I agree that Mazzacane's explanation that Rosen was needed to dispatch telephone calls during the 3 to 3:30 p.m. shift change made little sense. Telephone dispatching was undeniably an important function, but not only in the afternoon hours. Assuring Rosen's presence during a particular half-hour period would in no way address the dispatching problem during the balance of the day when she was not on duty. Further, Kalkreuth did not corroborate Mazzacane's contention that Rosen was needed to answer the telephone during the shift change. Rather, he explained that her presence during this time would permit maximum exposure to the greatest number of people in the department. In this event, however, a substantial number of the staff would be present to answer the telephone.

If Respondent's only justification for revising Rosen's schedule rested on the need to have her available for telephone dispatching, I would have grave reservations as to the legitimacy of its motivation. However, Mazzacane offered other reasons for the schedule change which are more convincing. Thus, he explained that he wished to stabilize her schedule so as to provide certainty to other department members who utilized her services; make way for another part-time clerk, and better accommodate his own work habits. Nothing in the record suggests that these were not valid considerations. Mazzacane's August 6 memo documents his intent to add a part-time clerk. Freel, a neutral and objective witness, testified that she valued the certainty of Rosen's new schedule. In addition, I note that Mazzacane testified without controversion that he acquiesced to Rosen's request for a starting time of 12 noon rather than 1 p.m. His willingness to defer to Rosen's wishes, at least in part, suggests that he was not acting wholly out of arbitrary and unreasonable motivations. On balance, then, I conclude that Respondent would have altered Rosen's work schedule even if she had not participated in union activity.

Similarly, although the October 13 warning to Rosen poses a close question as to the legitimacy of Respondent's motives, I conclude, based on the record as a whole, that the General Counsel failed to prove by the preponderance of the evidence that it was issued for unlawful reasons.

I credit Rosen's assertion that she specifically referred to the dates of October 10 and 17 in discussing with Mazzacane the medical appointments for her children, for it defies logic to believe that she would raise the matter in a general way when the appointments were already made. By the same token, it is illogical that Mazzacane would admit to having had such a conversation with Rosen on October 3 only to deny that she mentioned any dates to him. If Mazzacane were dissembling, he conveniently could have forgotten that any conversation about medical appointments occurred at all. As a matter of common sense, I surmise that Mazzacane simply forgot that Rosen mentioned express dates to him. Even granting Mazzacane's forgetfulness, a question remains as to his reason for issuing a written rather than a simple oral warning to an employee who had a 6-year untarnished work record. In reaching the conclusion that Mazzacane's overreaction was not in reprisal for her union activism, I bear in mind that the Union filed no objections alleging preelection campaign misconduct by any hospital representative. Further, the General Counsel was not successful in showing that any of Respondent's employees were treated disparately either because they supported or opposed the Union. Moreover, if Respondent wished to retaliate against Rosen for her union activity, it would not have granted her a 17-percent pay raise on October 17 as part of a job upgrading program. In light of these considerations, I conclude that, while Mazzacane's warning was intemperate, it was not issued for reasons which are violative of the Act.

2. The evaluations and denial of pay raises were unlawful

As soon as Mazzacane's warning was overturned, Rosen was subjected to a series of adverse employment actions which culminated in a devastating performance critique issued in early February 1981. The nexus be-

[7] In a recent decision, *Zurn Industries v. NLRB*, 680 F.2d 683 (9th Cir. 1982), the court specifically affirmed the Board's two-step approach in *Wright Line*, after carefully reviewing the relevant legislative history, but noted that there was not universal agreement among the circuits (id., fn. 9).

[8] As found above, Rosen was not notified of the precise details of the schedule change until on or about August 20. Thus, her charge that the change was unlawful, filed on February 17, 1981, was within the 6-month proscription of Sec. 10(b) of the Act.

tween the successful conclusion of Rosen's grievance and the subsequent actions taken against her strongly suggest that in successfully prosecuting her complaint, Rosen won a victory only to lose the war.[9] Thus, on the same day that Rosen received the final decision revoking the warning, Mazzacane advised Kalkreuth in a written memo that the retrospective analyses were not being submitted in a timely manner. Yet, by his own account, Mezzacane admitted that Rosen had prepared these analyses properly since November and there is no evidence in the record that he requested her to submit them at another time. Therefore, it is more than curious that he failed to mention that he had a problem with their timeliness until the very date that the grievance process was concluded. Approximately 1 week later Mazzacane objected to the manner in which Rosen filed computer printouts, work she had performed throughout her career with Respondent without comment. I am skeptical of Mazzacane's assertion that he spoke to Rosen about her improper filing techniques on numerous past occasions. Rosen was an articulate and obviously intelligent, college-educated woman. Throughout her testimony, she seldom forgot important matters, whereas Mazzacane frequently forgot the dates when certain events took place or who had been involved in them. I deduce from this that if Mazzacane had admonished her in the past she would not have made the same mistake twice. Therefore, Mazzacane's attempt to portray Rosen as a careless and inept employee who consistently failed to perform simple filing tasks seems manufactured or, at best, very much exaggerated.

Soon after these ill-founded criticisms were lodged, Rosen received the employee performance appraisal which found her deficient in virtually every regard. In finding that this appraisal stemmed from vindictive motives, I rely on more than the coincidence in timing between its issuance and the successful prosecution of Rosen's grievance. Among the other factors which must be taken into account is Rosen's previous work history. Throughout her career with Respondent, she regularly received merit increases. Pagliari, who without contradiction was depicted as a demanding taskmaster, described Rosen in exemplary terms in his last appraisal of her. Pagliari's comments were not those of a casual observer; rather, they reflected the considered judgments of a supervisor who had closely scrutinized Rosen's work on a daily basis for 5 years. Respondent fails in its attempt to call into question Pagliari's standards or judgment by introducing into evidence various imperfect typewritten memos. The claim or rather suggestion that these memos were all Rosen's work was unsupported by the evidence. There was no showing that all or most of these memos were her work or under what circumstances or conditions the errors and handwritten insertions were made, or that they were not corrected prior to circulation.

Further, the February evaluation was cosigned by Kalkreuth who had served as the associate chief throughout much of Rosen's employment in that department and who shared the same office with her. Yet, there is no documentation in the record that at any time prior to February 1981 he complained about her performance.

Based on this adverse appraisal, Rosen was denied a merit increase. Although several other staff members received unfavorable evaluations, Rosen was the only employee among the staff of approximately 33 in the respiratory therapy department to receive both a poor performance evaluation and a wage freeze during the first 2 years of Mazzacane's administration.[10]

These circumstances give rise to a compelling inference that Mazzacane's evaluation of Rosen was profoundly colored by the fact that she filed a grievance which exposed his decision-making to the scrutiny of his superiors and embroiled him and other administrators in an attenuated process which ultimately led to an acknowledgement that the Hospital's grievance procedures were flawed. Throughout, Rosen not only protested the impropriety of the warning, she also challenged the procedures employed. In so doing, she was engaged in concerted protected activity. It is well settled that individual efforts to compel compliance with a collective-bargaining agreement will be considered as serving a concerted purpose within the meaning of the Act. See *NLRB v. Interboro Contractors*, 338 F.2d 495, 500 (2d Cir. 1966). The principle of *Interboro* is applicable even in the absence of a labor contract where, as here, Rosen invoked the grievance procedure not only to rectify a personal injustice, but also to challenge a wrong which she believed stemmed from antiunion motives. Thus, her protest was designed, at least in part, to vindicate rights guaranteed to all employees, by Section 7 of the Act. In pursuing her grievances, Rosen induced Respondent to reexamine and clarify its grievance machinery. She thereby set in motion a process which could only inure to the benefit of her coworkers. See *Air Surrey Corp.*, 229 NLRB 1064 (1977). *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

Respondent avers that Rosen's negative evaluation was warranted because her performance was marginal. To support its position, Respondent introduced numerous documents which were intended to expose Rosen's incompetence. A close examination of these materials, together with Mazzacane's explanation of their imperfections, does not withstand scrutiny. For example, Mazzacane was particularly critical of Rosen's typewritten work. It became evident, however, that Mazzacane was not complaining about Rosen's finished work product

[9] At the hearing, I granted the General Counsel's motion to amend the complaint to allege expressly that Respondent's unlawful conduct also constituted a violation of Sec. 8(a)(1) in that it was designed to retaliate against Rosen because she resorted to the grievance procedure. Respondent argued strenuously then and in its brief that the amendment is time-barred under Sec. 10(b) of the Act. Respondent's argument is without merit. Settled authority establishes that once a charge is filed the Board may deal with any related matter which arises out of the original event. See *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952); *Gould, Inc.*, 260 NLRB 54 (1982). Here, Rosen's charge referred to unlawful reprimands, including the one which gave rise to her grievance. Thus, it cannot seriously be disputed that allegations of wrongful motivation based on Rosen's pressing that grievance are not closely related to the original charge.

[10] In contrast, between January 1979 and January 1980, Pagliari withheld merit increases for four other employees.

but about her first drafts. In other words, he was insisting on error-free work. It does not require expertise in modern office practice to recognize that Mazzacane's standard is virtually unattainable. Since Rosen was altogether willing to correct any errors, since many of the memos she prepared were for intradepartmental consumption only, and since previously, xeroxed copies of her typewritten work had been acceptable, Mazzacane's insistence on perfection seems particularly unreasonable. Several others, Freel and Rebecca Hoyt, another instructor in the school of respiratory therapy, were pleased with Rosen's typing; so much so that they relied on her to type papers for personal projects. Kalkreuth, too, was sufficiently satisfied with her skills to request that she type several letters for him in connection with a private business in which he was engaged. I attach particular significance to Kalkreuth's observation that Rosen may have typed approximately 20 documents a week out of which some 6 to 8 were returned for correction in a bad week, and only 2 to 3 in a good one. This means, of course, that at worst, 12 documents were completed without mistake. Such performance may fall short of perfection and leave room for improvement, but it hardly warrants total condemnation.

A number of documents which Respondent moved into evidence do not reveal Rosen's deficiency as much as they do the Hospital's efforts to grossly disparage her performance. Unquestionably, Rosen committed errors. Thus, she admitted making certain mistakes on the unreported therapy forms. She further acknowledged doing a poor job on certain work completed in the month of January, attributing her substandard performance at that time to both the stress of awaiting the disposition of her grievance and to personal problems. However, Rosen's willingness to admit error only serves to enhance the trustworthiness of her disclaimers of responsibility for certain projects which Respondent attributed to her. Although Rosen's work was not free of fault, a number of illustrations in addition to those previously discussed will suffice to show that Respondent overstated her shortcomings to create a false impression that she was incompetent.

Mazzacane's testimony with respect to the problem encountered when certain billing forms had to be hand assembled is indicative of his attempt to "build a case" against Rosen. The thrust of his testimony was that on learning that some of these forms were not properly aligned and stapled, he devised a method to determine which of the employees were responsible for the defectively assembled forms. He stated that he instructed each of the employees assisting him in this work to initial the forms they assembled. However, he did not so instruct Rosen, apparently believing that he could better identify improperly assembled forms as her work if they bore no identifying initials.[11] Mazzacane testified that an unspecified number of forms which had no initials on them were found to be defective. However, he produced no examples either of an allegedly defective uninitialed form which was returned to him or of a perfect form with another employee's initials on it. By failing to furnish any real evidence supporting these claims, when documentation should have been within Respondent's possession and control, an inference arises that had such records been produced, they would not have substantiated Mazzacane's contentions.[12] Thus, Mazzacane's own account of his efficiency control effort is more indicative of his hostility to Rosen than it is proof of her inefficiency.

Mazzacane's criticism of the minutes of a supervisory meeting which Rosen prepared was equally unwarranted. A comparison of the final version of Rosen's minutes with those Mazzacane completed reveals, at most, minor stylistic differences but no substantive distinctions.

Mazzacane's testimony with respect to Rosen's preparation of a library catalog also is incredible. He allegedly instructed Rosen to list a group of books sequentially according to numbers assigned to them and provided her with a sample catalog to follow. However, the model that Mazzacane introduced into evidence differs in every respect from the list which Rosen typed. I find it impossible to believe that a conscientious, responsible employee like Rosen would wholly ignore a format provided by her department chief. Therefore, I credit her account that he provided no such sample. Moreover, Mazzacane could not have been as displeased with her work as he claimed for he never suggested that she revise the catalog after it was submitted to him in January. In fact, shortly before Rosen resigned, he asked her to add additional titles to the list.

Mazzacane's disparaging description of the way in which Rosen handled the acute care shift logs also strikes me as misleading. He suggested that because Rosen mistakenly identified certain therapists as not having submitted daily logs as they were required to do, he, Mazzacane, wrongly rebuked those who were blameless. It is peculiar, however, that Mazzacane did not name nor did Respondent produce as a witness a single wrongly rebuked therapist. Moreover, since Mazzacane had the logs in his custody, he easily could have confirmed that a particular therapist had failed to submit a daily log before chastising him. Finally, since Mazzacane was not aware that Rosen had erred in compiling these lists until she mentioned it shortly before her termination, her mistake could not have been taken into account in preparing her evaluation.

In sum, Respondent failed to provide convincing evidence that Rosen's performance as a clerk-typist was so deficient as to justify the scathing appraisal issued to her in February 1981, just weeks after the grievance procedure had run its course. These circumstances persuade me that Mazzacane's judgment was distorted by a desire to retaliate against Rosen because of the manner in which she pursued her grievance against him. Respondent's allowing Rosen to prevail on her grievance does not alter the fact that Mazzacane and others in the administration were irritated by her charges of union har-

[11] It is not at all clear why the absence of initials could better identify Rosen's work than if her initials appeared on a returned form.

[12] See *Pacific Coast International Meat Co.*, 248 NLRB 1376, 1381–82 (1980); *R & L Plumbing*, 243 NLRB 1016, 1022 (1979). Respondent's inability to present such documentation is particularly puzzling in light of Mazzacane's admission that counsel instructed him to preserve evidence of Rosen's faulty work after she filed her unfair labor practice charge.

assment and her persistence in seeking clarification of and adherence to the grievance procedure. Skopac's comment that management felt harassed by Rosen's efforts to resolve her grievance suggests a willingness on the part of the administration to accept and act upon a negative appraisal of a troublesome employee. Accordingly, I find the issuance of the February evaluation and the attendant denial of a merit increase were violative of Section 8(a)(1) of the Act.

The General Counsel submits that the unlawful considerations which distorted the February evaluation infected Rosen's July appraisal as well. I agree for the record furnishes even less justification for the second adverse evaluation than it did for the first. Kalkreuth, who prepared this appraisal after having served as Rosen's supervisor for 6 months, could offer only one picayune example of her allegedly deficient performance—her failure to use a half sheet of paper rather than a full one for a typing assignment as instructed. Other than this, Mazzacane, not Kalkreuth, offered very few examples of Rosen's purportedly poor typing during this period. Again, it was apparent that he was referring to inaccurate first efforts, not to finished products.

Indeed, Kalkreuth saw an improvement in Rosen's performance up to May. Yet, he chose not to prepare an interim evaluation based on her improved performance within a 3-month period in conformance with hospital procedure.

Given Kalkreuth's inability to substantiate his dissatisfactions with Rosen's performance, and Mazzacane's continued reliance on uncorrected work, the conclusion is inescapable that Respondent's second appraisal of Rosen was unjustified and designed to buttress the propriety of the earlier one. As such, it was a perpetuation of Respondent's unlawful conduct.

I also agree with the General Counsel's contentions that Respondent denied Rosen's request for an earlier summer schedule for retaliatory reasons. Respondent offered no sound business justification for its refusal to accede to Rosen's modest request. Kalkreuth and Mazzacane merely asserted that her current hours were "good for the Department" without offering any explanation of why this was so. Arriving and departing from work 1 hour earlier for a period of 8 weeks could in no way offer less certainty or stability to those in the department who might need her services. There was no special need for her to be available at the 3 p.m. shift change as was found in the discussion above. Mazzacane even suggested that she dispense answering the phone if it interfered with her other more important duties. Further, Kalkreuth's flexibility in permitting others with equivalent or less seniority then Rosen to rearrange their schedules and designate their shift preferences contrasts markedly with his intransigence toward her. In the absence of any legitimate explanation for its position, I infer that Respondent's denial of Rosen's request for revised summer hours was part of a continuing pattern of retaliation.

3. Rosen was constructively discharged

The General Counsel posits that the totality of Respondent's conduct had the foreseeable effect of compelling Rosen to resign. He contends, therefore, that Respondent is liable for Rosen's constructive discharge.

In determining whether a constructive discharge has occurred, the Board holds that two elements must be established: first, an employer must deliberately make an employee's working conditions intolerable so as to force him to quit his job; second, it must be shown that these burdens were imposed because of the employee's union activities. See *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1967).[13]

In the present case, I found, on the one hand, that not all of the adverse actions taken against Rosen were unlawfully motivated. There was, for example, insufficient proof that Respondent's decision to alter Rosen's work schedule or to give her a written warning was discriminatory. Neither can I find that Respondent deliberately withheld Rosen's job description. Rather, the evidence suggests that her description, along with those for others in the department, was revised and, inadvertently, not returned in timely fashion for inclusion in a reference manual. Similarly, I am not persuaded that Mazzacane purposely gave Rosen conflicting instructions about compiling a report of overtime worked by staff members. The evidence also does not support the allegation in the amended complaint that Mazzacane screamed at Rosen about her failure to file new computer printouts. It follows that such conduct may not be relied on to establish a constructive discharge, however distressing such incidents may have been to Rosen. On the other hand, Respondent did make a number of far-reaching decisions affecting Rosen's status as an employee which were motivated by an intent to retaliate against her for having engaged in protected concerted activity. Accordingly, the second test enunciated in *Crystal Princeton* has been met. The critical question which remains is whether this unlawful conduct created a sufficiently oppressive atmosphere which Respondent reasonably could expect would force Rosen's resignation. A review of the entire record compels the conclusion that this question must be answered affirmatively.

As found above, Rosen was given two evaluations which unjustly exaggerated certain weaknesses in her performance and which provided justification for withholding a pay increase for more than 8 months. She was the only person in the department subjected to such treatment. Further, Rosen was criticized for performing her job in a way which for 5 years had been wholly acceptable to the former department chief. The alteration in the way in which Rosen's work was regarded cannot be attributed solely to the advent of a new department chief, particularly since Mazzacane was considered a less demanding taskmaster than Pagliari. Mazzacane's insistence on perfection from Rosen, contrasted with his tolerance for other employees' errors, is more than suspect.

In acknowledging receipt of the employee performance appraisal, Rosen stated her belief that the evaluation stemmed from unlawful motives and did not reflect her real performance. Nevertheless, in order to placate Maz-

[13] The same principles, of course, hold true where burdens are imposed on an employee who is engaged in concerted protected activity.

zacane, she began checking and rechecking her typing. The upshot of this was that her productivity decreased, leading to new criticisms. Thus, in an effort to satisfy Mazzacane and ward off his unreasonable faultfinding, Rosen was thrust into a no-win position. Denying Rosen an earlier summer work schedule served to exacerbate an already tense situation. Depriving her of this modest benefit without sound reason suggests that it was part of a continuing effort to make her working conditions as uncomfortable and inflexible as possible. Then, even after conceding that her efforts had improved, Kalkreuth unleashed another devastating evaluation. With both her supervisors denigrating her efforts, Rosen could have litle expectation for ordinary consideration on the job, much less hope for advancement.

Respondent cites *Van Pelt Fire Trucks*, 238 NLRB 794 (1978), for the proposition that an employee such as Rosen has an alternative other than quitting; that is, to seek redress through the Board's processes. However, given the amount of time which inevitably elapses before an unfair labor practice charge is resolved, Rosen could not look forward to a swift palliative for her physical and emotional reactions. Rosen had no real options here. As long as she remained in an atmosphere where no amount of effort on her part would satisfy those who controlled her working conditions, she continued to experience symptoms which she reasonably attributed to work-related stress. While the Board imposes a "reasonable person" standard in determining whether conditions are objectively onerous or merely unpleasant,[14] it does not insist that the reasonable employee be a stoic. See, e.g., *Pinter Bros.*, 227 NLRB 921, 938–939 (1977); *Zinke Foods*, 185 NLRB 901, 906 (1970). If Dorothy Freel, who did not work with Rosen on a daily basis, could during one brief episode in Mazzacane's office observe her discomposure, then Mazzacane and Kalkreuth had to be aware that their actions were causing her considerable distress. Consequently, Respondent must be held accountable for creating conditions which clearly signaled to Rosen that she was no longer wanted. No reasonable employee is expected to continue working under the conditions such as those created by Respondent. See *General Meats*, 247 NLRB 1036, 1038–40 (1980); *W. T. Grant Co.*, 195 NLRB 1000, 1008–09 (1972); *Zinke Foods*, supra. Accordingly, because I find that Rosen tendered her resignation under compulsion, it follows that her termination must be regarded as a constructive discharge violative of Section 8(a)(1) of the Act.[15]

[14] *Hit 'N Run Food Stores*, 231 NLRB 660, 666 (1977).

[15] The complaint alleges that Respondent's conduct toward Rosen was motivated by her union activities in violation of Sec. 8(a)(3) of the Act. There is without doubt some evidence of union animus here, and one can safely assume that Respondent would be happy to rid itself of a principal union proponent. Therefore, it is difficult for the trier of fact, as it must have been for the Respondent, to regard Rosen's participation in the grievance process as severable from her role as a key union activist. However, since the Board has rejected an "in part" test of motivation in *Wright Line*, supra, and the record does not establish by a preponderance of the evidence that Respondent would not have retaliated against Rosen in the absence of her union activities, a violation of Sec. 8(a)(3) does not properly lie here.

CONCLUSIONS OF LAW

1. Respondent Hospital of St. Raphael is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. New England Health Care Employees Union, District 1199, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by issuing to Sandra Rosen two adverse employee performance appraisals, denying her an annual merit wage increase and earlier summer working hours in retaliation for her engaging in protected concerted activities.

4. Respondent has violated Section 8(a)(1) of the Act by discharging Sandra Rosen on October 9, 1981, and by failing and refusing to reinstate her at all times thereafter.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act by revising Rosen's work schedule nor by issuing a written warning to her.

THE REMEDY

Having found that Respondent's conduct violated Section 8(a)(1) of the Act in that it was designed to retaliate against Sandra Rosen for engaging in protected concerted activities, I shall recommend that Respondent be required to cease and desist therefrom and from engaging in any like or related conduct hereinafter. In addition, in order to effectuate the policies of the Act I shall recommend affirmatively that Respondent be required to offer Sandra Rosen immediate reinstatement to her former job or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed and to make her whole for any loss of pay she may have suffered by reason of her discharge by paying to her a sum of money equal to that which she would have earned but for her discharge from October 9, 1981, to the date of an offer of reinstatement, less any net earnings during this period, to be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962). Respondent will preserve and make available to the Board on request all records necessary and useful to determining the amount of backpay due under the terms of this decision. In addition, I shall recommend that Respondent be required to rescind and expunge Rosen's adverse performance appraisals from her personnel file and, also, to post appropriate notices.

[Recommended Order omitted from publication.]

Eller & Company, Inc. *and* Gary Lee Jones *and* Arthur Lee Brown

International Union of Operating Engineers Local 675, AFL–CIO *and* Gary Lee Jones *and* Arthur Lee Brown. Cases 12–CA–10556, 12–CA–10587, 12–CB–2480–1, and 12–CB–2480–2

30 November 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 25 June 1984 Administrative Law Judge James J. O'Meara Jr., issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent Union and the Respondent Employer filed answering briefs. The Respondent Union also filed cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The motions of the Respondent Union and the Respondent Employer to strike the General Counsel's Notice of Authority are denied as lacking merit.

[2] The General Counsel and the Respondent Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

JAMES J. O'MEARA JR., Administrative Law Judge. These cases were consolidated and tried at Miami, Florida, on May 3 and 4, 1983. The charges were filed by Gary Lee Jones and Arthur Lee Brown against the Union Respondent on January 20, 1983. Subsequently, Jones and Brown filed additional charges against the Company Respondent on February 1 and 24, 1983, respectively. On March 9, 1983, a consolidated complaint was issued based on the four charges. That complaint alleges that Jones and Brown were discharged by the Respondent Eller & Company, Inc. in response to the request of the Union. The complaint also alleges that the Union, through several officials, threatened several employees with loss of employment because of their intraunion political views and activities. The complaint charges that such activities constituted violations of Section 8(a)(1) and (3) and Section 8(b)(2) of the Act.

The Respondents, Eller & Company, Inc. and the Union, deny that they have violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and in consideration of the briefs filed by the General Counsel, the Company Respondent, and the Union Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Eller & Company, Inc. (Eller) is a Florida corporation with several offices and places of business in the State of Florida, including its facility located at Port Everglades, Florida. It has been engaged in the business of providing maritime services, including stevedoring services and warehousing at various locations in several States including its facility at Port Everglades, Florida, which is the site of the incident giving rise to this case.

During the past 12 months, Respondent Eller, in the course and conduct of its business operations, performed services valued in excess of $50,000 in States other than the State of Florida, and is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent International Union of Operating Engineers, Local 675 (the Union) is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

I find that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. STATEMENT OF FACTS

A. *The Business of Respondent Eller*

Eller is engaged in the maritime industry as a shipping agent and provides stevedoring and other maritime services at various seaports throughout Florida, Virginia, and Texas. At its Port Everglades, Florida operation the Company employs operating engineers represented by the Union as well as other employees. Approximately 3 percent of the vessels unloaded by Eller at Port Everglades require the use of Eller-operated cranes and union crews to operate them.

B. *Eller's Employment of Operating Engineers*

The number of operating engineers engaged to operate Eller's cranes constantly changes due to fluctuations in the number and type of vessels for which Eller provides stevedoring facilities. These operating engineers are obtained through the Union's hiring hall and at the request of Eller. As a result of these circumstances, layoffs of operating engineers occur frequently. In 1982 Eller laid off a total of 18 crane operators; some of the operators have been hired and laid off several times during the year.

It was the practice of the Company at all times material to the issues in this complaint to maintain four "permanent" operators or "continuous" employees. These permanent operators performed their duties in teams of two and operated and maintained two cranes. The four continuous employees were treated differently from other operators by the Company in that they were paid 50 cents per hour over and above that wage required by a collective-bargaining contract with the Union to which Eller was a signatory. They also were allowed to remain "on the clock" whenever there was "downtime." Other employees known as "needed employees" were clocked out during "downtime." The continuous employees were also able to qualify for 1-week vacations every 6 months and, different from the "as needed employees," wore uniforms identifying them as Eller employees. The Company determined which of its operators would be deemed continuous employees and such continuous employees were changed from time to time. The practice of treating four of the union operators as continuous employees was at the Company's option and was not required by the collective-bargaining agreement with the Union. That collective-bargaining agreement with the Union did not provide for any seniority for operating engineers in regard to their employment either as continuous employees or as needed employees. At the time of the layoff of Gary Lee Jones and Arthur Lee Brown, each was what has been described as continuous employees, Brown, having been engaged in that capacity, continuously during the year that the two operator teams were in use. Jones entered the status of continuous employee on May 22, 1982,[1] as a replacement for another continuous employee who had been fired.

C. *The Union*

The Union and Eller are parties to a collective-bargaining agreement applicable to the operating engineers employed by Eller. The contract, in effect at the time material to the issues in this case, was one of a succession of contracts. The local union is administered by the business manager, who, since 1976, has been Dennis Walton. The business manager is elected by the members of the local union. On August 14, an election for local union officers took place. The prime candidates were incumbent Dennis Walton and a challenger, Gus Chandler. The campaign pursued by Walton and Chandler was intensive and resulted in a close election in which Walton was elected. There are 2200 union members of whom 1160 voted in this election. Walton, the winner, received a plurality of about 26 votes.[2]

The duties of the business manager of the local union include the responsibility for negotiating contracts, hiring and firing union staff, the responsibility for the operation of the local union, appointment of all shop stewards, and the day-to-day operation and oversight of the local union.

[1] All dates are in 1982 unless otherwise indicated.

[2] The record is unclear as to these totals but is is well established that the number of ballots was substantial and the margin of the winner was small.

D. *Discharge of Jones and Brown*

On or about October 21, 1982, Eller experienced adverse economic conditions and a reduction in its employee complement was necessary.[3] Six members of the Union, including Jones and Brown, were selected by Eller for layoff. Four members of the Union continued employment in the status of permanent employees. The selection of those employees to be laid off was not made on the basis of seniority in length of employment with Eller. An evaluation was made by supervisory personnel of Eller. The inclusion among the employees to be laid off of Jones and Brown was due to their "attitude" reflected on the job and arising out of the perceived adverse results of the union election of August 14. During the period from the date of the election to the October 21 discharge, both Brown and Jones had demonstrated their disappointment with the results of the union election. They did not converse with fellow employees at the Eller facility. They did not participate in the shared functions of their jobs, such as the cleaning of equipment and the maintenance and repair of equipment, and they engaged in unauthorized absences from the area in which they were expected to perform their job. These two operators were each one of a crew comprising two operators and were deemed continuous employees and worked as the partner or second member of a crew. Their refusal to participate in their assigned work caused the other crew members to undertake an undue share of the allocated work. The situation was so apparent and destructive of amicable working conditions that an Eller supervisor, after unsuccessfully attempting to resolve the matters within the Eller Company, called on Union Business Manager Walton to visit the worksite and exhort the operators to cooperate in the performance of their work. Walton appeared at the premises of Eller and advised the employees, who were also members of the Union, that the election was over and that they should return to the amicable work relationship which existed prior to the election. The condition which prompted Eller supervisors to request the intervention of Walton was sufficiently apparent that Charging Party Jones, in an effort to smooth relations, sponsored a picnic in early September to which both employee and management personnel of Eller were invited. Respondent's manager, Coenen, in consultation with other supervisory personnel, selected Jones and Brown for layoff because of the "attitude" of these employees as described above even though both Jones and Brown had in the past been members of the continuous employee cadre which was maintained at the option of the Company. Other operators who had supported Walton's adversary were retained by the Company and supporters of Walton were among those laid off.

III. THE ALLEGED UNFAIR LABOR PRACTICE

Brown and Jones contend that they were included among the personnel to be laid off on October 24 because of their activities during the intraunion election

[3] There is no contention on the part of the parties to this action that the reduction of Eller's employee complement was contrived or unnecessary.

where the principal candidates were Walton and Chandler. They allege that the Union, through Business Manager Walton, influenced Eller to lay them off because they were active and vocal in support of the unsuccessful campaign of challenger Chandler. In support of this allegation, they cite several instances occurring before and after the election of August 14 as evidence of their allegations. The campaign was hard fought and each of the candidates, Walton and Chandler, vied for the support of the various operators who were members of the local union. Included among these are Jones and Brown. The record suggests that they were of such stature among the union operators at Eller that their support for a particular candidate would generate like support from other members of the Union. As a result, Walton visited among the employees including Brown and Jones prior to the election. About 1 week before the election Walton is alleged by Jones to have said, "Whoever does not support me will be down the road." Although Walton denies this statement, no further elaboration on its meaning, or definition of any innuendo conveyed by such statement, appears in this record. On August 12, 2 days before the election, Walton, in discussions with Brown in the presence of other union employees at Eller, is alleged to have stated that he wanted good men to support his candidacy. Brown asked him if that were so, why he had relieved Randy Costin and George Elvis? Walton allegedly replied that people who do not support him do not work for him. Again on August 13, the day before the election, Brown, who, up to that date had been the union steward at Eller, was replaced by Douglas Bates.

About 2 weeks after the election the new business steward, Douglas Bates, encountered Jones and Brown on the job and told them to "watch out you will be replaced at Eller." The record does not disclose any elaboration by Bates as to his meaning or intent on this occasion nor did Jones or Brown question him about it.

Also, approximately 2 weeks after the election, Bob Krickovitch, the equipment superintendent, had occasion to call the union hall to advise them that they were laying off a union operator because of incompetence. The call, allegedly made in the presence of Brown, was to a union official by the name of Joe Gagne. Krickovitch is alleged to have stated to Brown that, during the conversation, Gagne had said to Krickovich that if they laid off anyone they should lay off Brown. Krickovitch denies such a telephone conversation. Again, after the election and approximately 1 week before the October 21 layoff, Bates, in a conversation with Brown and Jones, allegedly told them that they were to be laid off. He returned several hours later and told them they would not be laid off. Bates denied knowing whether they were to be laid off or having told either Brown or Jones that they would or would not be laid off.

On the morning of October 21, Pete Pescatore, who was acting as the equipment foreman in the absence of Krickovitch, informed Jones and Brown that they had been laid off. Later, on October 21, Jones and Brown spoke to Coenan, Eller's manager, regarding the reason for their being included among those employees to be laid off. Allegedly, Coenan stated that they had been laid off because of their "political views and that the layoff was a direct order from the Union hall." Coenan denies that their discharge had been a result of an order from the union hall and he also denies that he had told Jones and Brown that. Coenan's reason for including Jones and Brown among those employees to be laid off was their "attitude" comprising their failure to communicate with other employees, their failure to remain on the job, their failure to obey orders from the craft supervisors, and their failure to maintain their cranes.

IV. DISCUSSION AND CONCLUSIONS

The General Counsel specifies three distinct charges against the Respondents. First, he contends that Respondent Eller violated Section 8(a)(3) by terminating the employment of Gary Lee Jones and Arthur Lee Brown because of their union political beliefs and activities. Second, the General Counsel alleges that Respondent Union violated Section 8(b)(2) of the Act by causing the discharge of Gary Lee Jones and Arthur Lee Brown from Eller's employment. Third, the General Counsel contends that the Union violated Section 8(b)(1) of the Act by threatening and coercing employees with loss of employment because of the employee's union political beliefs.

The first two issues delineated above are reflected in the allegations in the complaint whereby the General Counsel charges that the Union requested Eller to terminate the employment of Jones and Brown because they had failed to support the successful candidate for business manager in the union election.

The evidence reflects, as stated above, that on October 21 Eller found it necessary, because of economic conditions, to lay off six of their crane operators because of a reduced demand for such cranes. There is no contention on the part of the General Counsel that the need to lay off these six employees was not economically prompted. The single issue in this regard is the inclusion of Gary Lee Jones and Arthur Lee Brown among the six employees laid off. Lee and Brown contend that the Union directed that they be included among the six employees to be laid off because of their opposition to the successful candidate for business manager, Dennis Walton, in the prior election. The only direct evidence of this consists of the statement by Jones and Brown that Coenan, Eller's manager, told them that they were discharged for political reasons and on direct orders from the Union and that a list of employees to be laid off was given to Coenan. Coenan denied the statement attibuted to him and also denied that the Union had any influence whatsoever in the selection of employees to be among those laid off. No list of such employees was produced nor was there any evidence of such a list.

Coenan contends that it was he who made the selection of Jones and Brown to be among those laid off. He stated that the reasons for the inclusion of Jones and Brown to be laid off was their "attitude." After the election of Walton, Jones and Brown became sullen, refusing to communicate with the other members of their crane crews, and were away from the jobsite when needed and would not participate in their share of the work in both the operation and maintenance of the particular equip-

ment with which they were charged. Fellow employees have testified in this record that both Jones and Brown refused to take a proportionate share of the work in the operation and maintenance of the crane which they operated. On one occasion, deemed characteristic, a crane was in need of maintenance or repair work and the crew was asked to attend to the work in order that the crane would be operable by 1 p.m. Brown and Jones left the location of their work with the crane and went to lunch, which conduct, but for other employees, would have precluded the operational status of the crane by 1 p.m. The evidence also reflects that Jones and Brown would not participate in the maintenance of their cranes as was required by their jobs and were tasks which they had performed prior to the election. Coenan characterizes this action as a poor "attitude." He is also charged to have said that the reason for Jones and Brown's inclusion among those to be laid off was their "political views." Although Coenan denies the use of the term "political views," it is probable that, since Jones' and Brown's reaction was to the results of the union election, such a posture could be deemed political views with the understanding that politics were those of and within the Union.

The situation after the election became intolerable to the supervisory personnel at Eller and they requested Business Manager Walton to visit the port, talk to the men, and attempt to reconcile the differences in order that the work at the port could continue without the disruption and delay caused by union politics. Walton came to the port, talked to the union members employed by Eller, and urged them to forget the election and the previous campaign and work harmoniously in order that the job which they were called on to perform could be accomplished to the satisfaction of management. Jones also recognized the aura of discontent prevailing at Respondent Eller's facility since he, in September, had sponsored a picnic to which both union employees and management personnel of Eller & Company had been invited. Jones acknowledged the purpose of the picnic was to alleviate the tension and reduce the discontent among the employees at Eller. It seems, therefore, that the postelection atmosphere at Eller & Company was tense and disruptive. Coenan perceived Jones and Brown to be all, or some, of the cause of such conditions and he selected them to be laid off in order to retain employees whom he perceived to be qualified and compatible with a more amiable atmosphere.

I find that the reasons attributed by Coenan for the layoff of Jones and Brown are persuasive in view of the conditions existing after the election at Eller. Further, it is improbable that in the event the Union had influenced the inclusion of Jones and Brown among those to be laid off, that Coenan would have expressed this to the employees so affected. There is no supporting evidence of Coenan having made the statement nor is there any evidence of the existence of a list of such employees. It is further significant that among the six employees laid off on this occasion, several were Walton supporters during the recent election.

The Charging Parties, Jones and Brown, infer great significance to the fact that they were members of the continuous employees, "permanent employees," or "cadre" of operators whom, according to Eller's practice, were retained even in times of slow work. They contend by innuendo that this position gives them some tenure not available to other employees. It must be noted that in March, Jones became a member of such cadre only after another former cadre employee was discharged. By this very fact Eller's position is confirmed that the membership among the permanent employees did not depend on seniority nor other factors except those that tended to create a better working crew of employees. The benefits to their permanent employees were voluntarily granted by the Employer. Such things as a 50-cent increase in wages over scale and being permitted to stay "on the clock" during downtime were among some of these benefits. The contract did not require such benefits and the Union was aware that Eller granted them. Notwithstanding the detailed description of this cadre, the membership within it was not entitled to any tenure or special preference. Therefore, notwithstanding Jones' and Brown's good performance prior to the election, when their persistence in permitting their political views of union matters to interfere with the discharge of their employment and that of other employees the Employer had the right, in selecting those employees to be laid off, to number them among such employees. Thus, the contention of Coenan that Jones and Brown were laid off because of their "attitude" and/or their "political views" is persuasive when weighed against the self-serving, unsupported testimony of Jones and Brown that Coenan made a statement suggesting a contrary reason for their discharge, I, therefore, credit the testimony of Coenan and find that the reasons for including Jones and Brown among those to be laid off were legitimate, lawful reasons and not the result of influence or urging by the Union. Another factor in suport of such a conclusion is that there appears to be no reason in this record that the Employer should subserviate its judgment as to who should be employed to the Union. There was an abundance of operators and nothing in this record to indicate that the Union was in a position to enforce their suggestion; on the contrary, layoffs were frequent and operators were numerous.

Several collateral episodes are contained in this record apparently in an attempt by the General Counsel to create an aura, by innuendo, of interference by the Union. During the campaign, prior to the election, Walton was alleged to have stated that, "No one works for me unless they support me." The record shows that the office of business manager of the Union carries with it a number of appointment rights including that of assistant business manager, "No one works for me unless they support me." Specifically, Randy Costin, an assistant business agent, was removed as an assistant business agent by Walton. On the day before the election, Walton removed Brown from his job as steward and appointed Doug Bates to such position. These appointments are the prerogative of the business manager of the Union and does not support the contention that Walton, the business manager of the Union, intended his remarks to refer to

the employment of the union members with the employer. I find this evidence to be nonprobative of the issues.

Approximately 2 weeks after the election, Brown had the occasion to be in Krickovitch's office. Krickovitch had placed a call to the union hall asking for Walton, the business manager, or Joe Gagne, the assistant business manager. The purpose of the call was to discuss with the Union the replacement of an employee the Company intended to discharge because they were dissatisfied with him. After concluding the conversation with Gagne, Krickovitch, according to Brown, turned to him and told Brown that Gagne had informed him that if Eller wanted to lay off anybody at the jobsite that it should be Brown. Krickovitch denies that Gagne had told him that if anyone was to be laid it should be Brown and he also denied that he told Brown that Gagne had so stated. The employee with whom Eller had been dissatisfied was discharged. Here again we have the testimony of Brown as to the conversation with Krickovitch and Krickovitch's denial of the conversation. No further action on the part of the Union or Eller is related to this conversation.[4] It would probably be necessary to determine Krickovitch's status as a supervisor if the evidence arising from his testimony was significant. Since no probative value is attached to the testimony of Krickovitch in regard to his conversation with Gagne, it becomes unnecessary to determine Krickovitch's status.

Other statements attributed by Jones and Brown to the new union steward, Bates, create what could be described as an innuendo. Statements such as Bates allegedly having stated that Jones and Brown were to be laid off and then an hour or two later that they were not to be laid off are nonprobative of the issues of the case.

Jones and Brown contend that when they confronted Coenan he allegedly told them that they were discharged because of direct orders from the Union. They asked him if he would testify to that before the Board. Coenan was alleged to have said that he would tell the truth. Subsequent efforts to get a statement from Coenan to the effect that the Union had directed their layoff were unavailing. The request to Coenan for such a statement was made after the Charging Parties had filed their complaint against the Union and before they had filed a similar complaint against the Company. In this interim, and on the refusal of Coenan to give them a statement in the manner which they requested, Jones and Brown went to Steven Erb, vice president of Eller's Florida operations. They advised Erb that they had been unsuccessful in getting a letter from Coenan stating that the reason for their inclusion among those employees laid off was because of pressure from the union hall, and that unless they got such a letter they would bring action against Eller before the Board. Erb told Jones and Brown that he would advise Coenan that they had come to see him which he did and no further action on the subject was carried on by Erb. On Februrary 7 and 24, 1983, respectively, Jones and Brown caused the filing of a companion complaint against the Company.

There is evidence in this record comprising a letter sent by Brown to the general president of the Union. That letter stated that Walton had influenced their layoff because of their opposition to him in the election. Walton, in response to a query in that regard from the general president, requested a statement from the company as to the reason for the inclusion of Jones and Brown and directed such letter to the president of the Union. The letter from the employer indicated that the reduction was due to a reduced demand for cranes created by economic conditions.

In summary, it is my conclusion that Jones and Brown were included among those to be laid off on October 21, because of their selection by the management based on the perception that working conditions at the Employer's facility would be improved and best served by the layoff of Jones and Brown. I find that the General Counsel has not discharged the burden of proof by the evidence in this record that the inclusion of Jones and Brown among those to be laid off was instigated by the Union nor was the result of pressure by the Union on the Employer. I further find that the General Counsel has not established by a preponderance of the evidence that the Union took steps to influence the inclusion of Jones and Brown among those to be laid off on October 21.

Jones and Brown have testified to certain statements made by Walton, Coenan, Bates, and Krickovitch. Each of these statements can be characterized as self-serving to Jones and Brown as none of the statements are corroborated by other testimony and all have been denied by the alleged declarant. Nothing in the observed demeanor of the alleged declarants and nothing in the content of their denials gives me cause to discredit their testimony. Except for the alleged statement of Coenan that Jones and Brown were laid off because of direct orders from the Union, all of the content of the statements fall short of establishing that the Union was instrumental in Jones' and Brown's discharge or that the Company succumbed to alleged influence by the Union in the selection of Jones' and Brown's layoff.

All evidence considered, it is my finding that the General Counsel has failed to establish, by a preponderance of the evidence, the allegations made in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Eller & Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, International Union of Operating Engineers Local 675, AFL–CIO, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established, by a preponderance of the evidence, that Respondent Eller &

[4] Krickovitch's status is not clear in this record in that he is mentioned by several different titles. One of the titles was craft foreman. The position of craft foreman is defined in the collective-bargaining agreement between Eller and the Union. This agreement expressly provides for a craft foreman who shall not be deemed a supervisor. Sec. V, art. 3 provides, in part, that: The craft foreman will be the leadman of the employees in the bargaining unit. Such individual, however, shall neither have the authority to, nor shall exercise any of the functions customarily "exercised by supervisors within the meaning of the National Labor Relations Act, as amended, and in no way shall such individual be deemed to be an agent of the Union."

Company, Inc. nor Respondent Union violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Foothills Food, Inc. d/b/a Erickson's Sentry of Bend *and* United Food and Commercial Workers Local Union No. 303. Case 36–CA–4532

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 20 March 1984 Administrative Law Judge Richard D. Taplitz issued the attached decision. The General Counsel filed exceptions[1] and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The relevant facts can be briefly summarized. Foothills Food, Inc. d/b/a Erickson's Sentry of Bend, herein Erickson's, has three stores in Bend, Redmond, and Madras, Oregon. The three constitute a single bargaining unit in which the employees are represented by United Food and Commercial Workers Local Union No. 303, herein called the Union. Erickson's and the Union engaged in collective-bargaining negotiations in June and July 1983. On 2 July Erickson's made its final offer to the Union, and on 21 July members of the unit voted to authorize a strike.

On the morning of 22 July, employee Harold C. Richards approached Bend store manager and part owner Douglas Schmidt and asked what language he could use on a petition to resign from the Union. Schmidt obtained the language[2] from his attorney and gave it to Richards. While in Schmidt's office, Richards wrote the language on a piece of paper and signed it. Schmidt and Richards then discussed who else would be interested in working during a strike, and Schmidt called employee Randy Albright to his office over the store's P.A. system.[3] During the afternoon Schmidt had Assistant Manager Mike Sears, an admitted supervisor, call employees Mike Jackson and Brian Palfrey individually from their work stations to Schmidt's office.[4]

The credited evidence shows that each of the three employees was told by Schmidt in his office that a strike was imminent; that if the employee honored the picket line he would be permanently replaced; that, if he came to work through the picket line the Union would fine him; that if he signed the petition to resign from the Union, the Union could not fine him for crossing the picket line to work; and that, if he did resign from the Union and cross the picket line to work, his wages and benefits would be the same.

After Schmidt gave Albright the above information, Albright signed the petition in Schmidt's office in the presence of Richards and Schmidt. Richards then took the petition with him to the produce area.

Later in the day, Jackson was given the same information by Schmidt in Schmidt's office in the presence of Sears. Jackson told Schmidt that he would like the night to think about it. Schmidt responded that the Union could strike as soon as the next day and that he wanted to keep Jackson on. He reiterated that if Jackson honored the picket line he would be permanently replaced and if he did not he would be fined. Jackson replied that he wanted the day to think about it. Schmidt told Jackson that if he had any questions he should talk to him, Sears, or Richards. Jackson asked Schmidt if he could see the petition and Schmidt replied that Richards had it and Jackson should talk to Richards or Sears. Later that afternoon Jackson asked Sears if the petition were still in the store and if he could sign it. Sears told him that the petition had already been sent in the mail to the Union, but that there would be another petition to sign since not everyone in the store had signed the first petition.[5]

Shortly after Schmidt's conversation with Jackson, he spoke with Palfrey in his office, again in the presence of Sears. Schmidt gave Palfrey the same information that he had given Albright and Jackson. He then told him that he could sign the petition in the produce area and keep his job, and that they would be sending the petition away later

[1] The General Counsel's exceptions were limited to the judge's findings concerning the Respondent's conduct in soliciting employees to sign a petition withdrawing their union membership on 22 July 1983.

[2] The petition read:

> As of 7–22–83 the following resign from the Retail Clerks Union Local #303 and will not honor any strikes or picket lines.

[3] These facts, which Schmidt testified to at the hearing, were not included in the judge's decision. Although Albright testified that Assistant Manager Mike Sears had told him to go to Schmidt's office, the judge credited Schmidt over Albright.

[4] The judge did not include in his decision the fact that the two were called in to Schmidt's office by Sears, but each of the employees, who were both credited over Schmidt and Sears, testified that Sears had come to him at his work station and told him to go to Schmidt's office.

[5] Although the judge failed to include all of the above facts regarding Jackson in his decision, Jackson testified to the facts at the hearing and the judge credited Jackson over all other witnesses at the hearing.

on that night. Palfrey later signed the petition in the produce area.[6]

The judge concluded that in these circumstances Schmidt did not violate the Act by any of his statements or actions as alleged in the complaint. We disagree. While we agree with the judge that an employer does not violate Section 8(a)(1) by providing employees with information on how to resign or withdraw from their union "as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation," *R. L. White Co.*, 262 NLRB 575, 576 (1982), we disagree that such is the case here.[7] Thus, Schmidt discussed with Richards which other employees to approach; Schmidt, not Richards, called the three employees to his office—one over the store's P. A. system and two by his assistant manager—away from their work stations and on company time; Schmidt's meeting with two of the employees did not even include Richards; Schmidt told Jackson to ask Richards, Assistant Manager Sears, or Schmidt if he had any questions about the petition; Schmidt told employee Palfrey that "they" would be sending the petition away that night; and Sears told Jackson that the petition had been sent to the Union but that there would be another one since not everyone in the store had signed the first one. In these circumstances, we find that the words and actions of Schmidt and Sears went beyond the mere providing of information found by the judge and constitute unlawful solicitation of union resignations.[8] Not only did Schmidt assist Richards, but he and Sears also gave the appearance that Erickson's favored the petition and encouraged employees to sign it and created a situation where employees would tend to feel peril in refraining from signing the petition. In addition, Sears made it clear by his statement to Jackson that Erickson's was monitoring who had or had not signed the petition.[9] Accordingly, we find that Erickson's unlawfully encouraged and solicited employees to sign a petition to withdraw from the Union, thereby impairing employee freedom of choice in violation of Section 8(a)(1) of the Act.[10]

ORDER

The National Labor Relations Board orders that the Respondent, Foothill Foods, Inc. d/b/a Erickson's Sentry of Bend, Bend Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully encouraging or soliciting empoyees to sign a petition whereby they withdraw from United Food and Commercial Workers Local Union No. 303 or any labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Bend, Oregon store copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges unfair labor practices not found herein.

[6] Palfrey testified to the above facts. Although the judge did not include all these facts regarding Palfrey in his decision, he credited Palfrey over both Schmidt and Sears.

[7] We agree with the judge that telling employees that they will be permanently replaced if they engaged in an economic strike and that they may be fined by their union if they cross the picket line is, absent any threats or promises, lawful.

[8] See *Hexton Furniture Co.*, 111 NLRB 342, 344–345 (1955); *Landmark International Trucks*, 257 NLRB 1375 (1981), remanded 699 F.2d 815 (6th Cir. 1983); *Cummins Component Plant*, 259 NLRB 456 (1981); *Texaco, Inc.*, 264 NLRB 1132 (1982), enfd. 722 F.2d 1226 (5th Cir. 1984).

[9] See *R. L. White Co.*, supra at 576.

[10] In so finding, we note that this is unlike cases where an employer merely advises employees of their contractual right to resign from a union but otherwise maintains a neutral position. See *Perkins Machine Co.*, 141 NLRB 697 (1963); *Cyclops Corp.*, 216 NLRB 857 (1975); *Mosher Steel Co.*, 220 NLRB 336, 337 (1975), enfd. 532 F.2d 1374 (5th Cir. 1976).

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully encourage or solicit you to sign a petition withdrawing from United Food and Commercial Workers Local Union No. 303.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FOOTHILLS FOOD, INC. D/B/A ERICKSON'S SENTRY OF BEND

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in Bend, Oregon, on February 2, 1984. The charge and amended charge were filed respectively on September 1 and November 21, 1983, by United Food and Commercial Workers Local Union No. 303 (the Union). The complaint, which issued on November 22, 1983, alleges that Foothills Food, Inc. d/b/a Erickson's Sentry of Bend (Respondent) violated Section 8(a)(1) of the National Labor Relations Act.

Issues

The primary issues are whether Respondent violated Section 8(a)(1) of the Act by initiating a petition seeking employee resignations from the Union; soliciting its employees to sign such a petition; by threatening employees with loss of employment unless they resigned from the Union; by promising employees an increase in benefits and improved terms and conditions of employment if they resigned from the Union; and by interrogating an employee concerning his and other employees' union sympathies.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties waived their right to file briefs and none were filed.

On the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Oregon corporation with an office and place of business in Bend, Oregon, is engaged in the retail grocery business. During the year immediately preceding issuance of complaint, Respondent had gross sales of goods and services valued in excess of $500,000 and during the same period of time Respondent caused to be transferred and delivered to its facilities within Oregon goods valued in excess of $50,000 directly from sources outside Oregon or from suppliers within Oregon which in turn obtained such goods and materials directly from outside Oregon. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Erickson's Sentry has three stores. They are located in Bend, Redmond, and Madras, Oregon. The three stores constitute a single bargaining unit in which the employees are represented by the Union. In June and July 1983 the three stores were engaged in collective-bargaining negotiations with the Union. On July 2, 1983, Respondent made a "full and final" offer to the Union. At a union meeting on July 21, 1983, a strike vote was taken and authorization was given for a strike.

On July 22, 1983, a petition was circulated in which employees withdrew from the Union. On the same day Respondent's store manager Douglas Schmidt[1] spoke to employees Randy Albright, Mike Jackson, and Brian Palfrey. The General Counsel contends that Respondent unlawfully involved itself with the petition and interfered with the Section 7 rights of employees by the remarks he made to those three employees.

The strike never took place. On August 11, 1983, Respondent and the Union executed a collective-bargaining agreement in the three-store bargaining unit, which was effective by its terms from June 1, 1983, through May 31, 1984.

On August 8, 1983, employees of Respondent filed a petition with the National Labor Relations Board in Case 36–UD–237 to rescind the authority of the Union to make an agreement requiring membership in the Union as a condition of employment. On August 29 a copy of the Board notice of election in that case was posted at the Bend store. It stated that an election would be con-

[1] The complaint alleges, the answer admits, and I find that Schmidt, as well as Assistant Manager Mike Sears, was an agent and supervisor of Respondent within the meaning of Sec. 2(11) of the Act.

ducted on September 8, 1983. On September 1, 1983, the Union filed the original charge in the instant case. That charge blocked the scheduled election and it has not yet taken place.

B. *The Initiation of the Petition to Withdraw from the Union*

The strike vote took place on July 21, 1983. At 8 a.m. the following day Respondent's employee Harold C. Richards[2] spoke to Store Manager Schmidt in the produce room of the Bend store. Richards was a union member and he had attended the meeting the previous evening. He told Schmidt that at the meeting the Bend store employees had voted to accept Respondent's firm and final offer but that the employees in the other two stores in the bargaining unit had rejected it. Richards said that he did not know whether the employees were going on strike or not but that for his own personal reasons he would not strike and he would cross a picket line if he had to. Schmidt told Richards that there was a possibility the Union might fine him. Richards replied that he was going to cross the picket line because he needed the work and that he was interested in starting a petition to withdraw from the Union. He asked Schmidt what language would be needed on a petition if he were to start one. Schmidt replied that he would check with his legal representative.

Schmidt then went to his office and called his attorney who gave him legal advice.

About a half hour later Richards went into Schmidt's office and Schmidt told Richards what a petition to withdraw from the Union should state. Richards used Schmidt's language to draft a petition which read:

> As of 7-22-83 the following resign from the Retail Clerks Union Local #303 and will not honor any strikes or picket lines.

Richards then signed the petition.[3]

C. *The July 22, 1983 Conversations Between Schmidt and the Three Employees*

Schmidt gave the wording of the petition to Richards on July 22, 1983. On the same day he spoke individually to employees Randy Albright, Mike Jackson, and Brian Palfrey.

Albright was called into Schmidt's office about 9 a.m. that day.[4]

Albright testified that Schmidt, in Richards' presence, told him that there was going to be a strike the next day; that no one who honored the strike would be hired back; that he (Schmidt) was starting a petition and that if he (Albright) signed the petition resigning from the Union, he would be able to cross the picket line and work the next day. Albright also averred that he asked Schmidt what the benefits and wages would be and Schmidt replied that the wages would be the same and the benefits might be a little better. Albright further testified that Richards was holding the petition and that Richards gave it to Schmidt who in turn handed it to Albright who then signed it.

Richards' testimony was quite different. He averred that he was the one who did the talking at the meeting. According to Richards, he told Albright that the petition was to withdraw from the Union; that he did not feel that the Union was representing them properly; and that it was up to Albright to make his own decision as to whether he wanted to sign it or not. Richards averred that Schmidt said that whatever Albright did would not affect the way he was treated, and that Schmidt never had the petition in his hands.

Schmidt's testimony was basically consistent with that of Richards. He acknowledged that he spoke to a number of employees, but his testimony indicated that he was not certain what he said to each one. He acknowledged that he told Albright, Jackson, and Palfrey that if they honored the picket line he would permanently replace them. He also acknowledged that he told employees that if they crossed the picket line the Union could fine them; that if they wanted to resign from the Union there was a petition going around; and that they were entitled to resign if they wanted to. In addition, he averred that some employees asked him about wages and benefits and he replied that they would be the same.

The demeanor of Albright, Schmidt, and Richards as well as the substance of their testimony gave reason to believe that they were not careful observers of what happened and that their reports were not always accurate. Albright, in particular, appeared to be an honest witness who was easily confused. I am reluctant to rely too heavily on the testimony of any of those three witnesses. Schmidt also spoke to Jackson and Palfrey on the same day that he spoke to Albright. Before speaking to those three employees Schmidt had received advice from his attorney. All three employees testified that Schmidt covered roughly the same subject matter. Though it is possible that Schmidt told different things to the three employees, it is much more likely that he told the same thing to all three. The testimony of Jackson and Palfrey, both of whom were called as witnesses by the General Counsel, was very similar as well as very credible. Jackson in particular appeared to have a very good recollection of exactly what was said. As I believe that Schmidt did make the same statements to Albright, Jackson, and Palfrey, and that Jackson's and Palfrey's recollections of the conversation were more accurate than Albright's, I must conclude that Albright misconstrued some of Schmidt's remarks and that more weight has to be given to the testimony of Jackson and Palfrey.

Jackson credibly testified to the following. He was called into Schmidt's office about 3 p.m. on July 22. Schmidt spoke to him in the presence of Assistant Manager Michael Sears as well as Richards. Schmidt asked him whether he knew that the Union was threatening to

---

[2] Richards had the title of produce manager. However, counsel for the General Counsel stated on the record that he was making no contention that Richards was a supervisor within the meaning of the Act.

[3] The above findings are based on the credited testimony of Richards and Schmidt, which was in large measure mutually corroborative.

[4] Albright testified that he was called in at 1 p.m. Schmidt and Richards, who were both present during the conversation, testified that it was 9 a.m. As is set forth more fully below, I do not believe that Albright's recollection was always accurate and I credit Schmidt and Richards as to the time.

strike and might strike as soon as Monday. He replied that he had heard there had been a strike vote but that he was not aware of any strike. Schmidt said that if he were to honor the picket line there would be a permanent replacement hired for him. Schmidt also said that if he crossed the picket line and came to work, there would be a big fine in it. Schmidt then said that there was a way out because there was a petition in the store that was being circulated and that if he resigned from the Union, he would not be subject to a union fine. He then asked what the wages and benefits would be, if he resigned, and Schmidt replied that they would be the same. He replied that he would like to think about it. He did not sign the petition.[5]

Palfrey credibly testified to the following. Between 3 and 4 p.m. on July 22 he was called into Schmidt's office where Schmidt spoke to him in the presence of Sears. Schmidt said that there might be a strike the next day. Schmidt also said that if Palfrey crossed the picket line he could be fined and that if Palfrey honored the picket line he would be permanently replaced. Schmidt then told him about the petition. Schmidt also said that if he resigned from the Union, wages would stay the same.

Part of Palfrey's testimony was somewhat ambiguous. At one point Palfrey testified that Schmidt, after talking about the fine, said that if he (Palfrey) resigned from the Union he could keep his job. On cross-examination he averred that Schmidt told him that if he resigned from the Union, wages would remain the same and he could have his job and work. However, Palfrey summed up his testimony by averring that he interpreted Schmidt's remarks to mean that, if he signed the petition, wages would be the same and he would not be faced with the alternative of being fined or being permanently replaced. Palfrey's interpretation was substantially the same as that of Jackson's in his conversation with Schmidt. I believe that Schmidt did tell him the same thing and that Jackson's recollection of the exact wording was more accurate than Palfrey's.[6]

Palfrey did not sign the petition at that time. Later that day he asked Richards where the petition was and Richards told him it was on the wall behind the clipboard. Palfrey then read the petition and signed it.

D. *The Interrogation of Albright by Schmidt*

All but one of the violations alleged in the complaint related to the incidents that occurred on July 22, 1983. That one additional violation is geared to an alleged conversation that occurred a day or two before September 8, 1983,[7] which was the date the union shop deauthorization election was scheduled to take place. Albright testified that on that day Schmidt spoke to him in front of the office as he was going to work. According to Albright, Schmidt asked whether he knew about the election and he replied that he did. Albright averred that Schmidt then asked what he thought about it and what employees Debbie Grant and Mary Hickman thought. Albright testified that he answered that he did not know and he had not talked to the others.

Schmidt acknowledged that he did talk to some employees about the election. He testified that he asked Mary Hickman whether she had seen the election notice on the checkstand and she told him how she felt about the situation. He also acknowledged that other employees had spoken to him about the election. Schmidt testified that he did not recall any conversation with Albright about September 6 or 7 regarding the election and that he had no knowledge whatsoever of any conversations with Albright pertaining to the election.

The charge in the instant case, which blocked the election, was filed on September 1, 1983. It is a bit difficult to believe that on September 6 or 7 Schmidt asked Albright about an election when the election was not going to take place. Nor is it very clear why Schmidt would be motivated to ask such a question. The election, if it were to be conducted, would have no impact on the store's basic bargaining obligation. The contract had already been signed. There was no strike in the offing nor was there any test of union and company strength. The election related solely to the Union's right to have a union-security clause. While those considerations raise some questions, the real issue turns on credibility. As noted above, I have very little confidence in Albright's ability to accurately report the details of conversations. His testimony does not fit into any pattern of interrogation and there is no direct or collateral corroboration. Schmidt's testimony that he had "no knowledge" of such a conversation, though inartfully worded, did amount to a denial. I do not credit Albright with regard to that alleged conversation and I therefore recommend that paragraph 6 of the complaint be dismissed.

E. *Analysis and Conclusions*

1. Summary of the findings

Though I have set forth the testimony in some detail, the findings can be simply restated. On the morning of July 22 employee Richards asked Schmidt what language he could use on a petition to resign from the Union. Schmidt consulted with his attorney and then gave Richards the resignation language. Richards incorporated it in a petition. Later that day Schmidt had separate meetings with Albright, Jackson, and Palfrey. He told each of them that a strike was imminent; that if they honored the picket line they would be permanently replaced; that if they came to work through a picket line the Union would fine them; and if they signed the petition to resign

[5] As mentioned above, Schmidt's testimony was often confused and, where it differs from that of Jackson, I credit Jackson. Much of Sears' testimony was basically consistent with that of Jackson. Sears averred that Schmidt told Jackson that if a strike were to take place and if he were a union member and crossed the picket line that he would be fined, but that if he resigned from the Union prior to the pickets going up that he would not be fined and he could continue to work. With regard to other matters, I believe that Jackson's memory was more accurate than that of Sears'. Sears averred that when Jackson asked whether there were going to be any benefits, Schmidt replied that he had not looked into it.

[6] Both Schmidt and Sears testified that they did not recall any specific conversation with Palfrey.

[7] The complaint alleges the conversation took place on or about September 2, 1983. Albright in his testimony placed the conversation on September 6 or 7.

from the Union, the Union could not fine them for working through the picket line. When the employees asked about wages and benefits if they worked through a strike, Schmidt told them that they would be the same. Albright signed the petition in Schmidt's presence, Jackson did not sign the petition, and Palfrey signed the petition at a later time.

2. The language of the petition

In response to Richards' request, Schmidt gave him the language to be used on the petition to withdraw from the Union. The Board has repeatedly held that such conduct does not violate the Act. *Mosher Steel Co.*, 220 NLRB 336, 337 (1975), enfd. 532 F.2d 1374 (5th Cir. 1976) *R. L. White Co.*, 262 NLRB 575, 576 (1982). In the *Mosher Steel* case, the Board held:

> Absent some evidence that union resignation was a company-imposed condition for returning to work (or that employees were led to believe that it was such a condition), and absent any evidence that the Company did more than furnish employees with resignation language, we decline to find that Respondent's conduct in this regard was unlawful.

In the *R. L. White Co.*, case, the Board held:

> An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation.

In the instant case there is no allegation in the complaint that Respondent used the petition as a device for coercively interrogating employees about their union sympathies. It is true that Albright signed the petition in Schmidt's presence. However, there is no indication that Schmidt requested him to do so. Neither Jackson nor Palfrey signed in Schmidt's presence. Cf. *Landmark International Trucks*, 257 NLRB 1375 (1981), enf. denied 699 F.2d 815 (6th Cir. 1983).

3. The remark about permanent replacement

An employer does not violate the Act when it permanently replaces economic strikers. *NLRB v. McKay*, 304 U.S. 333 (1938). Nor does an employer violate the Act when it tells employees that it will permanently replace them if they engage in an economic strike. As the Board held in *Eagle Comtronics*, 263 NLRB 515 (1982):

> [T]he Board has long held that an employer does *not* violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. The Board has held that such comments do not constitute impermissible threats under Section 8(a)(1) . . . . Unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats, it is protected by Section 8(c) of the Act.

4. The remark that the Union would fine employees

Schmidt told Albright, Jackson, and Palfrey that the Union would fine them if they worked during a strike. The Union may lawfully fine members who cross a picket line. *NLRB v. Allis Chalmers*, 388 U.S. 175 (1967). It is not unlawful for an employer to tell employees what the law is. See *Mosher Steel Co.*, supra. Schmidt did say that the Union would fine the employees rather than that the Union could fine the employees. However, if that was Schmidt's opinion, he had the right under Section 8(c) of the Act to express that opinion. Section 8(c) states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Even a misstatement of law by an employer will not violate the Act if it is free from any express or implicit threat that the employer by its own actions will interfere with employee rights. *Daniel Construction Co.*, 257 NLRB 1276 (1981). Here Schmidt's statement that the Union would fine employees did not imply that any action would be taken by Respondent that would interfere with Section 7 rights.

5. The remarks about the petition

Schmidt told Albright, Jackson, and Palfrey that if they signed the petition to resign from the Union, the Union could not fine them for working through the picket line. In a sense Schmidt was soliciting those employees to sign the petition. It is not likely that Schmidt made his remarks for purely academic reasons. In some situations the Board has held the solicitation of union resignations or dues checkoff revocations by an employer to be a violation of the Act. See, for example, *Peabody Coal Co.*, 259 NLRB 1409, 1412 (1982); *Cardinal Systems*, 259 NLRB 456 (1981). In *Texaco*, 264 NLRB 1132, 1133 (1982), enfd. 722 F.2d 1226 (5th Cir. 1984), the Board held that an employer violated Section 8(a)(1) of the Act where it "actively and effectively participated in the process of furthering employee withdrawal from the union." However, where, as in the instant case, the Employer's participation in the process of furthering employee withdrawal from the Union involves nothing more than telling employees the different alternatives they face and the Federal law that relates to those alternatives, then the free speech aspect of Section 8(c) of the Act must be given controlling weight. Schmidt did no more than express his views of the situation and there was no express or implied threat that he would take any unlawful action against employees. Nor does the credited evidence establish that he made any promise of benefits.

In these circumstances I do not believe that any of Schmidt's actions or statements violated the Act as alleged in the complaint. *R. L. White Co.*, supra; *Cyclops Corp.*, 216 NLRB 857 (1975); *Nordstrom*, 229 NLRB 601, 605 (1977); *Mosher Steel*, supra; *Perkins Machine Co.*, 141 NLRB 697, 700 (1963).[8]

CONCLUSION OF LAW

The General Counsel has not established by a preponderance of the credible evidence that Respondent violated the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[8] See also *Town Plaza Hotel*, 258 NLRB 69, 79 (1981), where Administrative Law Judge Burton Litvack dismissed an 8(a)(1) allegation similar to the one in the instant case, and the Board adopted the administrative law judge's decision pro forma in the absence of exceptions.

Krispy Kreme Doughnut Corporation *and* Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL–CIO–CLC

Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL–CIO–CLC *and* Krispy Kreme Doughnut Corporation. Cases 9–CA–18422, 9–CB–4595, and 9–RC–13315

30 November 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 7 May 1982 the National Labor Relations Board issued its Decision, Order, and Certification of Representative in Cases 9–RC–13315 and 9–CB–4595.[1] The Board adopted, as modified, Administrative Law Judge John H. West's recommended findings that the Respondent Union had not violated Section 8(b)(1)(A) as alleged, that the complaint be dismissed, and that the objections to the election be overruled. In so doing, the Board adopted the judge's credibility finding that employee Robert Foote had not promised to waive initiation fees for employees who signed authorization cards before the representation election.[2] Accordingly, the Board certified the Union as collective-bargaining representative in an appropriate unit of the Employer's employees. Thereafter, the Employer refused to bargain with the Union and, in a subsequent proceeding, the Board granted the General Counsel's Motion for Summary Judgment and found that the Respondent Employer's refusal to bargain with the Union was violative of Section 8(a)(5) and (1).[3]

Thereafter, the Employer petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's orders dismissing the complaint in Case 9–CB–4595 and directing the Employer to bargain with the Union in Case 9–CA–18422. The Board cross-applied for enforcement of its bargaining order. On 27 April 1984 the court issued its decision wherein it reversed the Board, set aside the election, and remanded the controversy to the Board for further proceedings consistent with its decision.[4] In so doing, the court found that, under the facts of this case, the judge unreasonably credited employee Foote's denial of having advised employees that union initiation fees would be waived for those who signed union authorization cards before the election and that "it seems clear that . . . Foote was the source of the discussions about waiving initiation fees."[5] The court noted that statements of this nature have been proscribed in *Savair*,[6] and the court construed such statements to be an unfair labor practice.[7]

Thereafter, the Board accepted the court's remand and notified the parties that they could file statements of position with respect to the issues raised by the remand. Subsequently, the Employer and the Union filed statements of position.

In its statement of position, the Employer argues that further proceedings in Case 9–CA–18422 are unnecessary because the court overturned the credibility findings of the Board and found that Foote made unlawful initiation fee offers to employees while soliciting union cards. Further, according to the Employer, the court implicitly found Foote to be an agent for the Union and overturned the election which was the basis for the Board's bargaining order. The Employer argues that a remedial order should issue in Case 9–CB–4595 because the court reversed the Board's dismissal of the complaint in that case. Finally, the Employer contends that the Board should not direct a second election absent the Union's establishing a current showing of interest because the original showing of interest was tainted by Foote's unlawful offer to waive initiation fees.

In its statement of position, the Union asserted that it does not wish to participate in a second election, and that it no longer desires the Board to process the representation case.

Having accepted the remand of the instant case, we must observe the court's opinion as the law of the case. For this reason we find that the Respondent Union, through its agent Robert Foote, violated Section 8(b)(1)(A) of the Act by telling employees that union initiation fees would be waived for those who signed union authorization cards prior to the representation election. In remedying this violation, we shall order the Respondent Union to cease and desist from this conduct and to take the appropriate affirmative action. Upon consideration of the Respondent Union's statement of position, we shall further order that the petition in Case 9–RC–13315 be dismissed.

[1] 261 NLRB 773 (1982). Chairman Dotson did not participate in that case or in the subsequent proceeding.

[2] Because of the finding that Foote had not made these statements as alleged, the Board found it unnecessary to consider the issue of whether Foote was an agent for the Respondent Union. The Board also disavowed an adverse inference drawn by the judge based on the General Counsel's failure to call a former employee as a corroborating witness.

[3] 264 NLRB No. 131 (1982). (Not reported in Board volumes.)

[4] *Krispy Kreme Corp. v. NLRB*, 732 F.2d 1288 (6th Cir. 1984).

[5] Id. at 1293.

[6] *NLRB v. Savair Mfg Co.*, 414 U.S. 270 (1973).

[7] 732 F.2d at 1289.

ORDER

The National Labor Relations Board orders that its Decision and Order in Case 9–CB–4595, 261 NLRB 773 (1982), dismissing the complaint in its entirety, is revoked.

IT IS FURTHER ORDERED that the Respondent, Bakery, Confectionery and Tobacco Workers International Union, Local No. 213, AFL–CIO–CLC, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Telling employees that union initiation fees will be waived for those who sign a union authorization card prior to a representation election.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its union office copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Krispy Kreme Division, Beatrice Foods Co., if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Board's Decision and Order in Case 9–CA–18422, 264 NLRB No. 131 (1982), finding that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, be revoked and that the complaint be dismissed.

IT IS FURTHER ORDERED that the Certification of Representative be revoked and that the petition in Case 9–RC–13315, 261 NLRB 773 (1982), be dismissed.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that union initiation fees will be waived for those who sign a union authorization card prior to a representation election.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION, LOCAL NO. 213, AFL–CIO–CLC

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Neo-Life Company of America *and* Warehouse, Mail Order & Retail Employees Union, Local 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 32–CA–4529

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 3 May 1983 Administrative Law Judge Earldean V. S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a copy of his brief to the administrative law judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by several statements made in the course of the June 1983 meeting of the Respondent's executive vice president Albert Miller, Patson Lines owner Milford Patterson, and Patson employee William Regan. Miller asked Patterson and Regan to come to his office one morning when Patterson was visiting the Respondent's plant, and he began the meeting by asking Regan why he was attending union meetings with the Respondent's employees. We agree with the judge that this question was coercive within the meaning of Section 8(a)(1).

While Miller asked only one question of a general nature he did so in a coercive context. He was the Respondent's highest official in the warehouse, and calling Regan and Patterson into his office created a setting of unusual formality. Moreover, Miller told Regan he did not want him attending the meetings and Patterson threatened he could lose his job as discussed below. Finally, Miller concluded the meeting by directing Regan not to talk to other employees. In these circumstances the question was coercive.[1]

The judge found that the Respondent violated Section 8(a)(1) by Miller's statements that a strike was inevitable. We agree that Miller's statements about bargaining and a strike violated Section 8(a)(1) for the following reasons. The issue, as we see it, is whether Miller threatened that if the employees selected the Union, the Respondent would violate Section 8(a)(5) by failing to bargain in good faith, thereby forcing a strike.[2] Such threats are coercive and violate Section 8(a)(1); see *Peabody Coal Co. v. NLRB*, 725 F.2d 357 (6th Cir. 1984); *Lawson Co.*, 267 NLRB 463 (1983); *Teamsters Local 164*, 267 NLRB 8, 9 (1983); *Woodview Rehabilitation Center*, 265 NLRB 838, 841 (1982); *Kay Motors*, 264 NLRB 1030 (1982).

Miller did not say directly that the Respondent would not bargain but that message was implied by a series of statements taken in the context of the entire Regan conversation. According to Regan's credited testimony, Miller told him that if the Respondent's employees voted for the Union the Respondent "would not want to bargain" with it, that the Respondent would have to bargain but would not have to sign a contract, and that if there were no contract a strike would follow, "scabs" would come in, and there would be "a real mess outside."

Miller did not make these statements separately or in isolation, and we must assess their coercive impact taken as a whole. *Peabody Coal Co. v. NLRB*, supra; *Hicks-Ponder Co.*, 186 NLRB 712, 725 fn. 7 (1970), cited in *Eagle Comtronics*, 263 NLRB 515 (1982).[3] We find three other unlawful statements in the same conversation with Regan; thus the Respondent demonstrated not only its union animus but its willingness to violate the Act. In this context it can be inferred that if the Respondent did not "want to" nor "have to" sign a contract, it would not sign one and a strike would follow. Thus the Respondent threatened to bargain in bad faith so as to prevent an agreement and force a strike.

We also adopt the judge's finding of an 8(a)(1) violation in the threat that Regan could lose his job. The judge relied for this finding on Patterson's statement to Regan that the Union would insist that the Respondent cancel its contract with Patson Lines; according to Regan's credited testimony, this was presented as a certain result of unionization that the Respondent presumably would be unable or unwilling to resist. In addition we note Patterson's testimony that he told Regan, "[I]f you have a contract . . . that contract is going to come up . . . and any time there's a problem with one of

[1] See *Rossmore House*, 269 NLRB 1176 (1984).

[2] That is what the complaint alleged.

[3] In *Eagle Comtronics*, we held that an employer's incomplete statement of the law is not coercive unless "it may fairly be understood as a threat . . . or is explicitly coupled with . . . threats." 263 NLRB at 516. In that case the employer's statements and omissions were found in a speech that contained no other unlawful statements, and the Board found that no threat was implied. In this case, the Respondent's statements were coupled with other coercive statements. Moreover, we find the threat to force a strike clearly implied in the succession of statements, and not merely by omission. We therefore do not need to consider those statements as an explanation of law that omitted some details.

your employees, with one of your clients, there's always the possibility of losing that business." This statement more directly threatened reprisal by the Respondent for Regan's own activity.[4]

While Patterson is not employed by the Respondent and Patson Lines is not a respondent in this proceeding, Patterson referred in Miller's presence to action that Miller might or might not take. We find that Miller adopted the statements by his silence and the Respondent thereby violated Section 8(a)(1).[5]

We do not agree with the judge that any of the Respondent's statements to employee Mary Fernandez were unfair labor practices, and we will dismiss those portions of the complaint. Fernandez, a union supporter, squirted water and used obscene language toward a fellow employee who was not a union supporter; that employee reported the incident to a supervisor and Fernandez was given a written warning. Fernandez complained to Supervisor Jack Winter, alleging that she received the warning because of her union sympathies. Winter replied that "none of this would have happened if it were not for Spencer"; Spencer was a discharged prounion employee who at the time was picketing the warehouse. Later Fernandez told Miller that she felt her fellow employee had complained out of antiunion motivation, and Miller replied that "all that was going on with the warehouse had made enemies out of the best of friends."

The judge found that both these statements violated Section 8(a)(1), but on their face they simply observed the intense feelings that the union campaign had generated among employees. Those feelings were not unfair labor practices by the Respondent and its commentary on them implied no threat of reprisal. The Respondent could lawfully express such opinions.

The judge also construed those statements as admissions that the Respondent issued the warning to Fernandez for antiunion reasons; we find no such admission. Fernandez did not say that the Respondent had such motivation, only that her fellow employees did. Both supervisors conceded that that might be true; it does not follow that the Respondent was obliged to examine its employees' motives in reporting one another's misconduct.[6]

[4] Member Hunter would adopt the judge's finding but does not rely on Patterson's other statement quoted above.

[5] The judge found an additional violation of Sec. 8(a)(1) of the Act based on Regan's testimony that Miller said something to the effect that the Respondent would get rid of Patson if Regan intended to stay involved in the union problem. However, as the judge noted, Regan did not recall precisely what Miller said. Contrary to the judge, we conclude that this testimony is insufficient to establish a violation.

[6] Member Zimmerman agrees with the judge for the reasons set forth in his opinion that the statements made by Winter and Miller to Fernandez violated Sec. 8(a)(1).

CONCLUSIONS OF LAW

By coercively interrogating employee William Regan concerning his union activity, threatening him with loss of employment, warning him not to discuss the Union with other employees, and threatening not to bargain in good faith if its employees selected the Union to represent them, thereby forcing a strike, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Neo-Life Company of America, Hayward, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union activities.

(b) Threatening employees that it will not bargain in good faith with Teamsters Local 853 if the Respondent's employees select it to represent them, thereby forcing a strike.

(c) Threatening employees with loss of employment for engaging in union activities.

(d) Warning employees not to discuss the Union with other employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its place of business in Hayward, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees regarding their union activities.

WE WILL NOT threaten employees with loss of employment for engaging in union activity.

WE WILL NOT threaten that we will not bargain in good faith with Teamsters Local 853 if our employees select it as their collective-bargaining representative, and thereby force a strike.

WE WILL NOT warn employees not to discuss the Union with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

NEO-LIFE COMPANY OF AMERICA

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge. This case was heard before me in Oakland, California, on January 31, 1983. The charge was filed by Warehouse, Mail Order & Retail Employees Union, Local 853, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), on May 24, 1982, and served on Neo-Life Company of America (Respondent), on May 25, 1982. The complaint, which issued on August 26, 1982, alleges that Respondent has violated Section 8(a)(1) of the National Labor Relations Act (the Act). The principal issue is whether Respondent violated the Act by certain statements and interrogations.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent, a California corpor-tion with an office and place of busienss in Hayward, California, has been engaged in the manufacture and nonretail distribution of food and supplements, household cleaners, cosmetics, and related goods. During the 12-month period preceding the issuance of the complaint, Respondent, in the course and conduct of its business operations, sold and shipped goods or services valued in excess of $50,000 directly to customers located outside the State of California.

The complaint alleges, Respondent admits, and I find that at all times material Respondent has been and employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Regan Incident*

Respondent utilizes common carriers to make deliveries to its customers. At the times material, Patson Lines has performed delivery services for Respondent under a verbal agreement, terminable at will. A Patson employee, William Regan, is assigned full time to make deliveries for Respondent. Regan works out of Respondent's Hayward, California warehouse,[1] making deliveries in Northern California from the general area of Watsonville to the Russian River. Although he is the only Patson employee working out of the Neo-Life facility, and there is no Patson supervisor at this facility, his work is not directly supervised by Respondent. Milford Patterson, the owner of Patson Lines, visits the Neo-Life facility periodically. Regan is paid weekly by mail and the truck driven by him is garaged at his residence. During an average week, according to Regan, he is actually at the Neo-Life premises 5 to 10 hours at the most. During that period, he does his paperwork, makes out his route, calls distributors to tell them they are going to be receiving products that day, and loads his truck. His work hours depend on the volume of deliveries, which are made in accordance with bills of lading prepared by Respondent's warehouse employees and left in a slot in the warehouse for Regan. Regan picks up the bills of lading, loads his vehicle, and proceeds to make the required deliveries.

In the spring of 1982, the Union commenced an organizing campaign among Respondent's warehouse employees. Regan became aware of the Union's campaign through Mike Spencer, an employee of Respondent,[2]

[1] The main Patson facility is located in Southern California.

[2] Spencer was subsequently discharged by Respondent and picketed Respondent's facility in protest of his discharge.

and thereafter attended two of the Union's organizing meetings. A representation petition was filed with the Board in May 1982.[3] An election was held on July 30. The Union lost the election and a certification of election results issued in December.

Regan testified that sometime in May or June, around the time that Spencer, a union activist, was discharged,[4] Patterson was at the Neo-Life facility. Patterson and Regan went to a restaurant for breakfast. Shortly after they returned to the warehouse, between 10:30 and 11:30 a.m.,[5] they were summoned to the office of Albert Miller, executive vice president of Respondent.[6] According to Regan, when he and Patterson arrived at Miller's office, Miller asked why Regan was attending union meetings. Regan said a notice of the meeting was posted for everyone to see and he did not feel he was violating anything by attending the meeting. Miller said he did not want Regan attending the meeting. Regan said his interest was academic, that he considered himself to be the best educated person in the warehouse and he was looking after the interests of his fellow workers for whom he felt a certain amount of compassion; so he attended the union meetings to ensure that the Union was not offering the employees a "bum deal." Miller said it was not necessary for Regan to attend the meetings, that he would explain the process to Regan.

Miller then stated, according to Regan, that if the employees were to vote for the Union, Respondent would not want to bargain with the Union, a strike would ensue, "scabs" would come in and there would be a "real mess outside." However, Regan admits that Miller also said that if the employees did vote for the Union, Respondent would have to bargain with the Union but would not have to sign a contract. Miller said he did not feel there was a need for a union and explained why. Miller further said that the problem with the country and business these days was unions and he cited two examples—the closure of Shaklee in Hayward and the closure of General Motors. Miller said something to the effect that if Regan intended to stay involved in this union problem, he would get rid of Patson; however, Regan does not recall precisely what he said.

Regan further testified that Patterson said, "We don't want you going to these union meetings. If we get a union into this company, Patson Lines would be out the door." Patterson also said that the Union would not want Patson, a nonunion employer, in there, that the Union would bring its own union drivers and Patson's contract would "be kaput." Both Miller and Patterson told Regan not to talk to Respondent's employees about the union problem. Regan promised that he would not attend union meetings and that he would not talk to the warehouse employees. Miller said that when the new warehouse was finished, they were going to locate Regan's office at the back of the warehouse. Regan said, since he was a problem to them, why did they not lay him off. Both Miller and Patterson said there was no need for that, they did not want to lay him off. Patterson instructed Regan not to get involved in the union problem. The conversation lasted approximately 30 to 45 minutes.

According to Regan, when he left Miller's office, a warehouse employee, Tara, apologized to him for telling Miller that he had gone to the union meeting. Further, Regan testified, as he walked through the warehouse, he told employees that he could not talk to them any longer and that he was going to be moved to the back of the warehouse when it was completed. Employee Fred Lemmo asked Regan what had happened. Regan told Lemmo that he was instructed not to talk to the employees because of the union problem and that he was going to be moved to the back of the warehouse when it was completed. He told other employees that he could not talk to them, that he had been banished.

Miller admits that he did have a meeting with Regan in mid-June. According to him, he had observed Regan talking to other employees in the warehouse on several occasions and was concerned about Regan being disruptive. He therefore telephoned Patterson and requested a meeting with Patterson and Regan on Patterson's next visit to the Neo-Life facility. According to Miller, the meeting occurred between 9 and 10 a.m. Miller began the conversation by asking Regan why he was attending a union meeting with Respondent's employees. Regan said he was just curious, he did not understand what was going on, and he went out of curiosity. He said he had no experience with union activity. Miller explained to him the basic procedures—that employees signed cards for representation, then there would be a petition to the NLRB for an election date and, if the election was in favor of union representation, Respondent would sit down and negotiate a contract; but, in the event they were unable to reach agreement on a contract, the alternative would be a strike by the employees.

At this point, according to Miller, Patterson told Regan he should not be involved in the internal affairs of Respondent. Regan suggested that Patterson did not want to create problems and that perhaps Regan should be laid off. Patterson said, no, that was not the point, that he was concerned about his business should the warehouse become union. He mentioned his experience with Shaklee and said that, if there were a union warehouse, there might be problems with Patson not being able to pick up orders or work out of the warehouse. Patterson said Regan had an assigned area, his responsibility was to transport Respondent's products which he could pick up at the back door where they were staged for him, so it was not necessary that he talk to all the warehouse employees.

Miller denies saying that, if employees voted for the Union, Respondent would not bargain with the Union, or that, if employees voted for the Union a strike would definitely occur. He admits explaining to Regan that, if the agreement was not reached, the alternative was a strike. According to him, his statements to Regan on this subject were no different than those made to Respond-

[3] All dates will be in 1982 unless otherwise indicated.

[4] A charge was filed with the Board alleging that Spencer's discharge was unlawful. The charge was pending at the time of the hearing.

[5] Usually Regan leaves the warehouse with his loaded truck between 8:30 and 9:30 a.m.

[6] Miller is responsible for Respondent's operations excluding finance and sales.

ent's employees. He denies saying to Regan that if the employees voted for the Union, "scabs" would come in. He further denies stating that if Regan intended to stay involved with the Union, he would get rid of Patson Lines or instructing Regan not to talk to Respondent's employees regarding the Union. On cross-examination, Miller testified that when he explained to Regan that if the Union won the election, Respondent would be obligated to bargain in good faith, Regan asked "what happens if you don't reach agreement"; to which Miller responded that the alternative would be a strike, that the employees would have the right to strike but Respondent would have the option of hiring additional employees in such event. Patterson voiced concern that, if Respondent's operation were to become union, it would be detrimental to Patson and related an experience that he had with Shaklee. He said he had no contract with Respondent, and if the warehouse became union there was a possibility that Patson, a nonunion carrier, would not be allowed to haul out of the warehouse. Patterson further said he did not want Regan interfering in Respondent's operation, that Regan was a Patson employee, not a Neo-Life employee, and Patterson did not want his business jeopardized.

Patterson testified that within a month or two prior to this conversation, Miller casually mentioned to him that Regan was known to talk a lot. There is no evidence that Patterson ever related this to Regan. Patterson did testify that prior thereto he had admonished Regan about excessive conversation with Respondent's employees. A month or two later, according to Patterson, Miller telephoned him requesting a meeting the next time Patterson was at the Neo-Life facility regarding some problems with Regan. Patterson inquired as to the nature of the problems but Miller said they would get into it when Patterson arrived. Patterson was not sure whether Miller told him at that particular time that Regan was observed talking to Mike Spencer on the picket line.

Two or three days later, Regan and Patterson met with Miller in his office.[7] According to Patterson, Miller asked Regan why he was attending the union meetings. Regan said he was there for informational purposes, out of curiosity to see what was going on. Miller then explained the union organizational and election process; however, Patterson cannot recall his exact words. Patterson told Regan that he was concerned regarding Regan talking to employees or creating any problems whatsoever with the employees. He explained to Regan that he could not create any problems with the Company with which he was doing business, that anything regarding union problems could have an effect on Patson Lines. He said he had experience with this before when he was doing business with Shaklee in the early 1970s and they had a union problem. Patterson said Regan's job was to deliver the product and keep as extreme a low profile as possible. He said that any problems could jeopardize Patson's business which constitutes Regan's job also, since the two were hooked together; that Regan works for Patson and if Patson does not have any business, then Regan is in trouble. Regan agreed this was true and said, "If it is going to be a case of you losing your business, I would rather that you lay me off," or either he said, "I'll quit." Patterson said, "I am not here to lay you off or fire you, I am just here to get things straightened out and prevent the problems before anything further develops." Patterson further said, "I'm not interested in creating problems, I just want to prevent problems."

Patterson testified that he said Regan was a Patson employee, he had nothing to do with Respondent's operation, that his job was to pick up the product in the morning and deliver it. Patterson also said that if there is a problem with a client, as a common carrier, somewhere down the line the contract is going to come up and there is always the possibility of losing that business, that all a client has to do is pick up the telephone and say, "We have no pickups today," and you don't pick up until they call you again. According to Patterson, he does not recall Miller saying if employees voted for the Union, there would definitely be a strike. He denies that Miller said if Regan remained involved with the Union he would get rid of Patson or that Miller instructed Regan not to talk to employees about the Union. Nor does he recall any conversation about the possibility of a strike except that when he was explaining to Regan the situation that existed with Shaklee, he could have said that if Respondent's employees went out on strike Patson could possibly be hurt.

I credit Regan as to the conversation with Miller and Patterson. He impressed me as an honest, reliable witness and, in view of the timing and other circumstances, Regan's version seems the more probable one. Thus, Miller testified that the purpose of the meeting was to express his concern that Regan's talking was generally disruptive and both Miller and Patterson deny that Regan was instructed not to talk to employees regarding the Union. Yet, even though Regan had been talking to warehouse employees for several months, it was only after he attended the union meetings that Miller found his activities to be unacceptable. In this regard, Patterson testified that the only previous mention of Regan talking to employees was a casual comment by Miller in April or May that Regan was known to "talk a lot." The casualness of the comment is underscored by the fact that Patterson apparently did not relate to Regan that Miller was concerned regarding him talking to warehouse employees.[8] There is no evidence that talking among the employees in the warehouse or between Regan and Respondent's employees had previously been discouraged by Respondent or that Regan's verbal contacts with Respondent's employees had increased or, beyond Miller's bare assertions, that such contacts were actually disruptive.

It is undisputed that Miller requested the meeting, stating that he wanted to discuss problems with regard to Regan and, according to Patterson, this may have been the time that Miller said he had observed Regan talking to Spencer on the picket line. It is further undisputed

[7] Patterson does not recall whether he had breakfast with Regan that morning.

[8] Patterson testified that he had previously admonished Regan regarding excessive conversation with warehouse employees.

that Miller commenced the meeting by asking why Regan had attended union organizational meetings. Thus, at the outset, he clearly identified his principal concern and, even if I credited Patterson's or Miller's version of the conversation, there was no discussion of Regan's conduct being disruptive except insofar as it related to union activities. In these circumstances, I conclude that Regan was called into Miller's office for the purpose of admonishing him with regard to union activities and that the enusing conversation made this purpose clear. I further conclude that the instructions to Regan not to talk to Respondent's employees were intended to restrict Regan's union activities and could reasonably be expected to be so understood by him, even assuming arguendo that this intention was not explicitly stated. Accordingly, I find that Respondent thereby violated Section 8(a)(1) of the Act despite Responden't's contention that Miller's various statements and his interrogation of Regan regarding why he had attended union meetings were not coercive since they were not directed toward a Neo-Life employee. This argument is not persuasive. It is well settled that an employer may violate Section 8(a) of the Act by actions affecting employees with whom it does not have an immediate employer-employee relationship. *Lucky Stores*, 243 NLRB 642 (1979). Here, Miller initiated the meeting, and made it clear at the outset that he was concerned about Regan's union activities and Miller and Patterson, in Miller's presence, made it clear that Regan's continued employment depended on Respondent. In these circumstances, I also find that Miller's interrogation of Regan was coercive and therefore violative of Section 8(a)(1) of the Act.

I further find that Miller's statements regarding a strike and the threat to cease doing business with Patson constituted threats as to the inevitability of a strike and consequent disruption of Regan's employment and a threat of loss of employment if the Union was selected as the collective-bargaining representative of Respondent's employees. Accordingly, I find that these statements violated Section 8(a)(1) of the Act.

B. *The Fernandez Incident*

Mary Fernandez, who was employed in Respondent's warehouse from March until the first part of August, testified, without contradiction, that in June she received a written warning for using obscene language and squirting a fellow employee from a squirt bottle on work premises. Thereafter, she told Warehouse Manager Jack Winters, an admitted supervisor, that she felt the reason she was written up for swearing was because she was extremely prounion and was outspoken in this regard. Winter said none of this would have happened "if it was not for Spencer out there."[9] Fernandez further testified, again without contradiction, that several days later she told Miller she did not feel that it was fair that she was written up for swearing because at one time or another swearing had been done by every person in the warehouse, including Winter and Miller. She further said that the person who made the complaint with regard to the squirt bottle knew that it had not been aimed at her and that she felt that the reason for the complaint was because she was prounion and people thought that she was taking Mike Spencer's place as a union activist. Miller said that all that was going on with the warehouse had made enemies out of the best of friends. I find, in the context of Fernandez' statements that she felt that the complaint against her and the resulting warning were motivated by her prounion sympathies and the failure of Winter and Miller to deny any unlawful motivation as to the warnings, that the statements made by Winter and Miller were violative of Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act by coercively interrogating an employee regarding his union activities; by threatening an employee with loss of employment and the inevitability of a strike and the consequent disruption of his employment if the Union were selected as the collective-bargaining representative of Respondent's employees; by telling an employee that the employees' union activities had made enemies out of the best of friends, that other employees would not have made complaints against her and she would not have received a written disciplinary warning if it had not been for the employees' union activities; and by warning an employee not to discuss the Union with other employees.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]

---

[9] Spencer was picketing Respondent's facility following his discharge.

The E. B. Malone Corporation, Bassett Bedding Division *and* Robert Scott Pickens. Case 1–CA–20752

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 27 June 1984 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in support of the decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The E. B. Malone Corporation, Bassett Bedding Division, Amherst, New Hampshire, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Chairman Dotson and Member Hunter find it unnecessary to rely on *J. P. Hamer Lumber Co.*, 241 NLRB 613 (1979), in adopting the judge's decision.

[3] We will issue a new notice to conform with the judge's recommended Order.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, discipline, or otherwise discriminate against our employees in regard to their hire or tenure of employment or any terms or condition of their employment because they engage in protected concerted activity.

WE WILL NOT interrogate our employees concerning their participation in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Pickens and Jerry Rush full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them and Edward Leonard whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharges, plus interest.

WE WILL expunge from our files any reference to the discharges of Robert Pickens, Edward Leonard, and Jerry Rush and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

THE E. B. MALONE CORPORATION, BASSETT BEDDING DIVISION

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on November 28, 1983, in Boston, Massachusetts. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by discharging employees Robert Pickens, Edward Leonard, and Jerry Rush for engaging in protected concerted activities, more precisely, for refusing to work overtime in order to protest Respondent's policy regarding employee telephone use. It also alleges as violative of Section 8(a)(1) the coercive interrogation of employees. The Respondent filed an answer denying the substantive allegations of the complaint. The General Counsel filed a posttrial brief in support of the complaint. The Respondent failed to file a brief.

On the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Florida corporation, operates a plant in Amherst, New Hampshire, where it is engaged in the manufacture, sale, and distribution of matresses, box springs, and related products. In the course of its operations, Respondent annually receives goods and materials

valued in excess of $50,000 directly from points located outside the State of New Hampshire and ships products valued in excess of $50,000 directly to points outside of New Hampshire. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. *The Facts*

On February 9, 1983, the date of the incident which precipitated this litigation, Respondent employed 10 people at its Amherst plant. The supervisory staff was composed of Orville Dale Cooney, known as Dale Cooney, and David Cooney. Dale Cooney is the highest official at the Amherst location and he serves as the operations manager; he reports to the regional manager of Respondent. David Cooney is his son, his plant foreman, and served as acting plant superintendent from about January 10, 1983, until the end of March 1983. Dale's wife, Stella, was the office clerk or secretary. The remainder of the work force was composed of six production employees and one truckdriver. None of Respondent's employees are represented by a union.

In January 1983, the employees worked a normal workweek—7 a.m. to 3:30—with a one-half hour lunchbreak and two 15-minute breaks. During the first week in February, the employees were notified that they would be required to work an extra hour per day the following week, beginning on Monday, February 7, 1983, because of an increased workload. Employee Robert Pickens was notified orally by David Cooney of the overtime schedule on Wednesday, February 2. Employee Edward Leonard was also similarly notified orally by David Cooney.[1]

On Monday, February 7, the first day of the scheduled overtime, the employees did not work overtime because they were released early due to a snowstorm. On Tuesday, February 8, Leonard, who performed shipping and receiving work and sometimes drove a truck, was told to stay home because low production on Monday meant no shipping work was available on Tuesday. Pickens did work on Tuesday and he worked the required overtime until 4:30 p.m.

On Friday, February 4, David Cooney approached Robert Pickens and other employees eating lunch in the break area of the plant. He complained that the employees were spending too much time in the restroom and were talking excessively during working hours and that, as a result, production had decreased. None of the employees responded to his criticism.

During the day on Tuesday, February 8, David Cooney again approached Robert Pickens and other employees during lunch. He again complained that the employees were spending too much time in the restroom and talking too much during working hours. One employee tried to joke about Cooney's complaint that lights were left on in the restroom, but Cooney cut him off by stating that he did not "like wisecracks."

The next day, Wednesday, February 9, Cooney again approached Pickens and a group of employees during lunch. Cooney told them that they could no longer use the telephone in the office except for emergencies. Pickens and another person complained that the employees had not abused the privilege of using the telephone which was situated in the plant superintendent's office and was the only telephone in the plant to which the employees had access. Pickens also made a remark to the effect that the Respondent was a "Communist company."[2]

After Cooney left, the employees discussed his remarks concerning the use of the telephone and there were comments that Respondent's policy in this respect was "not fair." During the afternoon break at 2:30 p.m., Pickens and the same employees who had been present during lunch discussed what they perceived as an unfair change in policy concerning the use of the telephone. Pickens said that in view of Respondent's treatment of the employees—complaints during the lunch period and a prohibition against the use of the telephone—the employees should "all leave at the regular quitting time." All of the employees agreed that they should leave at 3:30 that afternoon. One employee, Leonard, told Pickens that he already had permission to leave early for personal reasons. The employees returned to work after the end of the break.

At 3:30 the employees all left their work stations, punched out, and left the building.[3] As they were leaving, Dale Cooney saw them and said, "I thought you guys were working overtime tonight." According to Pickens' testimony, he responded, "Well, we're not because you're not going to let us use the phone." The employees then left the plant.[4]

---

[1] Dale Cooney testified that employees were ordinarily verbally advised of required overtime or "extended workweek" schedules 1 week in advance and that, subsequently, a confirming written notice would be posted on the employees' bulletin board. He further testified that such a notice was in fact posted during the first week of February. According to Dale Cooney, the notice was written and posted by David Cooney. David Cooney did not testify in this proceeding. No such notice was provided or submitted in evidence since, according to Cooney, it had been thrown away or destroyed. The only two employees who testified in this proceeding, Pickens and Leonard, stated that they did not see any such notice.

[2] Respondent's employee handbook—which apparently governs companywide operations and is not limited to Respondent's Amherst plant—provides that "Employees are not permitted to receive telephone calls or messages during working hours, except in cases of emergency." The handbook is silent with respect to outgoing telephone calls. Despite the handbook rule, however, there is considerable evidence to the effect that the rule was not strictly followed at the Amherst plant prior to February 9, 1984. Employees were regularly allowed to receive and to make nonemergency personal calls and they did so with permission during lunch and breaks. Whatever the exact nature of the rule before February 9, the Respondent clearly meant to enforce the rule more strictly after February 9 and the employees perceived a change in policy in the use of the telephone.

[3] Six employees left the building at the same time: Robert Pickens, Rush, Leonard, Dana Gauthier, Peter Pasquali, and Mark Pickens. All were expected to work until 4:30 p.m., with the exception of Leonard, who was given permission to leave early, and Mark Pickens, a new employee who was not required to work overtime. A seventh employee, the truckdriver, was also not required to work overtime, but nevertheless remained at work to help David Cooney start a truck.

[4] Pickens' testimony in this regard was corroborated by both Leonard and Cooney himself. Leonard testified that, in response to Cooney's in-

Continued

Neither Pickens nor any other employee indicated that they would refuse to work overtime on any day other than February 9, 1983.

That same afternoon, David Cooney called several of the employees at home. According to Pickens' uncontradicted testimony, David Cooney talked to Pickens and asked him about not working overtime that evening. Pickens responded that Respondent treated the employees with "disrespect" and that they would treat Respondent "the same way." Cooney simply said, "Thanks a lot, we'll be seeing you."

Dale Cooney testified that he subsequently had a conversation with David Cooney at approximately 4:30 that afternoon. David informed him that he had spoken with some of the employees by telephone and had been told that the employees "had a meeting at the break time and because of the use of the telephone they decided they'd leave at 3:30."

The next day, February 10, several of the employees arrived at the plant at the usual starting time prepared to go to work. When Pickens came into the plant, David Cooney asked him what he was "doing here." Pickens said he "came to work." According to Pickens, the remainder of the conversation went as follows:

> And he said, "You don't work here any more." And I said, "You didn't tell me that last night." And he goes, "Well, you're fired." And I said, "For what reason?" And he says, "No reason." I said, "Pretty good, Dave, there's no reason to fire me." And then his father, Dale Cooney, came around the corner and said, "Get out of here you don't work here any more." And I said, "Well, why was I fired?" And he goes, "For a unionized meeting." And I said, "Okay, I'll be back to pick my check up on Friday." And I left. And I think because I left I might have muttered an obscenity under my breath.[5]

Employees Edward Leonard and Jerry Rush arrived at the plant about 7 a.m. on February 10. When they approached the timecard rack they noticed that their timecards were missing. David Cooney then approached them and asked them to come to his father Dale's office. All three men went to the office where they met with Dale Cooney. Dale Cooney asked Rush if he participated in a "little meeting." Rush said, "I talked to Scott Pickens, if that's what you mean." Dale Cooney then asked Leonard the same question. Leonard replied that he did not, but that Pickens had asked him to leave at 3:30 p.m. with the other employees and that he told Pickens that he already had permission to leave at 3:30 p.m. Dale Cooney then again asked if he had participated in the meeting and Leonard simply said, "No." Dale Cooney then said, "You're both terminated for participating in an illegal meeting."

The above accounts of what transpired on February 10 are based on the credited testimony of Leonard and Pickens who impressed me as candid and reliable witnesses. Dale Cooney's account of the conversations did not include the reference to meetings held by the employees the day before. Cooney also denied that Leonard mentioned that he had permission to leave early the day before. According to Cooney, he simply asked Leonard and Rush if they knew they were supposed to work until 4:30 p.m. and when they said they did, he fired them. He did admit, however, that Rush attempted to interject "something about the telephone and I informed him that I did not want to discuss the telephone." The accounts of Pickens and Leonard are more plausible. First of all, Pickens testified that Dale Cooney had mentioned participation in a "unionized meeting" as the reason for his discharge. That testimony is thus compatible with that of Leonard that Cooney was concerned with the meeting itself. In contrast, Cooney's testimony concerning the subject of meetings was contradictory and thus unreliable. He originally testified that he became aware of the employee meeting concerning telephone privileges on the afternoon of February 9, after being so informed by his son David, who had learned of the meeting during his postwalkout telephone conversations with employees. Subsequently, however, Cooney testified that he could not have possibly mentioned a meeting in his February 10 conversations with Pickens, Leonard, and Rush, because, at that juncture, he was unaware of the employees having had any meeting. Second, Dale Cooney's denial that any mention was made in this meeting by Leonard that he had permission to leave early is implausible. It is uncontested that David Cooney did indeed grant Leonard permission to leave early. According to Dale Cooney, he was first notified of this fact sometime in March when an investigator for the state unemployment compensation commission called him with this information. He then checked with his son, David Cooney, verified that Leonard had permission to leave early and, on March 9, 1983, offered Leonard reinstatement. It is inconceivable to me that the Cooneys would not have known about Leonard having had permission to leave early or that Leonard—with his job on the line—would have failed to mentioned it during the discharge interview. I find it more likely that Leonard did mention the fact, as he testified. For these reasons, I find Leonard's version of the February 10 meeting more credible than Dale Cooney's version and I also find credible Pickens' testimony that Dale Cooney mentioned a "unionized meeting" in their conversation on the same day.

B. *Discussion and Analysis*

Respondent admits that it discharged employees Pickens, Leonard, and Rush because they walked out at 3:30 p.m. on February 9 and refused to work overtime on that day.[6] The remarks of Dale Cooney to the terminat-

quiry concerning the employees working overtime, Pickens responded, "No, because you won't let us use the phone." And Cooney admitted that Pickens advised him that the employees were leaving at 3:30 p.m. because "[Y]ou cannot make us work overtime and you will not let us use the telephone."

[5] Dale Cooney denied that he mentioned anything to Pickens about a "unionized meeting." He testified that, on seeing Pickens that morning, he informed Pickens that he was "no longer employed there" and told him to leave. Pickens asked for an explanation but Cooney refused to give him one.

[6] In its answer, Respondent states as follows:

Continued

ed employees on February 10 confirms not only the reason for the discharges, but also Respondent's concern over the employees' walking out and the meeting that preceded it. It is clear that the walkout, instigated by Pickens, was based on his and other employees' concern at Respondent's change in policy regarding the use of the telephone. This was a working condition and a legitimate concern of the employees. They discussed the problem, decided in concert to withhold their labor, and walked out together in protest over the matter. The employees' action was thus a traditional concerted protected activity under Section 7 of the Act and their discharge for such activity is violative of the Act. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Audio Systems*, 239 NLRB 1316 (1979); *J. P. Hamer Lumber Co.*, 241 NLRB 613 (1979).[7]

Although protests involving full-scale strikes—a complete withholding of services—are undeniably protected, it is clear that a single concerted refusal to work overtime, in protest of a condition of employment, is also protected by the Act. See *Hamer*, 241 NLRB at 619; *Gulf-Wandes Corp.*, 233 NLRB 772, 776 (1977); *Polytech Inc.*, 195 NLRB 695 (1972). As the Board stated in *Polytech*, 195 NLRB at 695:

> [There is] a presumption that a single concerted refusal to work overtime is a protected strike activity; and that such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.

The evidence herein shows that the employees' protest was a single concerted refusal to work overtime and it was not a part of a plan of intermittent action. The employees had worked overtime the day before. They expressed no intent to continue to refuse to work overtime after February 9. And they reported for work at the usual time the next day. Respondent failed to establish that the employees had embarked on a plan of intermittent action. Respondent did not even attempt to find out about whether there would be any other disruptions. In Respondent's view, one refusal was enough to cause the discharge. Indeed, Cooney seemed as interested in the fact that the employees had a meeting—the essence of concerted activity—as in the walkout itself. In these circumstances, the evidence clearly supports a finding of a violation.[8]

According to the credited testimony of employee Leonard, Dale Cooney repeatedly interrogated both him and employee Rush about whether they participated "in a little meeting." Cooney elicited from each the fact that they had participated in a meeting with Pickens where the employees talked about walking out in protest of working conditions. Of course, the meeting of employees, on their own time, to discuss working conditions and the possibility of engaging in protected activity is itself protected concerted activity. Such inquiries were made in a coercive setting in the office of a high management official in circumstances where discharge was imminent. There was no lawful purpose for the questioning—which clearly delved into matters protected under the Act—and there were no assurances given against reprisals. Indeed, reprisals were in fact taken because employees engaged in protected activites. In these circumstances, the interrogation was violative of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging employees Robert Pickens, Edward Leonard, and Jerry Rush for engaging in concerted protected activities, Respondent violated Section 8(a)(1) of the Act.[9]

2. By interrogating Edward Leonard and Jerry Rush as to whether they participated in concerted protected activities, Respondent violated Section 8(a)(1) of the Act.

3. The above violations constitute unfair labor pratices which affect interstate commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I shall recommend that Respondent cease and desist from the unfair labor practices found herein. Having found that Respondent unlawfully terminated employees Pickens, Leonard, and Rush, I shall recommend that it be ordered to offer employees Pickens and Rush full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them and employee Leonard whole for any loss of earnings they may have suffered because of Respondent's unlawful conduct.[10] The amounts due to the

[T]he reason for the discharge of the three employees is that, contrary to company policy and the best interest of their employer and, after previously agreeing to work additional time on February 9, 1983, they left their work stations without cause or provocation.

[7] It is clear, under the above authorities, that the protection of the Act does not turn on the reasonableness of the demand, whether there was advance notice to the employer of the walkout, or whether prior demand had been made for a change in the working condition protested. In this case, however, the Respondent was well aware, prior to the discharges, that the employees objected to the Respondent's telephone policy and that the walkout was a protest of that policy. Pickens mentioned this concern to Dale Cooney as he was walking out. David Cooney learned of this concern when he talked to several employees on the telephone after they walked out and arrived at their homes and he relayed the information to his father. And Dale Cooney admittedly cut off Jerry Rush during the February 10 meeting when Rush tried to object to the telephone policy being "unfair." Dale Cooney testified

[8] Even though employee Leonard may have left early because he had permission to do so, Respondent's discharge of him with the others was also unlawful because it believed he too was engaged in protected concerted activity. See *Audio Systems*, 239 NLRB at 1319 fn. 9, and cases there cited.

[9] Employees Gauthier and Pasquali were also terminated apparently as a result of the walkout of February 9. The orginal charge filed by Pickens alleged five discriminatory firings. However, the complaint alleged violations only as to the discharge of Pickens, Rush, and Leonard.

[10] I do not order the reinstatement of Leonard since he was offered and declined reinstatement. The General Counsel does not request that he be ordered reinstated

employees shall be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, E. B. Malone Corporation, Bassett Bedding Division, Amherst, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or condition thereof because they engage in protected concerted activity within the meaning of Section 7 of the Act.

(b) Interrogating employees concerning their participation in concerted protected activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer to employees Robert Pickens and Jerry Rush immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges of Robert Pickens, Edward Leonard, and Jerry Rusch and notify them in writing that this has been done and that their discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Amherst, New Hampshire, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

of Rush even though he was rehired in June 1983 because the evidence shows that he was rehired at a lower wage than he was receiving at the time of his termination and he was apparently treated as a new employee.

[11] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Best Mechanical Contractors, Inc. and G & R Contractors, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 119. Case 15–CA–8824

30 November 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 5 June 1984 Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, Respondent G & R Contractors, Inc. filed cross-exceptions and a supporting brief, and Respondent Best Mechanical Contractors, Inc. filed a brief in opposition to the exceptions of the General Counsel and the Charging Party.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on December 14, 1982, by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 119, against Best Mechanical Contractors, Inc. and G & R Contractors, Inc. (Respondents), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 15, issued a complaint dated January 31, 1983, alleging violations by Respondents of Section 8(a)(5), (3), and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondents, by their answers, denied the commission of any unfair labor practices.

Pursuant to notice, a trial was held before me in Mobile, Alabama, on March 21 and 22, 1983, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Best is an Alabama corporation, engaged at its Mobile, Alabama locale in the business of mechanical contracting. Annually, in the course and conduct of its business operations, it purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Alabama. I find that Respondent Best is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent G & R, alleged in the complaint as the alter ego of Respondent Best, is an Alabama corporation, engaged, at its Mobile, Alabama locale, in the business of mechanical contracting.

II. LABOR ORGANIZATION

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 119 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent Best has, for many years, been affiliated with Mobile Mechanical Contractors Association, Inc., a multiemployer bargaining association of Mobile, Alabama area employers in the mechanical contracting business. The plumber and pipefitter employees of those employers are represented by the Union. The Association, on behalf of its affiliates, and the Union have been parties to a series of multiemployer collective-bargaining agreements, the most recent of which is effective July 15, 1982, to July 14, 1984. Respondent Best is bound to that agreement.

In the fall of 1982, M. H. Best Sr., the founder, principal owner, and chairman of the board of Respondent Best, decided to close down the business because of the huge losses suffered in the preceding 3 years and the lack of contracts for future work. He so advised his son-in-law, R. J. Wagner, president of Respondent Best, and his son, George Best, a director and supervisor of that Company, both of whom were minority shareholders. Thereafter, Wagner and George Best decided to form their own contracting business, and they created Respondent G & R. That Respondent has refused to honor the Association's contract with the Union.

In the instant case, the General Counsel contends, and Respondents deny, that Respondent G & R is the alter ego of Respondent Best, created in an unlawful effort to avoid the obligations imposed by the collective-bargaining agreement with the Union. The General Counsel urges that Respondents, by refusing to recognize the Union as collective-bargaining representative of Respondent G & R's plumber and pipefitter employees, and apply the contract, violated Section 8(a)(5) of the Act. It is also alleged that Respondents violated Section 8(a)(3) of the Act when Respondent Best discharged, and Respondent G & R did not hire, certain unit employees.

B. *Facts*[1]

Respondent Best and predecessor companies owned and operated by M. H. Best Sr. have been engaged in the plumbing and pipefitting business in Mobile, Alabama, since 1946. In the fall of 1982, that Respondent had three corporate directors, including M. H. Best Sr., chairman of the board, who owned 175 shares, or 77 percent, of the corporation's stock. The other directors were Best's son-in-law, R. J. Wagner, president, who owned 38 shares of stock, and Best's son, George Best, who owned 10 shares. The only other shareholder was Barbara Wagner, R. J. Wagner's wife, who owned five shares. While M. H. Best Sr. determined company policies, Wagner ran the day-to-day business of Respondent Best and George Best supervised the field employees and construction operations.

During the 3-year period ending October 31, 1982, Respondent Best suffered operating losses in excess of $200,000. The total assets of the Company fell from $1,204,544 to $420,172, while shareholder equity went from $546,100 to $361,549. In light of this financial picture, M. H. Best Sr. became concerned that, at his advanced age, his assets might be wiped out. The corporation's accountant advised him to liquidate the business.

In September 1982, Best told Wagner that Respondent Best would go out of business. Best Sr. cited the financial decline and stated that the Company was not getting new contracts and was losing money at the rate of $20,000 to $30,000 per month. At a board of directors meeting held on September 30, 1982, Best Sr. formally announced his decision to close the business due to financial losses and a lack of work. Noting that he, personally, owned the building leased to Respondent Best, Best Sr. stated that he would seek to lease it to another contractor. He further stated his intention to sell Respondent Best's furniture, fixtures, and equipment. Best Sr. directed that no new work be sought or accepted and he asked for the resignations, as officers and directors, of Wagner and George Best, stating his intention to pay them their salaries through December 31, 1982. Best Sr. also ordered that an independent appraisal he obtained to determine the value of the office furniture, fixtures, and equipment.

On October 12, 1982, at a shareholder's meeting, M. H. Best Sr. was, at his request, elected as the sole member of Respondent Best's board of directors. At that meeting, Wagner inquired whether Best Sr. would lease the building to Wagner and George Best if they decided to organize their own mechanical contracting company. Best Sr. stated that he would be happy to do so, at market value rental. Wagner also asked about purchase of Respondent Best's furniture, fixtures, and equipment at book value. Best Sr. stated that he would not sell those items at book value, but only at appraised value. Following the stockholder's meeting, at a director's meeting, M. H. Best Sr. elected himself both president and secretary of Respondent Best.

During October 1982, Wagner and George Best decided to form their own company and, on October 25, Respondent G & R was incorporated. Its initial capital was $14,000. The sole shareholders were Wagner, the president, who owned 50 shares of stock, and George Best, the secretary-treasurer, who owned 40 shares. M. H. Best Sr. had no interest, financial or otherwise, in Respondent G & R. In view of Respondent G & R's thin capitalization, Wagner and George Best decided to seek the small jobs which had not been performed by Respondent Best, a large contractor that, normally, had sought major work. They also decided that Respondent G & R would commence its operations as a nonunion contractor.

On or about November 15, 1982, Respondent G & R entered into a lease agreement with M. H. Best Sr. thereby renting a portion, but not all, of the building theretofore occupied by Respondent Best.[2] The lease was for a 6-month term, at a rental fee of $1500 per month, commencing on November 15. Respondent G & R has since made all rental payments, starting that November. Also on November 15, Respondent Best entered into an agreement to sell to Respondent G & R certain of its furniture, fixtures, and equipment at appraised value as determined by independent appraisers. Thereafter, on December 17, after appraisal had been obtained, the parties executed a bill of sale. At that time, Respondent G & R signed a promissory note in the amount of $84,200, representing the full appraised value of the purchased material. The note was payable, without interest, on June 15, 1983. The parties also executed a collateral security agreement under which Respondent Best retained a security interest in the property sold to Respondent G & R.

In early November 1982, George Best met with the employees of Respondent Best in two groups, and informed them that Respondent Best was going out of business as M. H. Best Sr. was tired of losing money year after year. The employees were also told that Wagner and George Best were, thus, left without jobs and they had decided to form their own company which would do small scale work and operate as a nonunion shop or open shop.[3] During the ensuing days, Respondent Best laid off its field employees.

Walter Wilson, the Union's business manager, wrote a letter to Wagner on November 11, 1982, stating that, in the event that Wagner and George Best "reopen under G & R or some other name, in the piping business, I insist that you recognize Local 119's contract and rehire the men that you have laid off." On November 15, Wagner placed a telephone call to Wilson and invited him to a meeting for that day with George Best, Best Sr., and Wagner. At the meeting, M. H. Best Sr. stated that Respondent Best was going out of business because

[1] The factfindings contained herein are based on a composite of documentary and testimonial evidence introduced at trial. The record is generally free of significant evidentiary conflict.

[2] Respondent Best continued to occupy a portion of the premises as it finished the jobs that it had under contract and performed certain repair work for former customers. For those purposes, Best continued to employ one unit employee whose terms and conditions of employment remained governed by the contract with the Union.

[3] The foregoing account of those meetings is based on the testimony of George Best and that of employees James Anthony, Malcolm Nicholas, and William C. Dixon. To the extent that Best's testimony differs from that of the three employees, it is not credited.

of the extreme financial losses it had suffered. Wilson said that Respondent G & R was one and the same as Respondent Best and, therefore, was bound by Respondent Best's contract with the Union. Wagner and George Best insisted that Respondent G & R was not connected to Respondent Best and, as a new company, thinly capitalized, it could not be competitive if it abided by Respondent Best's contract with the Union. Respondent G & R, George Best told Wilson, needed to obtain small jobs in order to start a cash flow and be able to stay in business. Therefore, Best and Wagner told Wilson, G & R would "go open shop." The meeting then turned to a discussion of those portions of the contract that Wagner and Best felt were too costly, namely, wages, fringe benefits, travel time, and paid holidays.

On December 23, 1982, Wilson placed a telephone call to George Best and asked if Best had reconsidered his decision to operate Respondent G & R as an "open shop." George Best said, "No, I don't even want to discuss it." Thereafter, on January 26, 1983, Wilson sent a letter to George Best, demanding recognition and insisting that the Union's contract with Respondent Best was binding upon Respondent G & R. Wagner, on behalf of G & R, sent the following letter to Wilson on March 4, 1983:

> Enclosed herewith is a proposed collective-bargaining agreement between G & R Contractors, Inc., and U.A. Local 119. We would appreciate the opportunity of discussing our proposal and any counter proposal of Local 119 with you at your earliest convenience.
>
> By making the proposal, G & R Contractors, Inc. does not waive or modify its position that Local 119 does not now and has never represented an uncoerced majority of the employees of G & R Contractors, Inc. in an appropriate collective-bargaining unit.

Wagner and George Best met with Wilson on March 17, 4 days before trial in the instant matter. At that time, Wilson stated his objections to certain of the terms contained in the contract proposal of Respondent G & R. He presented to Wagner and Best a proposed contract and asked them to review it as a basis for further negotiations.

Including working foremen, who enjoyed supervisory status, Respondent Best laid off some 10 or 11 workers who did plumbing-pipefitting work, principally in the early November 1982 period. Only one of those individuals, Bruce Carter, who had worked as a plumber-pipefitter with Respondent Best sought employment with Respondent G & R. Carter was hired by that Respondent as a working foreman, a statutory supervisor, on December 7, 1982. On that date he resigned his membership in the Union. Respondent G & R had, as of the time of trial, employed only two other individuals to do work covered by the contract at issue. On January 18, 1983, it hired S. W. Arrighi as a pipefitter. Three weeks later, Arrighi was laid off. Previously, on December 9, 1982, it had hired W. J. Moiren as a pipefitter helper. Neither Arrighi nor Moiren had been employed by Respondent Best.

With respect to other personnel, Respondent G & R hired M. D. Crabtree as a laborer on December 8, 1982. Crabtree, who had not worked for Respondent Best, was laid off on December 23, 1982. On December 21, 1982, G & R hired Willie Crum as a laborer. Crum, who had previously worked for Respondent Best as a laborer, was laid off on February 3, 1983. Also in December 1982 Respondent hired J. Crabtree as an operator, and M. J. Jones as a truckdriver. Crabtree had previously worked as an operator for Respondent Best and Jones had worked for Best as a truckdriver. The former secretary for Respondent Best, Ruth Colvin, was hired to perform the same job for Respondent G & R.[4] Respondent G & R also hired the former purchasing agent for Respondent Best, Harper Field, to perform the same duties for Respondent G & R.

At the time of trial, Respondent G & R had performed only five jobs, at least one of which was for a customer which, previously, had been a customer of Respondent Best. However, Respondent Best's relationship with that customer had terminated 1 year before Respondent G & R was engaged to perform an entirely different type of job.

C. *Conclusions*[5]

I conclude that Respondent G & R is not a disguised continuance, or the alter ego, of Respondent Best, and that neither Respondent engaged in violations of Section 8(a)(5) and (3) of the Act. In my view, the record evidence demonstrates that Respondents are separate, unrelated entities and that Respondent G & R was not created in an unlawful effort to circumvent the collective-bargaining agreement obligations undertaken by Respondent Best.

As shown, the corporate stock of Respondent G & R is owned entirely by R. J. Wagner and George Best minority shareholders in Respondent Best. On the other hand, M. H. Best Sr., who has no interest in Respondent G & R, owned 77 percent of the stock of Respondent Best, and controlled that corporation. While R. J. Wagner and, to some extent, George Best ran the day-to-day affairs of Respondent Best, its company policies were set by M. H. Best Sr. It was M. H. Best Sr. alone who decided to cease the operations of Respondent Best. The corporate policies of Respondent G & R are set by Wagner and George Best, and they also run the daily affairs of that Respondent. There is no integration or interrelation of the operations of the two Respondents.

As of October 31, 1982, Respondent Best had between $300,000 and $400,000 in working capital. It performed large contracting jobs, utilizing more than 10 plumber and pipefitter employees. Respondent G & R commenced operations with just $14,000 in working capital

[4] Colvin still does work for Respondent Best. Her time so spent is billed by Respondent G & R to Respondent Best.

[5] In view of my deposition of this case, infra, I need not pass on Respondent G & R's contention that the contract unit is inappropriate because it includes working foreman, statutory supervisors, and, also, that the subject contract is an illegal "members only" agreement.

and sought the small work not performed by Respondent Best. Respondent G & R employs only two or three individuals to perform plumbing and pipefitting work.

In addition to the separate ownership and control of the two Respondents, and the very great difference in the scope of their operations, the record is devoid of evidence indicating that the purpose of the cessation of operations by Respondent Best, and the creation of Respondent G & R, was to avoid the obligations of Respondent Best under its contract with the Union. The record does not contain evidence of union animus, albeit Wagner and George Best did decide that Respondent G & R would commence operations as a nonunion contractor. Nor has there been irregular dealings. The one transaction between the Respondents, the sale of certain furniture, fixtures, and equipment, was demonstrably at arm's length, and the purchase price was determined by independent appraisal.[6] Likewise, it is not contended that Respondent G & R's lease of the building owned, personally, by M. H. Best Sr. was at other than fair market value.

Against this background, that Respondent G & R was housed in the same building occupied by Respondent Best, employed a small number of individuals who formerly worked for Respondent Best, and performed work for at least one former customer of Respondent Best are insufficient to show alter ego status. For those factors are outweighed by the separate ownership and control of the two Respondents, the entirely different scope of their operations, the absence of irregular business dealings between them, and the lack of evidence showing that the cessation of operations by the one and the creation of the other were motivated by antiunion considerations. Accordingly, the allegations of 8(a)(5) violations must be dismissed.

There is no evidence in this record to show that the layoffs of the plumber and pipefitter employees by Respondent Best, in November 1982, were other than in implementation of the lawful business decision reached by that Respondent to cease its operations. As there is also no evidence that Respondent G & R refused to hire applicants for employment who were former employees of Respondent Best, or advised the former Best employees that it would not hire them, the allegations in the complaint alleging violations of Section 8(a)(3) must also be dismissed.

CONCLUSIONS OF LAW

1. Respondent Best Mechanical Contractors, Inc. is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 119 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not violated the Act, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed in its entirety.

[6] Cf. *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ACL Corporation d/b/a Atlanta Hilton and Towers *and* International Brotherhood of Firemen and Oilers, AFL-CIO. Cases 10-CA-18929 and 10-RC-12727

6 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

Upon a charge filed by the Union in Case 10-CA-18929, 26 January 1983,[1] the General Counsel of the National Labor Relations Board issued a complaint[2] 1 February 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 4 January 1983, following a Board election in Case 10-RC-12623, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 7 January the Company has refused to bargain with the Union. On 7 February the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 18 March the General Counsel filed a Motion for Summary Judgment. On 24 March the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Company's answer admits its refusal to bargain, but attacks the certification's validity on the basis that the unit in which the election was directed is inappropriate for collective-bargaining purposes. The General Counsel argues that all material issues have been previously decided.

In Case 10-CA-18929, the record, including the record in Case 10-RC-12623, reveals that on 9 August 1982, after a hearing, the Regional Director issued a Decision and Direction of Election in which, inter alia, he found appropriate a unit consisting essentially of all full-time and regular part-time housekeeping, laundry, public facility, and exhibit employees employed at the Respondent's Atlanta, Georgia facility.[3] On 23 August 1982 the Respondent filed with the Board a request for review, contending that the unit was inappropriate. On 10 September 1982 the Board granted the request for review. The election was held the same day, but the ballots were impounded pending resolution of the request for review. On 15 December 1982 the Board affirmed the Regional Director's Decision and Direction of Election, and directed that the impounded ballots be opened and counted. On 20 December 1982 the impounded ballots were counted. The tally showed that of approximately 219 eligible voters, 98 cast valid ballots for the Union, 8 for the Intervenor, and 63 against both labor organizations; there were 4 nondeterminative challenged ballots. On 4 January 1983 the Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate.

On 3 March the Regional Director for Region 10 issued a Decision and Direction of Election in Case 10-RC-12727 in which he found appropriate the petitioned-for unit consisting essentially of all full-time and regular part-time food and beverage employees at the Respondent's Atlanta facility.[4] Thereafter, the Employer filed a timely request for review, challenging the Acting Regional Director's unit determination and contending, inter alia, that the only appropriate unit consists of all employees employed at the facility, but excluding property operations department[5] employees, confidential

[1] All dates are in 1983 unless otherwise indicated.

[2] Hotel, Motel & Restaurant Employees Union, Local 151, AFL-CIO was permitted to intervene in this proceeding.

[3] The precise unit description is as follows:

All full-time and regular part-time housekeeping, laundry and public facility and exhibit employees employed by the Employer at its Atlanta, Georgia, facility located at 255 Courtland Street, Atlanta, Georgia including aides, on-call aides, turn-down aides, attendants, the payroll clerk, dispatchers, night cleaners, stockroom attendant, locker room attendant, drapery attendant, washman, chuteman, laundry attendant, linen runner, seamstress, uniform room attendant, meeting room attendant, banquet houseman and assistant team leaders, excluding office clerical employees, secretaries, property operations employees, front office employees, food and beverage employees, steward employees, room service employees, communication employees, the hostesses, guest greeters, purchasing employees, human resources employees, the tower clerk, marketing and sales employees, accounting employees, security employees, guards and supervisors as defined in the Act.

[4] The precise unit description is as follows:

All full-time and regular part-time food and beverage employees, steward employees, room service employees, guest services employees, bellmen, cashiers, and stockroom attendant; excluding office clerical employees, secretaries, property operations employees, communication employees, housekeeping, laundry and public facility and exhibit employees, human resources employees, purchasing employees, the Tower clerk, marketing and sales employees, accounting employees, security employees, guards and supervisors as defined by the Act.

[5] On 26 February 1980 in Case 10-RC-11941, the Union was certified as the bargaining representative in the following unit, and entered into a collective-bargaining agreement which expired 29 May 1983:

Continued

employees, security officers, guards/watchmen and supervisors as defined in the Act.

The Board, by telegraphic order dated 26 August 1983 (Member Zimmerman, dissenting), granted the request for review.

In light of the overlapping issues presented in Cases 10–RC–12727 and 10–CA–18929, the Board has decided on its own motion to consolidate the cases for decision.

On the entire record,[6] the Board makes the following findings.

The Atlanta Hilton and Towers is a 30-story hotel in Atlanta, Georgia. The hotel derives approximately 83 percent of its gross revenues from its convention business. The hotel has 1250 rooms and employs about 832 regular full-time nonsupervisory employees. The hotel has 4 restaurants, 3 cocktail lounges, a nightclub, recreational facilities, 52 meeting rooms, and an exhibition hall.

Because it is mainly a convention hotel, the Respondent's facilities and organizational structure have been designed specifically for the purpose of servicing convention business. The Respondent's operations are closely coordinated and functionally integrated. The conventions require each department to cooperate with the others to provide the promised services. In Case 10–RC–12623, the Regional Director found that:

> [T]he hotel and tower are operated in a highly integrated and centralized manner, especially so because of the high volume of its convention business and the special needs of its convention guests. Thus, the front office, sales, catering, reservations, food and beverage, and communications personnel are involved in selling conventions to prospective customers and in an effort to ascertain customers' needs during their stay at the Employer's facility.

The Respondent has an extensive internal communications and recordkeeping system. This consists of a MICOR computer system,[7] a pneumatic tube system linking the front desk and other parts of the facility, communications (PBX) and food and beverage outlets, a beeper paging system, and a walkie-talkie system.

The booking, planning, and execution of conventions require close coordination among all hotel areas. The hotel's organization is designed to provide numerous services for the convention as arranged through contractual agreement. Preconvention meetings are held to review a convention resume that outlines the convention functions and particular roles of each area. The convention resume is circulated to approximately 40 different departments and contains instructions for each.

The hotel's management is highly centralized. The Employer introduced numerous memoranda from General Manager Utnik to various department heads, assistant department heads, and assistant area managers, which demonstrate Utnik's close involvement in minor details of the hotel's day-to-day operation.[8] Individual department heads oversee routine operations in their areas, but do not establish basic work policies or have final control over department functions.

The hotel's human resources department establishes uniform personnel policies, including wages and benefits,[9] which apply to all hotel employees except property operations employees whose terms and conditions of employment have been specified in a collective-bargaining agreement. Individual department heads do not determine personnel policies. Human resources screens all applicants and refers those selected to the department managers for interviews.[10] The director of human resources must approve all personnel decisions, including any discipline supervisors recommend. Hotel employees have an employee cafeteria, employee locker rooms, and a recreation program. There are employee training programs throughout the hotel in which employees of different departments participate. Some employees receive cross-training in

---

All full-time and regular part-time employees employed by the Respondent at its Atlanta, Georgia facility, in the Property Operations Department including electricians, T.V. technicians, mechanics, operators, plumbers, helpers, carpenters, carpet-men, upholsterers, printers and locksmith, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

In Case 10–RC–12182, the Regional Director dismissed the Union's petition to represent a unit confined to "PBX operators" in the Employer's communications department.

[6] In Case 10–RC–12727, the parties requested the Regional Director to take official notice of the records in the two earlier representation proceedings, Cases 10–RC–12182 and 10–RC–12623.

[7] The MICOR system is used by employees in accounting (cashiers), housekeeping, front desk, and communications. MICOR's information includes guest names, guest room locations, guest conventions, and room status.

[8] Some examples of the day-to-day issues with which Utnik has been involved include the policy regarding furnishing meals to police officers, cleaning of guest elevator doors, availability of rollaway beds, the purchase of a knife for the dessert wagon, use of employee name tags, the maintenance and cost of shower curtains, approval of a front office clerk's vacation period, guest entrapment in elevators, and the cleaning of the lower ground floor area.

[9] A hotelwide wage and salary program sets pay rates for each job classification, including the hiring rates and frequency and amounts of pay increases. Individual supervisors and department heads do not determine when their employees receive a pay increase. Among other hotelwide personnel policies the human resources department formulates, with Utnik's approval, are work hours, disciplinary procedures, dress standards, holidays, night differential pay rates, benefit improvements, funeral leave, vacation policy, jury duty, overtime pay, and probation periods. All hotel employees except property operations employees receive the same fringe benefits.

[10] Each manager makes the final hiring decision from among those that human resources refers.

other departments. For example, some communications employees received training to make them more aware of what goes on in the front office. There is also a "priority one" training program which covers any employee who has face-to-face contact with guests.

The hotel has a uniform transfer policy. The human resources department posts openings and employees from any area may apply. The employee's current supervisor must sign a form and human resources must approve the transfer. There have been approximately 27 transfers in 2 years from housekeeping to other departments. There have also been transfers from the food and beverage and stewards area to housekeeping, and transfers from communications to housekeeping, secretary, front office, and accounting. Other transfers have occurred from food and beverage to sales, front office, and accounting; from office to food and beverage; from housekeeping to the front desk; from greeter to catering; from bellstand to food and beverage; from communications to accounting; from room service to secretary; from personnel to catering; from public facilities to security; and from stewards to bellstand.

Employees from different areas have frequent contact with employees from other areas.[11] Examples of contact between accounting personnel and other employees include the following. Front office cashiers issue keys to food and beverage employees, restaurant cashiers, housekeeping, engineering, and laundry employees. Shipping and receiving employees deal with engineering, food and beverage, laundry, and housekeeping employees in handling goods to be picked up by other departments or delivered. Night auditors have contact with restaurant employees when they pick up reports and read registers in the restaurant outlets. Accounts payable clerks are involved with every department in obtaining approvals for payments of invoices.[12] Restaurant cashiers occasionally assist the hostesses or greeters in the dining rooms.

Laundry employees have contact with buspersons from all food and beverage outlets, banquet employees, kitchen employees, the storeroom clerk, shipping and receiving, communications, catering, room service, and the bellstand. Employees from other departments come into contact with laundry employees when they bring laundry to be cleaned, and pick up clean laundry and uniforms.

Housekeeping employees maintain contact with the front desk cashiers through the MICOR system regarding all room status changes. The front desk provides house counts to housekeeping for budgeting and scheduling purposes. Housekeeping employees have contacts with food and beverage employees when they clean restaurant outlets. Housekeeping employees work with public facilities employees in cleaning areas around the meeting rooms.

Food and beverage employees have contact with housekeeping and laundry employees as already described. They also keep contact with the front office on house count and the pay-in-advance guest list. Food and beverage employees have contact with restaurant cashiers and night auditors. They work closely with the inventory control office. Convention services advises food and beverage as to the food and beverage services each convention requires. Food and beverage employees work with housekeeping employees in setting up VIP rooms.

Communications employees assist cashiers regarding guest telephone charges (the pneumatic tube system is used for this purpose). Operators take restaurant reservations when food and beverage receptionists are not available. Restaurant cashiers call operators to verify guest room numbers, and operators call outlets to locate guests. Operators give out information regarding the hours of the various food and beverage outlets. Housekeeping employees call operators if a message light is left on in a vacant room or if a telephone is missing or damaged. Public facilities employees notify operators when a telephone needs to be removed from a meeting room. All departments notify communications when repairs are necessary.

There is some interchange of personnel between departments, mainly under emergency situations. Accounting personnel have worked as bartenders, and credit personnel as hostesses. During an ice storm, accounting personnel assisted housekeeping. Catering, sales, and accounting personnel have been used as bar cashiers. Housekeeping employees sometimes fill in at the laundry and uniform room. A housekeeping employee fills in for the restroom attendant in Nikolai's Roof Restaurant every week. Housekeeping employees have filled in as waitresses or buspersons, and help in shipping and receiving when a large order arrives. Housekeeping employees also occasionally substitute for lobby porters (bellstand).

In *Arlington Hotel Co.*, 126 NLRB 400, 404 (1960), the Board announced a general rule of hotel unit determination, finding only a hotelwide unit to be appropriate, holding, "in the hotel industry, all operating personnel have such a high degree of

[11] In finding a unit of only PBX operators inappropriate in Case 10-RC-12182, the Regional Director stated, "The record is replete with evidence of frequent daily contacts among employees in almost every area of the hotel as they attend to the needs of convention guests."

[12] Generally, rank-and-file employees in other departments are not involved with this function unless there is a question about receipt of merchandise.

functional integration and mutuality of interests that they should be grouped together for collective-bargaining purposes."

The Board later retreated from the *Arlington* rule in *77 Operating Co.*, 160 NLRB 927, 929–930 (1966), enfd. 387 F.2d 646 (4th Cir. 1967), and approved a unit limited to restaurant employees. The Board stated:

> Since *Arlington*, the Board has gained much experience and better insight into the nature of the hotel-motel industry. Although, as was held in *Arlington*, employees in the various facilities of hotels and motels have a basic mutuality of interest, neither their functions nor their mutual interests are in all cases integrated to such a high degree that an overall unit should be found the only appropriate unit. . . .
>
> *Arlington* took a valid principle (*if* functions and mutual interests are highly integrated, an overall unit alone is appropriate) and fashioned from it an inflexible rule to be applied to all hotels and motels. But, because our experience has indicated that such a degree of integrated functions and employee interests does not exist in every hotel or motel, we shall hereafter consider each case on the facts peculiar to it in order to decide wherein lies the true community of interest among particular employees.

In making unit determinations in the hotel industry, the Board applies the same general criteria used in other industries, including "distinctions in skills and functions of particular employee groups, their separate supervision, the employer's organizational structure and differences in wages and hours,"[13] as well as integration of operations, and employee transfer, interchange, and contacts.

In applying these criteria in Cases 10–RC–12727 and 10–RC–12623, the Regional Director found that "there is not such a high degree of functions and mutuality of interest" between the employees in the requested units and other hotel and tower employees as to require a single combined unit. We disagree. After carefully examining the facts of the instant case, we find that the units the Regional Director found appropriate in Cases 10–RC–12727 and 10–RC–12623 do not represent "the true community of interest" of the hotel's employees, and are inappropriate for collective-bargaining purposes.[14]

As described above, the evidence discloses that the Respondent is a highly integrated operation. Each department is closely coordinated with the others in order to serve the needs of conventions.[15] All employees are subject to the same personnel policies, and share the same wage and benefit programs. There is a hotelwide wage and salary program which establishes pay rates and determines increases. All employees receive the same fringe benefits and work under rules and policies the human resources department establishes. Individual supervisors or department heads do not formulate or change personnel policies. Rather, the human resources department with the general manager's approval formulates or changes such policies. Employees in different departments frequently have contact with employees in other departments in performing their duties, as previously detailed. There is substantial evidence of transfers between departments and some evidence of interchange of duties, particularly in emergency situations.

A number of employees who perform similar functions in different departments were placed in separate units or excluded from both units. For example, the stockroom attendant (housekeeping) was included in the unit found appropriate in Case 10–RC–12623, the food storeroom clerk (food and beverage) was included in the unit found appropriate in Case 10–RC–12727, but the general storeroom clerk (accounting) was excluded from both units. Other examples include the locker room attendant (housekeeping) (included in Case 10–RC–12623) and the restroom attendant in Nikolai's (food and beverage) (included in Case 10–RC–12727); the banquet helper (stewards) (included in Case 10–RC–12727) and the banquet houseman (public facilities) (included in Case 10–RC–12623); the night cleaners (housekeeping) (included in Case 10–RC–12623) and the night cleaners (stewards) (included in Case 10–RC–12727); the lobby porter (bellstand) (included in Case 10–RC–12727) and the housekeeping attendant (included in Case 10–RC–12623); and food and beverage cashiers (included in Case 10–RC–12727) and front desk cashiers (excluded from both units).

In Case 10–RC–12727 the Regional Director attempted to justify his unit determination in terms of a "white collar/blue collar" distinction under *Re-*

[13] *Regency Hyatt House*, 171 NLRB 1347, 1348 (1968).

[14] See *Holiday Inn Alton*, 270 NLRB 1405 (1984); *Holiday Inn Southwest*, 202 NLRB 781 (1973); *Holiday Inn*, 214 NLRB 651 (1974); *Days Inn of America*, 210 NLRB 1035 (1974); *Ramada Inns v. NLRB*, 487 F.2d 1334 (9th Cir. 1973), in which "housekeeping only" units were found inappropriate.

[15] See *Westward-Ho Hotel*, 437 F.2d 1110 (9th Cir. 1971), in which the Ninth Circuit reversed a Board finding that a unit consisting of only kitchen employees was appropriate. In that case, the court noted that "the employer's convention service involves the close coordination of all the hotel's employees." The volume of Westward-Ho's convention business was 60 percent, while 83 percent of Respondent's revenues is attributable to conventions.

gency Hyatt House, supra. The Regional Director stated:

> [T]he employees sought for consist of the hotel's *unrepresented* manual operating personnel, such as doorman, bellmen, waiters, waitresses, bartenders, and cooks. Each employee provides the hotel's customers with physical services, be it preparing food and beverages, changing cash after purchases, carrying luggage or opening doors. The differences between these employees' duties and job functions and other clerical personnel employed throughout the hotel justifies a "blue collar/white-collar" distinction as contemplated in *Hotel Equities, d/b/a The Regency Hyatt House, supra*. Accordingly, I find that the unrepresented "blue collar" employees share a sufficient community of interest apart from the broader interest they may share with other hotel and tower employees to warrant their separate representation. This finding is consistent with the previous decision in Case 10–RC–12623, which found a blue-collar unit to be appropriate. The record in the entire proceeding does not warrant a conclusion that the unit established in Case 10–RC–12623 should be merged into an overall unit with the unit currently sought herein. [Emphasis added.]

The Regional Director did not, however, explain why the "blue collar" employees in Case 10–RC–12623 should not be in the same unit with the "blue collar" employees in Case 10–RC–12727. The Regional Director's units separate "blue collar" employees into two units[16] and include some "white collar" employees in each unit while excluding others.[17] The Regional Director excluded from both units employees such as front office cashiers and storeroom clerk who perform similar functions to employees included in the units. We are therefore unable to agree with the Regional Director's unit determinations.[18]

We conclude that because of the highly integrated functions and mutual interests of the Respondent's employees, the common pay rates and fringe benefits shared by all employees, the centralized control of the Employer's day-to-day operations, the centralized formulation of personnel policies, the daily work contacts of employees in different departments, and the transfers of employees between departments, an overall unit of the Employer's employees, excluding property operations employees, confidential employees, guards, and supervisors is appropriate in the instant case.

Accordingly, because we have found that the units the Regional Director found appropriate in Cases 10–RC–12727 and 10–RC–12623 are not appropriate units for collective-bargaining purposes, we shall dismiss the petition in Case 10–RC–12727. In addition, we shall deny the Motion for Summary Judgment in Case 10–CA–18929 and dismiss the complaint. We shall also revoke the certification issued in Case 10–RC–12623, and dismiss the petition in that case.

ORDER

The petition in Case 10–RC–12727 is dismissed.

The Motion for Summary Judgment in Case 10–CA–18929 is denied, and the complaint is dismissed.

The certification of representative issued in Case 10–RC–12623 is revoked, and the petition is dismissed.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would grant the General Counsel's Motion for Summary Judgment in Case 10–CA–18929. Specifically, in accordance with the reasons set forth in my specially concurring opinion in *Bravos Oldsmobile*, 254 NLRB 1056, 1058 (1981), I believe that the Board should refrain from reconsidering the unit determination made by the Regional Director, and affirmed by the Board on review, in the underlying representation case, Case 10–RC–12623.

In *Bravos Oldsmobile*, I argued that any benefits to be derived from reconsidering and relitigating representation issues in a particular technical refusal-to-bargain case such as this one were decidedly outweighed by the advantages of stability in law and finality of litigation resulting from the Board's longstanding policy against such relitigation. Very recently, in my dissent in *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984), I reiterated these considerations, and noted that the sole reason that relitigation of the underlying representation issue was permitted by the majority was because there was a change in the composition of the Board from the time the representation case was litigated to the time the Respondent tested the Board's certification. That is precisely the same reason my colleagues are per-

[16] For example, "blue collar" employees such as housekeeping aides and laundry employees were included in Case 10–RC–12623, while other "blue collar" employees such as bell persons, waiters, and cooks were included in Case 10–RC–12727.

[17] Thus, "white collar" employees such as the food and beverage cashiers were included in Case 10–RC–12727 and the housekeeping payroll clerk was included in Case 10–RC–12623, but other "white collar" employees such as front office cashiers and PBX operators were excluded from both units.

[18] Contrary to Member Zimmerman, we are reconsidering the underlying representation proceeding in Case 10–CA–18929 not because of a change in the composition of the Board, but because the Regional Director erroneously applied existing precedent.

mitting relitigation of the underlying unit determination in the instant refusal-to-bargain case.

Accordingly, for the reasons fully set forth in my separate opinions in *Bravos Oldsmobile* and *Sub-Zero Freezer*, I would not relitigate the representation issue underlying the refusal-to-bargain case, and I would grant the General Counsel's motion, finding that the Respondent has violated Section 8(a)(5) of the Act as alleged.

Also contrary to my colleagues, I would not have granted review of the unit determination made by the Regional Director in the instant case, Case 10–RC–12727, and I would therefore affirm that unit determination. The hotelwide unit which my colleagues find appropriate is squarely at odds with the Regional Director's unit determination in Case 10–RC–12623, underlying the General Counsel's Motion for Summary Judgment. Because I believe that the Board should refrain from now reversing its earlier affirmation of the Regional Director's unit determination in Case 10–CA–12623 (and also for the substantive reasons on which that affirmation was based), I disagree with my colleagues' unit determination in Case 10–RC–12727.

Fleur DuLac, a joint venture composed of Fred Sahadi and Fred Andrews *and* Carpenters Local Union 2035, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 20–CA–16918

6 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 21 February 1984 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fleur DuLac, a joint venture composed of Fred Sahadi and Fred Andrews, Campbell, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make whole Martin Kostelny, Lyle Teuscher, Raymond Jordan, and Robert Rule for loss of earnings and benefits, plus interest, from the dates of their unlawful discharge in January 1982 until 8 March 1982, the effective date of the offer of reinstatement."

2. Substitute the following for paragraph 2(b).

"(b) Remove from its files any reference to the unlawful discharges of Kostelny, Teuscher, Jordan, and Rule, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used against them in the future."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee because of that employee's membership in or support of Carpenters Local Union 2035, United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Martin Kostelny, Lyle Teuscher, Raymond Jordan, and Robert Rule for loss of earnings and benefits, plus interest, from the dates of their unlawful discharge until 8 March 1982.

WE WILL remove from our files any reference to the unlawful discharges, and WE WILL notify Teuscher, Kostelny, Jordan, and Rule that this has

[1] We find merit in the Respondent's contention that the evidence establishes that the Company made unconditional offers of reinstatement to the discriminatees and that the latter effectively rejected the offers. The credited evidence shows that on 4 March 1982 General Building Superintendent Bergsma invited discriminatees Kostelny, Jordan, and Rule to report to work on 8 March. Bergsma informed the three carpenters they they would receive union wages and benefits. Bergsma's efforts to contact Teuscher with the same message were unsuccessful. On 8 March Kostelny, Jordan, and Teuscher reported to the jobsite and tendered dispatch slips containing recognitional language. Bergsma refused to accept the slips because of the recognitional language. Kostelny, Jordan, and Teuscher stated that they could not return to work if Bergsma refused to accept the dispatch slips. As a result, they were not rehired. Rule, who had recently undergone surgery, contacted Bergsma in early June 1982 and stated that he had recovered and wished to return to work. Bergsma asked Rule how he wanted "to come back." Rule answered "as a Union member and the whole bit." Bergsma replied that he could not hire Rule.

The judge concluded that the Respondent's refusal to rehire the discriminatees was not unlawful. The judge found that the Company's actions were permissible in view of the discriminatees' insistence that the Respondent accept the dispatch slips containing recognitional language. We find, based on the evidence and the judge's findings set forth above, that the Respondent unconditionally offered to reinstate the discriminatees at their previous terms and conditions of employment and that the discriminatees rejected the offer by conditioning their return on the Company's acceptance of the dispatch slips. Accordingly, we shall modify the backpay provision and delete the reinstatement requirement in the recommended Order and notice. We shall further modify the Order and notice to require that the Respondent expunge from its files any references to the unlawful discharges. *Sterling Sugars*, 261 NLRB 472 (1982).

been done and that evidence of these unlawful discharges will not be used against them in the future.

FLEUR DULAC, A JOINT VENTURE COMPOSED OF FRED SAHADI AND FRED ANDREWS

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in South Lake Tahoe, California, on March 15 and 16, 1983. The charge was filed February 18, 1982, and amended March 31 and August 16, by Carpenters Local Union 2035, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Union). The complaint issued August 20, 1982, was amended during the trial, and alleges that Fleur DuLac, a joint venture composed of Fred Sahadi and Fred Andrews[1] (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act by:[2]

(a) Discharging Martin Kostelny and Lyle Teuscher on January 20, 1982.

(b) Discharging Raymond Jordan and Robert Rule on January 23, 1982.

(c) Refusing to rehire Kostelny, Teuscher, Jordan, Peter Gillis, and William Kelly on March 29, 1982.

(d) Refusing to rehire Rule on June 1, 1982.

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the development of a multimillion dollar, 22-unit condominium project (Project) on Lake Tahoe near Homewood, California. To this end, it annually purchases over $50,000 in goods and materials from suppliers outside California, and thus is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED MISCONDUCT

A. *Evidence*

1. Background

Work began on the Project in the spring of 1981. The project manager, so called, is Fred Sahadi, one of the joint venturers. Although his office is over 200 miles away, in Campbell, California, he visited the site almost daily from the Project's onset through October 1981. Thereafter, as weather worsened with the coming of winter, his visitations were markedly less frequent. The ranking person regularly on the site, directly accountable to Sahadi, is John Bergsma, general building superintendent. He testified that he is "in charge of all construction." Sahadi testified that, whether or not physically present on the site, he was in communication with Bergsma "on a continuous basis" at relevant times.[3]

The carpenter complement peaked at perhaps 40 people in October 1981. As Sahadi put it, Respondent was "pushing the job hard" before winter, "working as many people as [it] could in as many places on the site as [it] could." Reductions in force followed as tasks were completed and winter conditions curtailed the range of activities that might feasibly be undertaken. Five carpenters remained after the discharges in question. That number persisted through the week following, after which it rose to 7 in the week ending February 7, to 8 in the week ending February 14, to 16 by the end of February, and to 25 by mid-March, as weather moderated. The complement designedly was comprised of both union members and nonmembers until the present discharges.[4] It has been entirely nonunion since.

The union carpenters were paid union scale wages, and fringe benefit contributions were made for them as if they were covered by the Union's master labor agreement.[5] The nonunion carpenters receive varying wages purportedly pegged to their skills, which in some and probably most instances are less than union scale, and have no fringe benefits. Compensation for the union carpenters was agreed upon during a meeting on June 5, 1981, between representatives of Respondent and the Union. It was further understood, at least so Respondent thought, that Respondent would not be party to the master labor agreement and that the Union would enjoy no representational status on the Project.

---

[1] The Company's name and the caption are as amended during the trial.

[2] Sec. 8(a)(1) states that "it shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Sec. 7 states in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Sec. 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[3] Sahadi testified that he speaks with Bergsma, by telephone if not in person, "two or three times a day almost every day of [his] life." Bergsma testified that Sahadi sometimes calls "ten times a day" and sometimes does not talk to Bergsma "for a week."

[4] Kostelny testified credibly and without refutation that, when he was invited to work on the Project, Bergsma told him that Respondent needed "some token union men"; and that Sahadi told the newly hired carpenters a week or so later that he was "happy" to have some union members on the payroll inasmuch as he needed "some token union men . . . to keep Bob Young . . . off his back." Young is the Union's business representative.

[5] Union carpenters received an hourly wage of $15.35 at the start of the job. Respondent's hourly fringe benefit contributions for them were $1.605 for health and welfare, $1.95 for pension benefit, $1.60 for vacation fund, 12 cents for apprenticeship training, and 7 cents for industry advancement.

There were three union carpenters on the Project as of the June 5 meeting, each of whom had been hired by Bergsma independently of the Union's hiring hall. On June 8, the Union's business representative, Robert Young, appeared at the site, presenting Bergsma with dispatch slips pertaining to the three. The slips, bearing the imprimatur of the Sierra Nevada Foothill District Council of Carpenters, included this language:

> Note: By accepting this referral, the Employer herein recognizes the Union and each of its affiliated local unions and district councils as the collective bargaining representative of his or its carpentry employees employed in the 46 Northern California counties and agrees to be bound by all the wages, hours, or other terms and conditions of the Carpenter's Master Agreement for Northern California, including the payment of all wage scales, health and welfare, pension, vacation, apprentice, and industry advancement contributions required by said Agreement.

Prompted by Young's action, Respondent's attorney, Roy Potts, sent Bergsma a letter dated June 9 in which he "attempt[ed] to summarize" the June 5 understanding. Copies were sent to Young, to the Union's attorney, Michael Roger, and to R. A. Caples, business manager of the Sacramento-Sierra Building & Construction Trades Council, all of whom had attended the June 5 meeting. The letter stated in part:

> At the meeting on Friday, I reiterated Mr. Sahadi's position that he would pay union scale wages and fringes for all carpenters hired out of the union hall. No agreement was made that Fleur DuLac would hire all its help through the hall . . . .
>
> Further it was made clear that Mr. Sahadi would not sign any agreement or do anything which would give the Union any direct or indirect jurisdiction whatsoever over the job.
>
> Mr. Young's appearance on the job on Monday afternoon, and the tender of his dispatch tickets was not as a result of any agreement which I made on Friday or any other time and was solely on his own initiative for his own account and presumably for union internal bookkeeping procedures.

This was followed by a letter dated June 15 from Potts to Young, copy to Roger, in which Potts stated, after setting forth the above-quoted dispatch-slip language, that he had been "careful to point out" in the June 5 meeting "that the employer did not recognize the union as the collective bargaining representative of its employees"; and that, while "we expressed our willingness to pay scale and fringes if and when we used union employees . . . we were at pains to find a way to do this without extending recognition." The letter concluded that Respondent "presume[d]" that the use of the dispatch slips "was not an attempt to gain recognition indirectly."

On June 22, Potts sent a telegram to Caples stating:

> Just after lunch today Robert A. Young appeared on the Fleur DuLac construction site . . . for the second time in a week and announced that his men could not work with others on the job. . . .
>
> As was pointed out in my letter to Job Superintendent Bergsma dated June 9, 1981, a copy of which was sent to you, and my letter to Young dated June 15, 1981, Fleur DuLac does not recognize the Carpenters as bargaining representative of any of its employees; does not have an agreement with the Carpenters to hire any employees from the Union; and has not worked out with the Union an arrangement whereby carpenters hired through the hall, if any, may be paid fringes.[6] This is the kind of problem that the Employer has feared from the outset.
>
> We need your help.

What happened next is not revealed by the record. The record does reveal, however, that tension between Respondent and the Union escalated. Kostelny, one of those whose discharge is in issue, testified that Sahadi convened a meeting of Respondent's carpenters in late July or early August, declaring that he was "having union problems with Bob Young," that he did not like the way Young "handled" the Union, and that Respondent's union carpenters "would have to go to work there on a nonunion basis" if there were "any more problems." This testimony was not controverted.

Then, by letter to Sahadi dated October 9, Young wrote:

> We have now had three meetings together and still have not resolved our problems at Fleur DuLac. I have dispatched eleven carpenters to your job. There are five of them left. There are approximately twenty to thirty carpenters on the job that were not dispatched by this Hall. This leaves me to assume that they are nonunion and that their wages and fringes are below the area standard.
>
> I don't know if you are aware of a fight on your job between a union carpenter and a nonunion carpenter. What the fight was about is immaterial. The union carpenter was laid off the next day. I was never contacted by your superintendent, John. In my opinion, it takes two people to have a fight. So, if there was any doubt about who started what, they both should have been laid off . . . .
>
> There was also a meeting held October 6, 1981, after work, with John Bergsma and the union carpenters on the job. The union carpenters were told that if the problems with the union were not solved,

[6] In context, it is plain that Potts, by mentioning the absence of an arrangement for making fringe benefit contributions, was not contending that Respondent had not committed itself to make such contributions for union members on its payroll. Rather, he was referring to the as yet unresolved problem of how to comply with the "written agreement" requirement for such contributions, as specified in the proviso to Sec. 302(c)(5) of the Act, in the absence of a collective-bargaining agreement. The problem was handled by Respondent's including with its July 1981 contributions a cover letter setting forth the commitment as understood by Respondent and stating that the cover letter "will constitute the written agreement" as required by the Act.

> they could continue working provided they dropped out of the union. This does not sound like we are working together.
>
> I would very much like to get together with you in the next few days to see if we can resolve the problems on our job. If we cannot resolve them, we could appear before an impartial arbitrator at a grievance hearing to settle the problems of hiring and the payment of fringes for the people performing carpenter work at the Fleur DuLac jobsite.

Sahadi replied by letter dated October 22, stating that "the substance of our understanding is set out in" Potts' June 9 letter to Bergsma, a copy of which had been sent to Young; that Respondent "has fulfilled all obligations of our understanding"; and that, while Sahadi would be "happy to meet and confer with" Young, Young's letter "does not raise any question requiring a meeting at the present time."

Young countered on about October 28 by filing a grievance against Respondent, alleging it to be in violation of the union-security, hiring hall, and fringe benefit provisions of the Union's master labor agreement. Respondent was bound by that agreement, so the Union contended, because Sahadi had signed an agreement with another Carpenters Union affiliate in 1969. On December 11, the United States District Court for the Eastern District of California granted Respondent's ex parte motion for an order temporarily restraining the Union from going to hearing on the grievance. On February 5, 1982, following a court hearing January 18, the restraining order was superseded by a preliminary injunction; and, by order dated May 18, after another court hearing March 22, the Union was permanently enjoined "from proceeding with any form of hearing or arbitration of the grievance," the Union's underlying premise having been rejected that Respondent was bound by the master labor agreement.

2. The discharges

Kostelny and Teuscher were discharged January 20, 1982, 2 days after the hearing from which the preliminary injunction emanated. Jordan and Rule were discharged January 23. Kostelny had been on the payroll since late May 1981; Teuscher, since late June; Jordan, since early July; and Rule, since September. All were carpenters and union members. Sahadi testified that Kostelny and Teuscher are "top flight" carpenters, that Jordan is "good," and that Rule is "an absolutely top-class layout man," but "the worst" as a mechanic.

The discharges were effected by Brad Scott, a carpentry foreman.[7] He informed Kostelny and Teuscher, who "partnered" on the Project, in a single conversation on January 20, after which he conducted them to the gate. He followed the same procedure with Jordan and Rule, also partners, on January 23. Kostelny testified that Scott, having said that he and Teuscher had "to go down the road," explained that Sahadi had decreed the action because "it was snowing," work "was slow," and they were not "getting much progress done." Kostelny asked, as he recalled, if "the entire job" was being shut down, and Scott said it was. Kostelny assertedly then remarked that he had "heard that the nonunion guys were going to stay and union guys were going," to which Scott replied, "I don't know, you guys just have to go."[8] Kostelny testified that Scott never "point-blank" said he was being let go because he "was union."

Teuscher recalled Scott's words as being more pointed. He testified that Scott stated: "You guys are going down the road. Mr. Sahadi is laying off all the union guys." Scott appended, according to Teuscher, that Jordan and Rule would be kept for the layout of some walls, after which they, too, would be sent "down the road."

Jordan testified that Scott advised him and Rule, on January 23, that they were being laid off because Sahadi was "cutting all ties with the Union"; and that Scott "hated" to see them go, but "could do [nothing] about it." Rule recalled Scott's stating that Sahadi "didn't want union carpenters on the job and wanted nothing to do with the Union"; and that, since Jordan and Rule were union members, he "was sorry" but he "had to lay [them] off."

The record is without Scott's version of the discharge conversations. He did not testify.

Bergsma was vacationing in Hawaii the week of the discharges. On his return the week following, according to Kostelny and Teuscher, they jointly confronted him, asking why they had been laid off when he "had promised [them] three years worth of work." Bergsma had induced him to leave another job, Kostelny testified, by assuring him that "there would be two or three years worth of work" on the Project; and Teuscher testified that, when he inquired about working on the Project and asked how much work there would be, Bergsma replied, "Oh, heck, we have three years of work."[9] Bergsma answered, as recounted by Kostelny, that Sahadi had come "all unglued" while Bergsma was in Hawaii; that Bergsma wanted Kostelny and Teuscher back "right away" and would "have to find out what was going on to straighten up the problem"; and that, if they did return, "it would more than likely have to be on a nonunion basis, because Fred [Sahadi] wanted to break all ties with the Union" and "all the union men were suppose[d] to get off the jobsite." Kostelny testified that he then asked, "[I]f we're going to come back to work on a nonunion basis, [would] 22.50 an hour be an out-of-line figure?" to which Bergsma replied that he "would not have any problems with that."

Teuscher described the encounter in substantially the same terms, although his version of Bergsma's answer to the opening question, why they were laid off, was more explicitly antiunion—that Sahadi "got into a tiff with the

[7] The parties stipulated that Scott is a supervisor for purposes of the Act.

[8] Kostelny testified that there had been "little rumbles throughout the project for that whole day that the whole job was going to be shut down on Friday, but the nonunion guys would be back to work on Monday morning."

[9] That he made these representations was not controverted by Bergsma.

business agent from the Union" and the discharges were "just to get rid of the union guys."

Bergsma, while testifying at some length, did not address this exchange.

Jordan testified that, about 2 weeks after he and Rule were discharged, he had a conversation with Bergsma and Scott in which he asked if he could have his job back if he "dropped out of the Union." Bergsma answered, according to Jordan, that he "would love to have [Jordan] back, and that he should report the next Monday." Jordan continued that, when he showed up for work as directed, Bergsma said there would be "a problem hiring [him] back as a nonunion carpenter," and that it would be necessary "to check" with Respondent's lawyers first. Bergsma said nothing about these conversations in his recital.

Concerning the origin of the decision or decisions to effect the discharges, and the underlying reasons, Bergsma testified that he had nothing to do with them, his first knowledge coming on his return from Hawaii. He first averred that he had "no idea" who had ordered them, not having been there, later conceding—"I would think so"—that the decision(s) had to have been Sahadi's or Scott's since "nobody else had anything to do with carpenters." Bergsma testified yet later that, when he asked Scott and the Project's architect, Nick Kromydas, about the discharges, "they told [him] . . . someone . . . told 'em to lay some carpenters off," but "never did give [him] no reason for the layoff." Bergsma ventured that, while not "absolutely positive," he thought this came from Kromydas, and that Kromydas also disclosed that Sahadi had given the order to "lay 'em off." Bergsma added, "Work was catching up, that's what [Kromydas] told me, and he had orders to lay some people off."

Kromydas did not testify.

Bergsma would have it that he never spoke with Sahadi about the discharges—"I don't think I did." He went on that, while he had "had a lot of conversations with Mr. Sahadi on the phone about carpenters," he did not think "it's necessarily union carpenters." Bergsma later relented that he could not remember any particular conversation with Sahadi about union carpenters, but "would say" they "probably" had such a conversation "at one time or another," although not before his departure for Hawaii.

Bergsma testified that he was not "really surprised" to learn about the discharges, "because . . . the weather was bad." Beyond that, he asserted, carpentry work "was nearing completion." "The only reasons" he could think of for the discharges, he testified, were "a lack of work, [and] the weather started catching up with us." He denied—"I don't think so, no"—that Kostelny, Teuscher, Jordan, and Rule were selected for discharge because Respondent "had to pay them a higher wage than the nonunion carpenters"; and stated that it was "pure coincidence" that they happened to be union members.

Sahadi testified that he customarily decides when layoffs are called for, leaving it to Bergsma to decide on "specific people." The "only specific instruction" he gave Bergsma, he stated, was, "Keep your best people to the end." With regard to the discharges in question, however, Sahadi testified that he was "not sure" whether Bergsma was party to the decisional process, having been "on vacation at this time." Sahadi later opined that "probably the decision was made prior to the time that [Bergsma] left" for Hawaii, and that he "would think" Bergsma "made the decision." As concerns his role in the decision(s), Sahadi testified that he had "no intimation" beforehand that "these particular people" were to be separated, and that he had "no reason to anticipate" it. Sahadi continued:

> [U]ltimately the responsibility was mine. . . . But at no time did I single out, at least that I can recall . . . people like Bob Rule and Marty [Kostelny] and Gar [Teuscher].

Sahadi testified that he and Bergsma never discussed the discharges, only to concede that the subject "could have come up in conversation." He enlarged:

> I don't think so. But it could have. And—and it wouldn't be unusual for me not to remember it. I mean, it—it was not a big thing until these charges were filed.

Regarding the reasons for the discharges, Sahadi testified that "it was a combination of things"—"we had run out of work and weather conditions precluded us from doing work." "And another reason," he asserted, "was that the working conditions were just plain dangerous." Sahadi elaborated that "the weather had turned totally intolerable" in January; that there was "ice all over the place," electrical cords for the power equipment were "literally frozen to the subfloor," the roofs "were unworkable," and "it was so cold . . . you couldn't hold a hammer." Sahadi proceeded:

> So we had reached a point where, as the severity of the winter continued, it became almost intolerable to go forward, and we just basically terminated the—the work because we weren't getting any productivity.

Whether Sahadi was speaking from personal observation when describing the January conditions, and, if so, when during that month, is unclear. As previously mentioned, he visited the site less frequently during the winter; and, while he was "sure" he was there in January, he could not recall when. Bergsma testified that he could not remember seeing Sahadi on the site in January.

Sahadi testified elsewhere, in explanation of the discharges, that in January:

> . . . we were slowly but surely winding down and trying to tighten up certain categories of the job; and as those categories were finished, to the extent we could finish 'em, then those people were laid off and were not rehired again until the weather broke in the spring.

Sahadi denied that the discharges were "to get rid of union employees." As if to underscore his indifference to union status, he testified when asked if the carpenters on

the payroll after January 23 were all nonunion, "I'd have to check the records."

As concerns his "instruction" that Bergsma keep his "best people to the end," Sahadi acknowledged that Kostelny, Teuscher, and Rule "fell into that category." Asked, then, if they were superior to those retained, Sahadi testified:

> [T]here's no question about it. The few people that were retained were dumbbell carpenters, do a little bracing here, put a little plywood up to keep the snow out of the buildings.

Sahadi hastened to add that this did not mean his instruction had been violated. He explained:

> What I'm saying is that we had a situation where the job had just come to a stop. When you're spread out over 18 acres with a million of dollars sticking up, you've got to have some people running around doing, you know, for a few hours a day, hopefully at the smallest hourly rate per day, menial things, tacking up plywood.

Kostelny, Teuscher, Jordan, and Rule were doing interior framing when discharged. Kostelny testified that he and Teuscher had been doing this "for some time," that it was "nowhere nears being completed," and that "skilled" carpenters were needed to do it. Teuscher testified that "there were a lot of very important jobs to do yet," and that they required "a skilled carpenter." Jordan testified that he "had plenty of work to do" when discharged; that "major interior framing" remained to be done; that "it was going to take an immense amount of time" because of the custom nature of the work;[10] and that "all the windows had to be put in" besides. Rule echoed the others that "there was work to do."

In addition to testifying that Bergsma assured them, about the time of their hire, that there would be 2 or 3 years of work, Kostelny and Teuscher related that they spoke with Bergsma shortly before Christmas 1981 about the prospect of their being "able to stay busy throughout the winter." Bergsma told them, according to Kostelny, that they "were some of [the] best boys on the job and . . . would be staying throughout the winter to go work in the boathouse and to go work underneath the roof on the various different projects." Teuscher's version of Bergsma's words was to the same effect: "You guys ain't going no place 'til this job is over. Don't worry about any work." Bergsma did not speak to this exchange in his testimony.

Jordan and Rule testified that, in a conversation with Scott about a week before their discharges, Scott spoke about himself teaming with one of them, and having another foreman, Joe Columbus, team with the other, to do interior framing and set windows until the weather moderated.

Kostelny, Teuscher, and Jordan all testified that the Project posed no unusual hazards when they were discharged. They particularized that the weather-exposed power cords presented no threat, Kostelny and Teuscher explaining that OSHA-required ground-fault interrupters ensured against shock, and Jordan noting that a problem would arise only if the cords were not properly grounded. Bergsma said nothing about hazardous conditions in his testimony.

The day before Kostelny and Teuscher were discharged, January 19, Respondent laid off two carpenters, both nonunion. The day of their discharges, it also released three nonunion carpenters, all of whom were back on the payroll in the week ending February 14. Earlier in January, three others were laid off, two of whom were nonunion. One of those two was recalled the week ending February 21. As earlier indicated, there were no reductions in force after the January 23 discharges of Jordan and Rule.

3. The alleged refusals to rehire

By telephone on March 4, 1982, Bergsma invited Kostelny, Jordan, Rule, Peter Gillis, and William Kelly to report for work the following Monday, March 8, telling them they would receive union wages and benefits. He also attempted, without success, to call Teuscher with the same message. Gillis previously had worked on the Project, as a union carpenter, from October 1981 until laid off December 31. Kelly, also a union carpenter, had worked on the Project from October 1981 until laid off January 16, 1982. Bergsma presumably was acting on Sahadi's say-so when making these overtures. Sahadi testified that he wanted Kostelny, Teuscher, and Rule back "so bad [he] could taste it," and that union wages and benefits therefore "were not even an issue."

On March 8, all but Rule of those called reported to the site at the appointed time, ready for work. Teuscher also reported. Rule, who had undergone surgery after his January discharge, was still disabled. Each of the five tendered to Bergsma a dispatch slip of the sort earlier described.

Bergsma announced that he "would not accept a dispatch slip," and the five said they could not go to work in that circumstance. As a result, none was hired. Bergsma conceded that, but for the slips, they would have been hired. He explained to them that he had been "told by our attorneys not to accept the slip" because of the recognitional language previously set forth.

The next day, March 9, the Union's Young demanded by telegram that Respondent immediately hire the five. The telegram further stated:

> They were refused work because they brought dispatches to the job, which is their union obligation. If they are not reinstated, we will have to take this mattter to the National Labor Relations Board.

Attorney Potts responded by letter dated March 11, stating in part:

> Fleur DuLac did not accept the referral slips containing recognition language in 1981 and it does not do so now. Your attempt to obtain recognition through the use of the referral slips is not well taken.

[10] Jordan testified, "Each piece of wood had to be cut special."

> The employees referred to in your letter were offered employment on March 8, 1982, under the same conditions that they were offered employment in the past year. That offer remains outstanding. Fleur DuLac does not recognize your union and does not intend to accept a self-serving boilerplate statement of recognition as a condition of employment of the employees in question.
>
> The restriction placed upon these five men by your union is the only bar to their employment.

On March 26, Young sent another telegram to Respondent, again demanding the immediate hire of the five carpenter-members. The telegram also stated:

> The use of the dispatch slips only serves to confirm their employment and the conditions of their employment and nothing else. You have no right to condition employment on these workers because of their union membership or activities.

In late March as well, according to Young, the Union's attorney, Roger, counseled him to "put the men on the job without a dispatch."[11] Young consequently informed each of the five, so he testified, that they were free to return to the Project without dispatch slips. Young initially testified that he so advised Kostelny, by telephone, on March 28, and that Kostelny and Teuscher called him back the same day for verification; that he told Gillis and Kelly, also by telephone, on March 28 or 29; and that he informed Jordan, in person at the union hall, on March 29, having earlier left a telephone message with Jordan's wife. Young later testified that he first advised the men of the new circumstance on "a work day," "more than likely Monday." March 28 was a Sunday. He testified still later that he "sometimes" makes calls "on the weekend" when he "can't get ahold of men" otherwise, and that he "must have called them on the 28th" inasmuch as he "sent them out [to the Project] on the 29th." Young testified, finally, that he could not remember if he made the calls on March 29 or 1 or 2 days before.[12]

Kostelny testified that Young called him on March 28, and that he and Teuscher then called Young back the same day. Teuscher testified that the return call occurred on about March 29. Gillis testified that Young's call came to him on March 29; and Kelly, that he heard from Young on March 28 or 29. Jordan testified that he also received word by telephone, not in person at the hall as Young would have it, Young having called him in late March or early April. Later that same day, according to Jordan, he chanced to see Bergsma in a grocery store, telling him about this latest development.

Kostelny, Teuscher, and Jordan testified that they visited the Project the day after receiving Young's go-ahead, apprising Bergsma of the Union's willingness to let them return without dispatch slips; and Gillis and Kelly testified that they spoke with Bergsma by telephone the day after, likewise telling him that they could return without slips.

Kostelny testified that Bergsma's response to him and Teuscher was that he "would like" to have them "come back to work," but would "have to consult the attorneys first" and would "get back with" them. Kostelny then asked, as he recounted, "What is this stuff that two weeks ago you would have hired us without a dispatch, and now you won't?" to which Bergsma answered: "I just don't know. I have to consult the attorneys." Teuscher recalled Bergsma's saying, "I'd like to have you, but I don't think my attorneys will allow it." Kostelny testified that he never did hear back from Bergsma.

Jordan testified that Bergsma told him, when he appeared at the site, that he "wanted" Jordan, but there was "no way that [Jordan] could come back to work." Bergsma also remarked, according to Jordan, that Young "was not running" the job. Gillis related that Bergsma's response to him was that Respondent could not take him back "on the advice of [its] lawyers"; and Kelly testified that Bergsma told him, simply, that Respondent "no longer needed [his] services."

Young testified that, learning about these latest refusals to hire later the same day, he called Bergsma, asking "how come." Bergsma replied, as Young recalled, that Young "would have to talk to" Potts to get the answer.

Bergsma denied being party to any conversations of the kind just described, averring that no one came to the site about March 29 asking to return to work; that no one told him on or in the week after March 29 that the union carpenters could return "without a referral slip"; and, indeed, that he had no recall that any of the union carpenters asked to return any time after March 8.

Seeking to bulwark Bergsma's testimony that none of the union carpenters visited the site about March 29, Respondent attempted to show, in the words of its counsel, that the Project was in the midst of a "horrible storm" at the time, that "many of the roads were closed off," and that the "area was paralyzed." It is undisputed, however, that Bergsma drove about 22 miles from his home to the Project on March 29; and Earl Hagadorn, the Project's civil engineer, testified that "the highway was open that day and we could reach the front gate." Further, a vehicle log maintained by gate attendants at the site reveals that 12 vehicles entered the premises by 9 a.m. March 29, that another 20 entered during the balance of the day, and that 34 exited that day. The log does not reflect any entry or exit by Kostelny, Teuscher, or Jordan. As its name implies, however, pedestrian ingress and egress ordinarily was not entered; and they testified that they walked in and out on March 29, having parked outside the gate as had been their practice while on the payroll.

By letter to Young dated March 29, ostensibly prompted by Young's March 26 telegram, Potts stated in part:

> In my March 11, 1982, letter you were advised that the five employees in question were offered jobs under the same conditions that were prevailing at the time their earlier employment was terminated.

[11] Roger did not testify.

[12] "The only way" he could give "a definite answer" with regard to when he made the calls, Young testified, would be "to get [his] phone bills from either the union hall or [his] personal phone at home." He added: "They'd be very hard to find. They'd be in boxes of bills. It would take hours." The bills were not provided.

> Those conditions did not include the restrictions contained in the referral slips. The employees in question did not accept Fleur DuLac's offer and subsequently other employees were hired. . . . Fleur DuLac does not intend to hire new employees with such conditions attached. Furthermore, the project has no current need for employees.

The letter said nothing about the union carpenters' having told Bergsma, on March 29, that they would be able to return without dispatch slips.

Roger, the Union's attorney, responded by letter dated April 6, declaring:

> The Union reiterates that the use of the dispatch slip is not intended to establish terms and conditions of employment which were [not] in existence as of the time that the workers were originally hired or when they were initially discharged. The use of the dispatch slip is only a record that in fact these workers are employed on this job, and we disclaim any attempt by you or your client to view it otherwise.

There is no hint in this letter that the Union had abandoned its insistence upon the dispatch slips as a condition of hire.

Potts countered by letter dated April 13. Referring to the objected-to language in the dispatch slips, he stated:

> That language is inconsistent with statement in your letter and adroitly worded disclaimers will not vary the fundamental truth that by the use of referral slips the union is trying to establish representative status.

Rule testified that, about June 1, 1982, he informed Young that he was recovered from his surgery and ready to go to work; and that Young suggested he call Bergsma, adding that a dispatch slip would not be necessary for his return to the Project. Rule continued that he then called Bergsma, saying that his operation had been "a success" and that he wished to return to work. Bergsma asked how he wanted "to come back," according to Rule; he answered, "As a union member and the whole bit";[13] and Bergsma responded that he could not hire Rule, "no way." Rule admittedly did not think he mentioned to Bergsma that he would not need a dispatch slip. Bergsma did not speak to this conversation in his testimony.

Rule's last previous conversation with Bergsma, apparently, was in early March, when Bergsma invited Rule and the other alleged discriminatees to return to work. At that time, according to Rule, he told Bergsma about his disability and that Young had said he would have "to have a dispatch" from the Union to return to work for Respondent, and Bergsma responded that he would not "allow a dispatch."

[13] Asked what he meant by "the whole bit," Rule testified, "Well, with the benefits and everything."

B. *Conclusions*

1. The discharges

It is concluded that Kostelny, Teuscher, Jordan, and Rule were chosen for discharge because of their union membership, and that the discharges consequently violated Section 8(a)(1) and (3) as alleged.

This conclusion is based on the totality of these factors:

1. Respondent and the Union were engaged in an ongoing dispute over the nature and legal incidents of their relationship, most recently manifested by a court hearing January 18—2 days before the discharges of Kostelny and Teuscher, and 5 before those of Jordan and Rule—in connection with Respondent's ultimately successful effort to enjoin the Union's grievance against it. That Sahadi mightily resented the Union's part in this dispute was revealed the preceding summer when he declared to Respondent's union carpenters that he was "having union problems" with Young, and that all the carpenters "would have to work there on a nonunion basis" if there were "any more problems."[14]

2. Scott, when informing Jordan and Rule of their discharges, cited Sahadi's desire to sever Respondent's ties with the Union.[15]

3. When challenged by Kostelny and Teuscher why they had been discharged, given that he had promised them "three years worth of work," Bergsma again stated that Sahadi wished to end all ties with the Union. Bergsma added that, if Kostelny and Teuscher were to return, it probably would have to be on a nonunion basis.[16]

4. When asked by Jordan, in early February, if he could return if he "dropped out of the Union," Bergsma told him to report the next Monday.[17]

5. The selection for discharge of Kostelny, Teuscher, Jordan, and Rule, all concededly excellent carpenters, while retaining what Sahadi termed as "dumbbell carpenters," breached Sahadi's own directive to "keep [the] best people to the end."

6. By denying involvement in the discharge decisions, Sahadi and Bergsma undermined their competence to testify knowingly about the discharges; and, by implicating each other in the decisional process in the face of those denials, they severely impaired their own and each other's overall credibility with regard to those actions. That impairment was compounded, moreover, by their often deficient testimonial demeanor, by their ready resort to evasion when examined by other than Respond-

[14] Kostelny, uncontroverted, is credited that Sahadi so spoke.

[15] The unchallenged and substantially consistent testimony of Jordan and Rule is credited that Scott said this.

[16] Kostelny's and Teuscher's renditions of this encounter, coincident in their essentials and unrefuted, are credited. Because of their discrepant versions of Scott's words when he discharged them, however, no weight adverse to Respondent is given either version of that event, even though Respondent did not come forward with Scott's account.

[17] Jordan's uncontroverted description of this incident is credited, as is his further testimony that Bergsma later reneged, citing a need "to check" with Respondent's lawyers.

ent's counsel,[18] and by Respondent's failure to bring forth Scott, who effected the discharges and thus likely had knowledge of the underlying deliberations, or Kromydas, identified by Bergsma as being a percipient witness. Consequently, even if there were not countervailing evidence, the reasons advanced by Sahadi and Bergsma, one or both, for a reduction in force of a magnitude embracing Kostelny, Teuscher, Jordan, and Rule—bad weather, hazardous conditions, lack of work—were unpersuasive and are rejected; and the reason offered by Sahadi for eliminating those four rather than the surviving "dumbbell carpenters"—that the overriding consideration was not skill but "the smallest hourly rate per day," inasmuch as only "menial things" remained to be done—likewise is not credited.

7. Apart from Sahadi's and Bergsma's poor credibility concerning the discharges, Kostelny, Teuscher, Jordan, and Rule were impressively believable that there was ample work for them to do, weather notwithstanding, and that conditions were not unusually hazardous. Further in that vein, Bergsma told Kostelny and Teuscher when hired that they could count on as much as 3 years of steady work, and assured them only a month or so before their discharges that they "would be staying throughout the winter";[19] and Scott discussed with Jordan and Rule, only about a week before their discharges, new interior work teaming arrangements until the weather eased.[20]

8. Union member carpenters never again were employed on the Project.

Respondent argues, of course, that unlawful motive in the discharges is belied by its having terminated a number of others, more of whom were nonmembers than members of the Union, starting the preceding fall, including five nonmembers on January 19 and 20, and by its having offered rehire to the four in question in early March. These circumstances, however, do not begin to offset the array of factors just itemized in support of the contrary conclusion. That others were terminated from time to time in apparent disregard of union membership, beyond showing the never contested fact that legitimately based reductions in force occurred during the winter, is of little moment. And that the four later were offered rehire is of slight redemptive value considering that, despite their exceptional abilities, the offers were not forthcoming until some 6 weeks after their discharges, during which time the carpenter complement more than tripled.

2. The alleged refusals to rehire

March 8.[21] It is concluded that Respondent's March 8 refusal to rehire Kostelny, Teuscher, Jordan, Gillis, and Kelly was not unlawful.

Although the parties have cited no authority on point, and none has been found, it would seem to go without saying—perhaps that explains the apparent paucity of authority—that an employer properly can decline to accept referral of a union member when to do otherwise, because of recognition language in the dispatch slip, would place it at risk of being deemed to have recognized a union not legally entitled to representative status.[22]

March 29. It is concluded, as a matter of fact, that Respondent did not refuse to rehire Kostelny, Teuscher, Jordan, Gillis, and Kelly about March 29; and that the allegation that it violated the Act by so doing therefore is without merit.

The grounds for this conclusion are these:

1. That Young defended the use of the dispatch slips in his March 26 telegram to Respondent, and that Roger did the same in his April 6 letter to Potts, compellingly indicates the absence of an intervening relinquishment by the Union of its insistence on the dispatch slips, and further indicates that the alleged discriminatees never presented themselves for hire on that basis.[23]

2. Young's testimony was unconvincing that Roger told him to "put the men on the job without a dispatch," as was his additional testimony that he advised the alleged discriminatees accordingly. Beyond the impeachment implicit in his March 26 telegram and Roger's April 6 letter, his demeanor when rendering this testimony was markedly lacking in conviction, his supposed conversation with Roger was devoid of corroboration and without any but the scantest of credence-giving foundational detail, his descriptions of his alleged conversations with the five members were fraught with telltale vagueness and speculation, and his version of how he informed Jordan that slips no longer would be needed was in direct contradiction of Jordan's account.

3. The testimony of the five alleged discriminatees on this issue likewise was unconvincing. Both their demeanor and the content of their recitals gave the impression of collaborative preprogramming; and Jordan's account, as just noted, conflicted diametrically with Young's.

4. Bergsma, while not an exemplar of probity in certain respects previously mentioned, was believable in his denials that anything transpired around March 29 of the sort described by the alleged discriminatees, and in his additional denial that Young called him about January 29 to ask "how come" the five had not been hired.

In concluding that there was no refusal to rehire about January 29, no weight is given the nonmention in the vehicle log of Kostelny, Teuscher, or Jordan, or to the possibility that the area was beset by a storm at the time.

---

[18] Sahadi, recurrently professing an inability to understand the question, was especially lacking in forthrightness. At one point in his cross-examination, he was moved to volunteer, "I'm not trying to be difficult, Judge." In fairness, however, it should be noted that some of the questions put to him were artlessly crafted.

[19] The substantially conforming and uncontroverted testimony of Kostelny and Teuscher is credited that Bergsma made these statements.

[20] Jordan's and Rule's consistent and unrefuted versions of this incident are credited.

[21] The complaint contains no allegation regarding the March 8 refusals to rehire. Counsel for the General Counsel declared during the trial, however, that their legality "should be considered and addressed," the issue was fully litigated, and Respondent argues the matter in its brief.

[22] That Respondent, from time to time after Young's June 8 presentation of dispatch slips for members previously hired, may have accepted such slips when newly hired union carpenters first reported for work does not detract from this conclusion. Given the pendency, at the time of the March 8 rejection of the slips, of the District Court's final disposition whether Respondent was subject to the Union's master labor agreement, Respondent had valid and pressing reason to be skittish about the recognitional language in the slips.

[23] Furthermore, neither of the amended charges, *the first of which was filed March 30*, refers to a refusal to rehire on or about March 29.

June 1. It is concluded that the refusal to rehire Rule about June 1 was not improper.

Although supposedly told by Young that he would not need a dispatch slip to return to the Project, Rule concededly doubted that he mentioned this to Bergsma. He recalled instead telling Bergsma, when asked how he wanted to come back, "As a union member and the whole bit." This answer would imply, Rule having told Bergsma in March that he would have "to have a dispatch" to return and there being no credible evidence that Respondent since had learned otherwise, that rehire remained contingent upon Respondent's acceptance of a dispatch slip, recognitional language included.

As earlier concluded in connection with the March 8 refusals to rehire, an employer properly can decline to hire in that circumstance, the union's not being legally entitled to representative status.[24]

CONCLUSIONS OF LAW

By its discharges of Martin Kostelny and Lyle Teuscher on January 20, 1982, and its discharges of Raymond Jordan and Robert Rule on January 23, 1982, Respondent violated Section 8(a)(1) and (3) of the Act.

Respondent did not otherwise violate the Act as alleged or contended.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Fleur DuLac, a joint venture composed of Fred Sahadi and Fred Andrews, Campbell, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee because of that employee's membership in or support of Carpenters Local Union 2035, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Martin Kostelny, Lyle Teuscher, Raymond Jordan, and Robert Rule for any loss of earnings and other benefits suffered as a result of its unlawful discharge of them in January 1982, with interest on lost earnings;[26] and, if it has not already done so, and if such employment is still available on the Fleur DuLac Project, offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.[27]

(b) If it has not offered reinstatement as prescribed in the preceding paragraph, and no longer can do so because all substantially equivalent carpentry work on the Fleur DuLac Project has been completed, inform Kostelny, Teuscher, Jordan, and Rule, in writing, that they will be considered eligible for employment in the future at any of its projects, on a nondiscriminatory basis, should they choose to apply for employment at any of them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at any and all of its jobsites within the jurisdiction of the above-named Union copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Send copies of the aforementioned notice, duly signed, by first-class United States mail, to Kostelny, Teuscher, Jordan, and Rule, and to all other carpenters employed on the Project at any time from January 20 through January 23, 1982, at their last known addresses.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that, except as otherwise decided, the complaint is dismissed.

---

[24] Young's March 26 telegram and Roger's April 6 letter, both professing to explain to Respondent the purpose of the dispatch slips, were of such ambiguity that Respondent's continued skepticism over the slips' recognitional language, as exemplified by Potts' April 13 letter to Roger, cannot be said to have been unreasonable.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[27] Whether the offers to rehire made March 4, 1982, satisfied Respondent's obligation to offer reinstatement to those unlawfully discharged, and effected a tolling of backpay, is left to the compliance phase of this proceeding.

[28] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Monroe Auto Equipment Division of Tenneco Automotive *and* Employee Committee of Monroe Auto Equipment Co., Petitioner. Case 10–RD–859

6 December 1984

DECISION ON REVIEW

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 18 November 1983 the Regional Director for Region 10 issued a Decision and Direction of Election in the above-entitled proceeding[1] finding, inter alia, that 71 employees of the Employer who had been laid off on 7 September 1982 and had not been recalled as of 18 November 1983 had a reasonable expectancy of being recalled at a later time and therefore were eligible to vote in the decertification election petitioned for by the Petitioner. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer and the Petitioner both filed timely requests for review of the Regional Director's decision contending, inter alia, that the Regional Director's finding that the 71 laid-off employees had a reasonable expectancy of recall and were eligible to vote in the election was clearly erroneous and departed from established Board precedent. The Intervenor subsequently filed a statement in opposition to the Employer's request for review.

The Board, by telegraphic order dated 25 January 1984, granted the Employer's and the Petitioner's requests for review with respect to the Regional Director's finding that the 71 laid-off employees had a reasonable expectancy of recall and were eligible to vote in the election.[2] Thereafter, the Intervenor filed a brief in support of the Regional Director's decision, and the Petitioner filed a memorandum of law in opposition to the Regional Director's decision. The Petitioner also filed a motion to reopen the record to admit additional evidence, and the Intervenor filed a response in opposition to the Petitioner's motion to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issue under review, along with all of the documents filed by the parties, and makes the following findings.

The Employer, a Delaware corporation with Michigan headquarters, operates a facility in Hartwell, Georgia, which manufactures shock absorbers and struts for automobiles. Prior to 7 September 1982 the Hartwell facility was devoted primarily to the manufacture of shock absorbers and struts for the new-car market and secondarily to the manufacture of shock absorbers and struts for the replacement part market. Since at least early 1978 the Intervenor has been the collective-bargaining representative of a bargaining unit composed of the production and maintenance employees at the Hartwell facility. The most recent collective-bargaining contract between the Employer and the Intervenor, which took effect on 15 December 1980, provided that it would remain in effect until 16 December 1983 and from year to year thereafter unless either one of the parties gave a written notice of termination at least 60 days in advance.

On 7 September 1982 the Employer laid off 124 of the employees in the bargaining unit.[3] According to the uncontradicted testimony of Hartwell Plant Personnel Manager Charles Byrd, the Employer instituted the 1982 layoff primarily because the nation's new-car industry had entered a serious sales slump and secondarily because the Employer's Michigan headquarters officials had decided to transfer the manufacture of shock absorbers and struts of the replacement part market out of the Hartwell facility. The layoff of 124 bargaining unit employees was accompanied by the layoff of 26 salaried individuals, including 15 individuals who were supervisors or foremen and directly supervised bargaining unit employees. After the layoff of 124 bargaining unit employees and 26 salaried individuals was carried out, the operation of the Hartwell facility was consolidated from two shifts into one shift and the positions of the salaried individuals who were laid off either were combined with the positions of salaried individuals who were not laid off or were eliminated altogether.

At the time the 1982 layoff was announced, the Employer's Michigan headquarters issued a press release describing the layoff as "a response to the current soft market demand" in the new-car market and quoting Company Director of Human Resources G. D. Gieske as saying, "Although industry analysts are not predicting an increase in demand in the near future, we look forward to the day that our Hartwell plant returns to its former level of production." At the same time, Company Manager of Manpower Development John Wein-

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local Union No. 1427 intervened in this proceeding.

[2] The Board denied the requests for review in all other respects.

[3] The Regional Director's statement that the Employer laid off only 123 of the employees is not borne out by an examination of the Employer's documentary and testimonial evidence.

garten and Hartwell Plant Personnel Manager Bryd told Union President Thomas Herring that the Employer was instituting the layoff because new-car sales were down and that they hoped that new-car sales would "pick back up" and the Employer's business would "pick back up." According to the uncontradicted testimony of Byrd, Byrd at no time told any of the laid-off employees or the Intervenor's officials either that the layoff was temporary or that the layoff was permanent. According to the uncontradicted testimony both of Byrd and of Herring, Byrd at no time sent written notices or letters to any of the laid-off employees or the Intervenor's officials stating that the employees did not have a reasonable expectancy of being recalled and at no time told any of the Intervenor's officials that the employees did not have a reasonable expectancy of being recalled. Bryd testified without contradiction that he told those of the laid-off employees who asked him whether they would be called back "any time soon" that the Employer did not have "any reasonable expectation of calling anyone back in the near future because of the economic situation," that the Employer was "tied directly with the new car market," and that "until the new car market . . . itself came out of the slump [the Employer] would not be in a position to call anyone back."

On 1, 6, 9, and 13 June 1983 and 18 August 1983 the Employer invited a total of 32 of the bargaining unit employees included in the 1982 layoff to return to work on a temporary basis. Twenty-nine of the employees accepted the invitation and were reinstated on a temporary basis; three of the employees declined the invitation and retained their rights as laid-off employees in accordance with the provisions of the collective-bargaining contract. On 15 August 1983 and 26 September 1983 the Employer invited a total of 53 of the bargaining unit employees included in the 1982 layoff to return to work on a permanent basis. Forty-six of the employees accepted the invitation and were reinstated on a permanent basis; seven of the employees declined the invitation and were terminated as company employees in accordance with the provisions of the collective-bargaining contract. The 1983 permanent recalls included 29 of the employees included in the 1983 temporary recalls. None of the salaried individuals included in the 1982 layoff was invited to return to work either at the time of the 1983 recalls or at any other time.

According to the uncontradicted testimony of Hartwell Plant Personnel Manager Byrd, the Employer instituted the 1983 temporary recalls because the Employer was experiencing an increase in strut production requirements which Michigan headquarters officials predicted would last about 90 days.[4] According to the uncontradicted testimony of Byrd, the Employer instituted the 1983 permanent recalls because headquarters officials decided that the Employer was not going to experience lower strut production requirements again. Byrd testified without direct contradiction that after the 1983 permanent recalls were carried out, company officials concluded that the 53 employees included in the 1983 permanent recalls would be sufficient to meet the Hartwell facility's planned production schedule for the rest of 1983 and that the 71 employees included in the 1982 layoff and not included in the 1983 permanent recalls did not have a reasonable expectancy of being recalled. Byrd also testified without direct contradiction that at the time of hearing on 3 November 1983, he continued to consider that the 71 employees included in the 1982 layoff and not included in the 1983 permanent recalls did not have a reasonable expectancy of being recalled.

The collective-bargaining contracts between the Employer and the Intervenor have always provided that laid-off employees automatically lose all seniority and are terminated if they are not recalled before the expiration of a period of 15 months or a period equal to their plant seniority, whichever period is shorter. From the beginning of 1979 until the time of the 1982 layoff, 360 bargaining unit employees included in layoffs at the Hartwell facility were not recalled before the expiration of the applicable period and were accordingly terminated. Of the 360 employees so terminated, 12 were subsequently rehired.

Undisputed documentary evidence introduced by the Employer indicates that from June 1979 until November 1983, the number of bargaining unit employees at the Hartwell facility were reduced from 630 employees to 301 employees. The same evidence indicates that from June 1979 until November 1983, the monthly productivity of bargaining unit employees at the facility was steadily increased from 50.7 units per employee to 93 units per employee. Hartwell Plant Personnel Manager Byrd testified without contradiction that since June 1979, the Employer has had a companywide management-by-objectives program containing guidelines

[4] Although Byrd testified that the increase in strut production requirements was expected to last about 90 days, the evidence does not indicate exactly how long the temporary recalls were expected to last. The memoranda from Bryd to Hartwell Plant Senior Accountant Gene Cleveland announcing the temporary recalls stated that the employees involved would be used as "spares" and that the employees' jobs, rates, and departments could vary from day to day. The collective-bargaining contract states that temporary employees are hired "for a designated (but limited) period of time such as, but not limited to, during the summer vacation period or during the Christmas holidays."

which provide that every facility must try to reduce its labor costs and its material costs by 10 percent a year. According to the uncontradicted testimony of Byrd, the Hartwell facility has met the guidelines every year.

Since at least 1981, the Employer has subcontracted out some of the janitorial work at the Hartwell facility to other employers. Since the 1982 layoff, the Employer has had from about 7000 to about 21,000 of the shock absorbers manufactured each week at the facility sorted and packed by handicapped adults at a nearby center for the handicapped. At the time of the hearing, the Employer was using independent contractors to repaint the facility.

Hartwell Plant Personnel Manager Byrd testified without contradiction that at the time of the institution of the Employer's management-by-objectives program, Michigan headquarters officials decided that it would be more cost-effective for every facility to meet production requirements by having existing employees work overtime rather than by hiring additional employees. Byrd testified without contradiction that employee fringe benefits at the Hartwell facility are equal to about 35 percent of regular employee wages and that having existing employees work overtime does not require the Employer to pay additional fringe benefits. Undisputed documentary evidence introduced by the Employer indicates that from January 1979 until October 1983, the quarterly number of hours of overtime worked at the Hartwell facility was increased from about 4805 hours to about 94,563 hours and the quarterly percentage of the total number of hours worked at the facility which was composed of overtime was steadily increased from 2.2 percent to 20.8 percent. Seven bargaining unit employees testified without contradiction that during the 2 or 3 months immediately preceding the hearing, they and a number of other bargaining unit employees regularly worked from about 8 hours to about 60 hours of overtime a week. According to the undisputed testimony of several of the bargaining unit employees, company officials at no time told them either that the existing level of overtime would be maintained or that the existing level of overtime would be reduced. According to the undisputed testimony of Bryd, company officials did not have any intention at the time of the hearing that the existing level of overtime would be reduced.

Hartwell Plant Personnel Manager Byrd testified without contradiction that the Employer added American Motors as a customer at some time after the 1982 layoff and that he was aware that at some time Chrysler Corporation, another one of the Employer's customers, experienced a dramatic increase in sales. Byrd also testified without contradiction that the Hartwell facility is the only strut manufacturer in Georgia and that that fact has significantly increased the facility's production requirements. According to Union President Herring, company officials announced around July 1983 that they wanted the Hartwell facility's daily strut production to be increased from 6500 units to 10,000 units. Two shipping department employees testified that during the 2 months immediately preceding the hearing, the volume of shock absorbers and struts shipped from the facility increased noticeably; one shipping department employee testified that the volume of shock absorbers and struts did not increase noticeably. Undisputed documentary evidence introduced by the Employer indicates that in April, June, August, and October 1983, respectively, the facility's monthly production of shock absorbers and struts was 24,900 units, 25,500 units, 24,400 units, and 28,100 units.

The Board has traditionally held that laid-off employees are eligible to vote in a Board-conducted representation election only if they have a reasonable expectancy at the time of the election of being recalled in the near and foreseeable future. *Lennox Industries*, 250 NLRB 58 (1980); *Allied Products Corp.*, 220 NLRB 634 (1975); *Marley Co.*, 131 NLRB 866, 869 (1961). In determining whether laid-off employees have a reasonable expectancy of recall, the Board evaluates "objective factors" which include "the employer's past experience, the employer's future plans, the circumstances of the layoff, and what the employee[s] w[ere] told about the likelihood of recall." *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983). Accord: *D. H. Farms Co.*, 206 NLRB 111, 113 (1973). After evaluating all of the objective factors which are present in this case and which we have described in detail above, we conclude, in disagreement with the Regional Director, that the 71 Hartwell employees included in the 1982 layoff and not included in the 1983 permanent recalls did not have a reasonable expectancy of recall and therefore were not eligible to vote in the decertification election petitioned for by the Petitioner.

In concluding that the 71 laid-off employees do not have a reasonable expectancy of recall in the near and foreseeable future, we place particular emphasis on the extensive and undisputed record evidence indicating that the Employer has long been engaged in and continues to be committed to a conscious effort to reduce the size of the Hartwell facility's work force. As we have described in detail above, undisputed evidence shows that of the 360 bargaining unit employees who were included in layoffs at the facility during the

approximately 3-1/2 years preceding the 1982 layoff and were not recalled before the expiration of the period specified in the collective-bargaining contract, only 12 were ever rehired.[5] Undisputed evidence shows that the 1982 layoff itself was instituted both because the new-car industry had entered an extended sales slump and because headquarters officials had decided to transfer the manufacture of shock absorbers and struts for the replacement part market out of the facility altogether. Undisputed evidence shows that of the 15 supervisory salaried individuals and the 11 nonsupervisory salaried individuals who were also included in the 1982 layoff, none was ever recalled. Undisputed evidence shows that during the approximately 3-1/2 years preceding the hearing, the number of the bargaining unit employees at the facility was reduced by about 52 percent and the productivity of the bargaining unit employees was increased by about 83 percent. Undisputed evidence shows that during the approximately 3-1/2 years preceding the hearing, the Employer reduced the facility's labor costs by at least 10 percent every year and that at the time of the hearing, the Employer planned to continue to reduce the facility's labor costs by at least such a percentage every year. Undisputed evidence shows that during the approximately 3-1/2 years preceding the hearing, the quarterly number of hours of overtime worked at the facility was increased about twentyfold and the quarterly percentage of the total number of hours worked which was composed of overtime was increased about ninefold. Finally, undisputed evidence shows that during the approximately 3-1/2 years preceding the hearing, the Employer believed that it would be more cost-effective for the facility to meet production requirements by having existing employees work overtime rather than by hiring additional employees and that at the time of the hearing, the Employer did not intend to reduce the existing level of overtime at the facility. Taken together, the foregoing factors virtually compel us to conclude that the Employer is not reasonably likely to increase the size of the Hartwell facility's work force in the near and foreseeable future. Indeed, if the consistent patterns and the conscious policies of the past 4 years are continued, the Employer may reduce the size of the facility's work force still further. See, e.g., *All-American Distributing Co.*, 221 NLRB 980, 981 (1975) (laid-off employees had no reasonable expectancy of recall because, inter alia, none of employees laid off in the preceding year was ever recalled); *Sierra Lingerie Co.*, 191 NLRB 844, 845 (1971) (laid-off employee had no reasonable expectancy of recall because, inter alia, employer phased out one of its two lines of production and decided it would be more cost-effective for the other line to hire already trained outside employees than to retrain laid-off employees).

In addition, we place particular emphasis on the equivocal and uncontradicted record evidence indicating that the Employer has never said anything either to the 71 laid-off employees or to the Intervenor suggesting that the employees have a reasonable expectancy of recall in the near and foreseeable future. There is no record evidence showing that any of the Employer's officials ever told any of the laid-off employees or the Intervenor's officials that the employees had a reasonable expectancy of being recalled. On the contrary, as we have described in detail above, undisputed evidence shows that Hartwell Plant Personnel Manager Byrd never told any of the laid-off employees or the Intervenor's officials that the 1982 layoff was temporary. In addition, undisputed evidence shows that Michigan headquarters officials issued a press release at the time of the layoff stating that the layoff was "a response to the current soft market demand" and that "industry analysts [were] not predicting an increase in demand in the near future . . . ." Finally, undisputed evidence shows that Bryd told those of the laid-off employees who asked him whether they would be called back "any time soon" that the Employer did not have "any reasonable expectation of calling anyone back in the near future . . . ." The fact that all of the Employer's statements which have specifically addressed the question have indicated that the 71 laid-off employees would probably not be recalled in the near and foreseeable future strongly supports our conclusion that the employees do not have a reasonable expectancy of recall. See, e.g., *Lennox Industries*, 250 NLRB at 58 (laid-off employees had no reasonable expectancy of recall because, inter alia, employees were told that the layoff was "indefinite" and that they should accept other employment if offered); *Tomadur, Inc.*, 196 NLRB 706, 707 (1972) (laid-off employees had no reasonable expectancy of recall because, inter alia, supervisor not only told him to find other work but also gave no estimate as to duration of the layoff and no specific indication as to when, if ever, he would be recalled).

[5] The contractually specified period during which laid-off employees must be recalled to avoid being terminated expired for employees included in the 1982 layoff at the latest on 7 December 1983, 34 days after the close of the hearing and 19 days after the issuance of the Regional Director's decision. None of the parties has ever offered any evidence or made any claim, either at the time of the hearing or at any subsequent time, that any of the employees included in the 1982 layoff and not included in the 1983 recalls either was likely to be recalled or was in fact recalled by 7 December 1983.

Finally, we also emphasize the repeated and unequivocal record evidence indicating that the Employer itself considered that the 71 laid-off employees do not have a reasonable expectancy of recall in the near and foreseeable future. As we have described in detail above, Hartwell Plant Personnel Manager Bryd testified without direct contradiction that after the 1983 permanent recalls were carried out, company officials concluded that the 71 laid-off employees did not have a reasonable expectancy of being recalled. Bryd also testified without direct contradiction that at the time of the hearing, he continued to consider that the 71 laid-off employees did not have a reasonable expectancy of recall. Since the foregoing testimony is directly contradicted by no evidence and is circumstantially corroborated by extensive evidence, the testimony also supports our conclusion that the 71 laid-off employees do not have a reasonable expectancy of recall. See, e.g., *Lennox Industries*, supra, 250 NLRB at 58 (laid-off employees had no reasonable expectancy of recall because, inter alia, employer indicated that it had no plans to recall employees in the near future); *Allied Products Corp.*, supra, 220 NLRB at 634 (laid-off employees had no reasonable expectancy of recall because, inter alia, witness for employer testified that the possibility of recalling employees was quite remote).

In concluding that the 71 employees included in the 1982 layoff and not included in the 1983 permanent recalls had a reasonable expectancy of recall, the Regional Director relied on a number of factors which he interpreted as indicating that the Hartwell facility's production and manpower requirements had increased significantly since the 1982 layoff and would continue to increase for the foreseeable future. The factors in question included a purported "dramatic increase" and "general revitalization" in the nation's new-car market in the months immediately preceding the hearing; a purported increase in the volume of shock absorbers and struts shipped from the Hartwell facility during the 3 months immediately preceding the hearing; the Employer's announcement around July 1983 that the facility's daily strut production was supposed to be increased from 6500 units to 10,000 units; the facility's status as the only strut manufacturer in Georgia; the addition of American Motors as one of the Employer's customers since the 1982 layoff; the marked increase in the facility's use of overtime since the 1982 layoff; and the permanent recall of 53 of the facility's employees since the 1982 layoff. For a number of reasons, we find that the factors relied on by the Regional Director do not warrant the conclusion reached by the Regional Director.

First, we note that the record contains little specific evidence concerning either the size or the significance of the increase in the Hartwell facility's production requirements since the 1982 layoff. Although Hartwell Plant Personnel Manager Byrd acknowledged that he was aware that at some time Chrysler Corporation experienced a dramatic increase in sales, the record contains no evidence either supporting the Regional Director's conclusion that the nation's new-car market as a whole experienced a "dramatic increase" and "general revitalization" in the months immediately preceding the hearing or indicating that such a phenomenon, if it occurred, directly affected the facility's production requirements. Compare *Lennox Industries*, supra, 250 NLRB at 58 (determination of expectancy of recall should be based on record evidence rather than "on mere speculation on the future of the nation's economy"). Although two shipping department employees testified that the volume of shock absorbers and struts shipped from the facility increased noticeably during the 2 months immediately preceding the hearing, the record shows that one of the two employees acknowledged that some of the purported increase may have represented an increase in parts manufactured elsewhere and simply shipped from the facility and that a third shipping department employee testified that the volume of shock absorbers and struts shipped from the facility did not increase noticeably during the 2 months preceding the hearing. The only documentary evidence in the record concerning the increase in the facility's production requirements is a company chart indicating that in April, June, August, and October 1983, respectively, the facility's production of shock absorbers and struts was 24,900 units, 25,500 units, 24,400 units, and 28,100 units, and such evidence does not establish either that production requirements have increased at a steady and predictable rate during the recent past or that production requirements are likely to increase at such a rate for the foreseeable future.

Second, we note that the record does not indicate that a majority of the factors relied on by the Regional Director occurred after the permanent recall of 53 of the Hartwell facility's employees in 1983. The record evidence in no way suggests that either the facility's status as the only strut manufacturer in Georgia or the addition of American Motors as one of the Employer's customers was not a factor until after the 1983 permanent recalls. On the contrary, the record evidence unequivocally shows that the announcement around July 1983 that the facility's daily strut production was supposed to be increased from 6500 units to 10,000 units occurred before the 1983 permanent recalls

and that the increase in the facility's use of overtime had been plainly present since January 1979. Hartwell Plant Personnel Manager Byrd testified in effect that the Employer believed that the 1983 permanent recalls would be sufficient to meet the increase in the facility's production requirements for the foreseeable future, and the fact that a number of the factors relied on by the Regional Director occurred before the recalls supports such a brief.

Third, we note that the record indicates that the increase in the Hartwell facility's production requirements has been accompanied by striking increases both in the productivity of the facility's employees and in the facility's use of overtime. The record evidence undisputedly shows that from the month before the 1982 layoff to the month before the hearing, the productivity of the facility's employees was increased by 6-1/2 percent. In addition, the record evidence undisputedly shows that from the half year immediately preceding the 1982 layoff to the half year immediately preceding the hearing, the facility's use of overtime was increased by about 140 percent. Finally, Hartwell Plant Personnel Manager Byrd testified in effect that the Employer has had a companywide policy of meeting production requirements by using overtime rather than by hiring additional employees for the past 4 years and that the Employer does not have any intention of reducing the Hartwell facility's use of overtime for the foreseeable future. All of the foregoing factors virtually compel us to conclude that the striking increases in the productivity of the facility's employees and in the facility's use of overtime, coupled with the permanent recall of 53 of the facility's employees, are likely to be sufficient to meet the increase in the facility's production requirements for the foreseeable future.

The Regional Director found that the Employer's use of overtime was not likely to meet the increase in the Hartwell facility's production requirements for the foreseeable future in essence because the continued payment to employees of time-and-a-half and double-time pay would eventually prove too expensive and the continued use of employees to work many hours of overtime would eventually prove too exhausting. The Regional Director's reasoning, however, ignores the fact that the record indicates that the Employer does not have to pay existing employees who work overtime the 35-percent fringe benefits it would have to pay additional employees whom it might hire and that a sizeable segment of the facility's existing employees have not been working many hours of overtime and so are in a position to take over the overtime burden from employees who have been working such overtime and might not be able to continue to do so. More fundamentally, the Regional Director's reasoning in effect substitutes the Regional Director's business judgment for the Employer's. The question before us is not what steps we or the Regional Director believe the Employer ought to take to meet the facility's production requirements, but what steps the Employer, in the legitimate exercise of its own business expertise and experience, is in fact likely to take. The undisputed record evidence requires us to conclude that the step the Employer is likely to take is to continue to apply its long maintained and consistently applied companywide policy of meeting production requirements by having existing employees work overtime rather than by hiring additional employees.

In contending that the 71 laid-off employees have a reasonable expectancy of recall, the Intervenor, in addition to relying on the factors relied on by the Regional Director, relies on the fact that the Empoyer has never explicitly told the employees that they do not have a reasonable expectancy of recall. As we have already emphasized, however, the undisputed record evidence shows that the Employer issued a press release at the time of the 1982 layoff stating that the Hartwell facility did not face an increase in production requirements "in the near future" and that Hartwell Plant Personnel Manager Byrd stated to those employees who asked him whether they would be called back "any time soon" that the facility did not have "any reasonable expection of calling anyone back in the near future . . . ." The foregoing statements unmistakably indicated to the employees that they did not have a reasonable expectancy of being recalled in the near and foreseeable future, and the record evidence does not show that the Employer has ever made any statement to any of the employees indicating otherwise.

In addition, the Intervenor relies on the fact that the Hartwell facility has a policy of meeting needs for additional employees by rehiring former employees rather than by hiring new employees. The question, however, is not whether the facility is likely to meet a need for additional employees by rehiring the 71 laid-off employees, but whether the facility is likely to face a need for additional employees at all. As we have already explained, the undisputed record evidence requires us to conclude that the facility is not likely to face a need for additional employees in the near and foreseeable future.

Finally, the Intervenor relies on the fact that the Employer has subcontracted out some of the Hartwell facility's work to other employers since the 1982 layoff. The fact that the Employer has subcontracted out some of the facility's work, how-

ever, in no way indicates that the Employer is likely to recall the 71 laid-off employees in the near and foreseeable future. On the contrary, the fact indicates, as do many of the other facts established by the record, that the Employer has followed a conscious policy of reducing the size of the facility's work force in the past and is likely to continue to follow such a policy in the future.

The Intervenor repeatedly insinuates that the Hartwell facility's use of overtime and the facility's subcontracting out of work are steps deliberately designed to prevent the 71 laid-off employees from being eligible to vote in the decertification election. The record, however, contains no evidence suggesting the steps in question were taken for the purpose of achieving any impermissible objective related to the election or indicating that the Intervenor or any other party has ever filed any charges with the Regional Office alleging that the steps were taken for such a purpose. On the contrary, as we have already explained, the record contains extensive evidence indicating that the steps in question were taken as part of a conscious policy to reduce the size of the facility's work force which the Employer clearly adopted years before the filing of the decertification petition and consistently followed thereafer.[6]

We have been administratively advised that, despite the Board's grant of review in this proceeding, a decertification election was conducted by the Regional Director on 31 January 1984.[7] We agree with our colleague that the Regional Director breached Section 102.67(b) of the Board's Rules and Regulations by failing to impound the ballots. However, no party has placed the issue of the validity of the election results before us at this time. Accordingly we remand the case to the Regional Director for further processing consistent with this decision.

---

[6] In its motion to reopen the record, the Petitioner requests us to admit additional evidence consisting of a form letter requesting rehire which the Petitioner's motion asserts was distributed by the Intervenor to all of the 71 laid-off employees and was returned to the Hartwell facility's plant manager by fewer than 10 of the laid-off employees. The assertions in the Petitioner's motion regarding the form letter, however, are not supported by any evidence or offer of evidence other than a single unsigned and undated copy of the letter itself, and therefore constitute nothing more than unsubstantiated and unsworn representations by the Petitioner's attorney. Accordingly, we deny the Petitioner's motion to reopen the record.

[7] Inasmuch as the Board was administratively advised that Regional Director failed to impound the ballots in accordance with Sec. 102.67(b) of the Board's Rules, Member Dennis would direct a new election.

Local 29, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO *and* Boston Chimney & Tower Co., Inc. and Massachusetts Laborers' District Council and Local Union No. 7, Boston, Massachusetts of the International Association of Bridge, Structural and Ornamental Iron Workers. Case 1–CD–698

6 December 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The charge in this Section 10(k) proceeding was filed 27 June 1983 by the Employer, alleging that the Respondent, Boilermakers Local 29, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers. The hearing was held 10 August 1983 before Hearing Officer Benjamin Smith.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Company, a Massachusetts corporation, is engaged in chimney erection and maintenance and annually performs contract work outside the Commonwealth of Massachusetts valued in excess of $50,000. It also purchases and receives materials directly from points outside the Commonwealth of Massachusetts valued in excess of $50,000 per year. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Boilermakers Local 29 and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Ronald G. Plante, at the time of the hearing, was the president, owner, and general manager of Boston Chimney. On 1 June 1978 Boston Chimney and New England Laborers' District Council entered into a collective-bargaining agreement effective from that date through 31 May 1981. Article XVIII of the agreement provides that the contract will continue in effect on a yearly basis absent notification by either party that it desires to change, modify, or terminate the agreement. As of the hearing in this matter, the collective-bargaining agreement was still in existence. On 7 April 1977 the Company entered into a contract with the Iron Workers, which contract was also in existence as of the hearing herein. Boston Chimney has never had a collective-bargaining agreement with the Boilermakers.

On 7 January 1981 the Company entered into a contract with CEA Combustion, Inc. (CEA) for the design, fabrication, and erection of two chimneys[1] at the Brockton Wastewater Treatment Facility in Brockton, Massachusetts. The Employer has traditionally used employees represented by the Laborers to perform this work. On 13 August 1981 Crouse Combustion Systems, Inc. (Crouse) notified Boston Chimney that it had taken over the CEA project and would assume CEA's contractual obligations. At all relevant times, Crouse and Boilermakers Local 29 were parties to a collective-bargaining agreement.

In December 1982 Plante received a telephone call from Boilermakers business agent William Carey inquiring about the Brockton job and who would be performing the work. When Plante advised Carey he planned to use his "regular employees" (i.e., laborers), Carey responded that there would be "possible trouble" if Boston Chimney did not assign the work to members of the Boilermakers. Plante informed Carey that he would call him prior to commencing the job. Later in December Plante contacted Carey, told him the anticipated starting date of the Brockton job, and offered to employ one of his certified welders on the project "in an attempt to maintain harmony." Carey rejected the offer. Shortly thereafter Plante again called Carey and offered to assign two of his members to the project but Carey responded that it was unacceptable and that his members would not be permitted to work side by side with laborers on that job.[2]

Work on the Brockton project commenced on 3 January 1983 with only laborers being assigned work on the chimneys.[3] When the employees ar-

[1] One chimney was a prefabricated chimney consisting of a steel jacket with a refractory lining and the other was an emergency bypass chimney consisting of a single wall, stainless steel stack.

[2] Plante admitted that Carey stated he had no problem with Boston Chimney utilizing its employees in a supervisory capacity on the job.

[3] Prior to commencing work, Boston Chimney had requested two welders from the Iron Workers Union, but the welders failed to report to the jobsite. As a result, members of the Laborers Union were used as welders.

rived at the jobsite, they discovered a Boilermakers picket line at the main entrance. Boston Chimney's attorney contacted the Boilermakers attorney and requested that the picket line be removed. The picketing ceased the following day. Boston Chimney completed the job on 24 February 1983.

B. *Work in Dispute*

The disputed work involves the onsite erection of two chimneys at the Brockton Wastewater Treatment Facility in Brockton, Massachusetts.

C. *Contentions of the Parties*

The Employer and the Laborers contend that the work in dispute should be assigned to employees the Laborers' District Council represents, arguing that the Employer's preference, economy, safety and efficiency, and the Laborers contract with the Employer favor such an award. Further, they contend that the Employer's past practice supports an award assigning the work to members of the Laborers.

Boilermakers Local 29 argues that there is no genuine dispute as the work involved has been completed, that Plante testified generally as to the factors he considers in making work assignments rather than stating precisely what he relied on in making the work assignment to the Brockton project, that Plante did not follow his normal practice in assigning employees to the subject job, and that the Employer and the Laborers have failed to support their claim that economy, safety, skill, or practice favor the award they seek.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

No party contends that there is an agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

As stated above, Boilermakers Local 29 established and maintained a picket line at Boston Chimney's Brockton jobsite upon learning that the Employer had assigned the disputed work to employees represented by another union. We find that an object of Boilermakers' conduct was to force the Employer to assign the disputed work to employees it represents.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act.[4] Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Collective-bargaining agreement

The Employer, as stated above, is signatory to a collective-bargaining agreement with the Laborers. Article II of the contract recognizes the Laborers as the exclusive bargaining agent for all employees of the Employer performing such work as pointing, rebuilding, waterproofing, coating, sandblasting, painting, welding, rigging, demolition, erection of stacks, and installation of permanent platforms, ladders, safety climbing equipment, and concrete caps. Article I, section 1 of the agreement provides that the contract is in effect within the boundaries of the New England States and covers all field construction, demolition, plant-type construction, and other construction work, coming within the trade jurisdiction of the Union, resulting from decisions of public and private tribunals, or resulting from trade or area practice. Finally, the contract requires that the Employer make all work assignments in accordance with the provisions of the agreement.

The Employer does not have a contract with the Boilermakers.

Accordingly, we find that the collective-bargaining agreement favors assignment of the work in dispute to employees represented by the Laborers.

2. Company preference and past practice

Although Boilermakers Local 29 has claimed the disputed work, Plante testified that the Employer has utilized its employees (laborers) almost exclusively ("ninety-nine and nine-tenths of the time") to

[4] We find no merit in the Respondent's claim that there is no longer a genuine dispute because the work involved is completed. The dispute is not moot absent evidence that the dispute will not arise again if the Employer later performs similar work in the Boilermakers' jurisdiction. *Boilermakers Local 744 (Williams Crane Service)*, 232 NLRB 164 (1977).

perform the work of erecting chimneys since the Employer entered into a collective-bargaining relationship with the Laborers in 1978. Plante estimated that the Employer erected approximately 125 chimneys in the 5-year period preceding the hearing in this matter.[5]

We find the history of the Employer's past practice favors an award to employees the Laborers represent.

3. Relative skills

Plante testified that the average number of years Boston Chimney's employees have worked for the Employer is in excess of 10—two particular employees (of a total of about 5 to 10) have been with the Company for more than 25 years. Plante further testified that the firm never had a fatal accident and has an unblemished safety record. Boston Chimney's employees are familiar with the scaffolding used by the Company and the procedures and safety precautions which must be observed to perform the disputed work without accidents. The Boilermakers Union presented no evidence concerning the ability of employees represented by it to perform the disputed work. Accordingly, we find this factor favors assigning the disputed work to employees the Laborers represent.

4. Employer assignment and preference

The Employer assigned the work in dispute to, and prefers that it be performed by, employees represented by the Laborers. This factor favors an award to these employees.

5. Economy and efficiency of operations

Although the Employer and the Laborers argue that it is more economical and efficient to have laborers perform erection work rather than boilermakers, they failed to submit evidence establishing the manner in which utilizing laborers would result in more efficient operations. Therefore, this factor favors neither group of employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the applicable collective-bargaining agreement, past practice, and the Employer's assignment and preference. In making this determination, we are awarding the work to employees represented by the Laborers, but not to that Union or its members. The current determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Boston Chimney & Tower Co., Inc. represented by Massachusetts Laborers' District Council are entitled to perform the chimney erection work at the Brockton Wastewater Treatment Facility in Brockton, Massachusetts.

2. Local 29, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Boston Chimney & Tower Co., Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 29, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO shall notify the Regional Director for Region 1 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

[5] Plante acknowledged that he utilized ironworkers on occasion over the years for performing welding work on steel permanent scaffolding and prefabricated refractory-lined chimneys. As of the hearing, Boston Chimney employed at least one certified welder, a member of the Laborers Union.

Pattern Makers' League of North America, Pattern Makers' Association of Milwaukee and Vicinity *and* Badger Pattern Works, Inc. Cases 30–CB–2122 and 30–CB–2155

7 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon charges filed by Badger Pattern Works, Inc., the Employer, 8 September and 18 November 1983, the General Counsel of the National Labor Relations Board issued complaints 19 October and 19 December 1983 against the Respondent alleging that it has violated Section 8(b)(1)(A) of the National Labor Relations Act. The General Counsel issued an order consolidating the cases 19 December 1983. The General Counsel issued amendments to complaints 5 January 1984.

The complaints allege that the Respondent imposed court-collectible fines against named individuals for engaging in certain conduct after submitting written resignations of membership in the Respondent. The Respondent filed answers denying that it committed an unfair labor practice.

On 13 February 1984 the parties jointly moved the Board to transfer the instant proceeding to the Board, without benefit of a hearing before an administrative law judge, and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On 25 April 1984 the Associate Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the Acting General Counsel and the Respondent filed briefs.

Upon the entire record in the case, the Board makes the following findings.

I. JURISDICTION

The Employer is engaged in the manufacture, sale, and distribution of patterns from its facility in New Berlin, Wisconsin. During the fiscal year ending 30 September 1983 the Employer sold and shipped from the New Berlin facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Wisconsin. The parties stipulated and we find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated and we find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether the Respondent violated Section 8(b)(1)(A) by imposing a fine against 12 named individuals because they worked for the Employer during a strike. Each employee tendered his resignation to the Respondent before or shortly after returning to work.

A. *Facts*

Since about 28 June 1983 the Respondent has engaged in a strike against the Employer. The Respondent's constitution at all material times included the following provision:

> (Resignation) and/or (Trade Dispute)
>
> 13. No resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.[1]

The following eight employees mailed or hand-delivered letters of resignation which the Respondent received before the employees returned to work: Richard Graham Jr., Herbert Heinze, James Anadelle, Bobby Lee Taylor, Robert Slak, Eugene Walker, Herbert Van Auwaeler, and Dale Kreil. The Respondent received the resignation letters of Paul Jaquette and Robert Karpay at approximately 9:30 a.m. of the respective days on which each returned to work at 6 a.m., and Jim Griffin's at approximately 9:30 a.m. on the day he returned to work at 6:30 a.m. The Respondent received William Prah's resignation the day after he returned to work. Each employee continued to work from the date of his return during the strike until at least the date the parties executed the stipulated record. After the employees returned to work and the Respondent received each one's letter of resignation, the Respondent sent each of the above-named employees a form letter ordering the employee to appear before the Respondent's executive committee to respond to charges that the employee violated various named articles of the Respondent's League Law. On 11 October 1983 the Respondent fined each of the 12 employees "the full amount of compensation paid to [him] and on [his] behalf during the strike." The Respondent filed charges against, and fined, the employees solely because they worked for the Employer during the strike. The Respondent has not specified the dates of work for which each employee is fined, nor the dollar amount of the fine. The Respondent has not

[1] The stipulated facts include a recitation of the constitutional provision at issue as well as a reproduction of the constitution. There is a one-word difference ("appears" instead of "is"), not significant to this decision.

taken any action to either collect the fines or to expunge or withdraw them.

B. *Contentions of the Parties*

The Acting General Counsel alleges that the Respondent's rule prohibiting resignation during a strike or when a strike is imminent is unlawful and does not privilege the fines it levied against employees who resigned during a strike at the Employer. The Respondent contends the complaint should be dismissed because its constitutional restriction on resignations rendered the employees' resignations ineffective and, in any event, it has not made any effort to collect the fines levied. Finally, it argues that no violation occurred as to its fining of employees who returned to work prior to the Respondent's receipt of their resignation letters.

C. *Discussion and Conclusions*

We recently reevaluated the authority of a union to limit its members' right to resign and ruled that a union may not restrict the right of its members to resign from membership. *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984).[2] Accordingly, we find the Respondent's maintenance of its constitutional prohibition on union resignation unlawful. Further, the Respondent's charging and levying of fines against employees for their conduct occurring on days after the Respondent received their resignations also violates Section 8(b)(1)(A) of the Act.[3]

CONCLUSIONS OF LAW

1. Badger Pattern Works, Inc., New Berlin, Wisconsin, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing its constitutional prohibition on its members' right to resign from the Union, and by charging and fining employees who worked during a strike after they resigned from the Respondent, the Respondent violated Section 8(b)(1)(A) of the Act.

4. The foregoing unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in an unfair labor practice in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act, including refunding to Richard Graham Jr., Herbert Heinze, James Anadelle, Bobby Lee Taylor, Robert Slak, Eugene Walker, Herbert Van Auwaeler, Dale Kreil, Paul Jaquette, Robert Karpay, Jim Griffin, and William Prah any moneys they may have paid as a result of the fines imposed on them because of their postresignation work for Badger Pattern Works, Inc. during the strike that began about 28 June 1983, with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[4] In addition, we shall order the Respondent to cease and desist from maintaining the restriction on resignations found invalid and to expunge the provision from its governing documents. *Engineers & Scientists Guild (Lockheed-California Co.)*, 268 NLRB 311 (1983).[5] In so doing we are not ordering that the parent International, which is not a party to this proceeding, expunge the offending provision from its constitution. Rather, we are only ordering the Respondent to expunge the provision from its governing documents including such documents of the International that the Respondent may have incorporated by reference and adopted as its own.

ORDER

The National Labor Relations Board orders that the Respondent, Pattern Makers' League of North America, Pattern Makers' Association of Milwaukee and Vicinity, West Allis, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

---

[2] *Neufeld Porsche-Audi*, supra, Member Zimmerman dissented from the majority's overruling of *Machinists Local 1327 (Dalmo Victor II)*, 263 NLRB 984 (1982), enf. denied 725 F.2d 1212 (9th Cir. 1984), although he agreed with the majority's determination that the rule against resignations of the union in that case was unreasonable and that fines levied against employees who tendered resignations during the strike violated Sec. 8(b)(1)(A) of the Act. By the same reasoning, he concludes that the constitutional provision here is invalid and unenforceable.

[3] The Respondent received the resignations of Paul Jaquette, Robert Karpay, and Jim Griffin several hours after they returned to work. It received William Prah's resignation on the day after he returned to work. The Board orders reimbursement on a pro rata basis for fines levied in part for preresignation conduct and in part for postresignation conduct. In the event the Respondent should take action to collect the fines, they are enforceable against the four employees named above only in proportion to the percentage of the employee's conduct which took place before the employee's resignation was received. See *Engineers & Scientists Guild (Lockheed-California Co.)*, 268 NLRB 311 (1983).

[4] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[5] Member Dennis joins her colleagues in ordering the Respondent to cease and desist from maintaining the restriction on resignations because the complaint alleges unlawful maintenance of the constitutional provision and the record supports that allegation. Compare *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 fn. 22 (1984), in which the complaint contained no such allegation. As in *Neufeld Porsche-Audi*, however, Member Dennis considers it impracticable to order the Respondent to "expunge" a provision appearing in the constitution of the parent International, which is not a party to this proceeding. Instead, Member Dennis would order the Respondent to notify its members in writing that it will not enforce the restriction on resignations.

(a) Maintaining in its governing documents League Law 13 of the constitution of the Pattern Makers' League of North America to the extent it provides:

> (Resignation) and/or (Trade Dispute)
>
> 13. No resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.

(b) Restraining or coercing employees who have resigned from, and are no longer members of, the Respondent in the exercise of the rights guaranteed them by Section 7 of the Act by imposing court-collectible fines on such employees because of their postresignation conduct in working at Badger Pattern Works, Inc. during the strike that began about 28 June 1983.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from its governing documents League Law 13 of the constitution of the Pattern Makers' League of North America set forth above.

(b) Rescind the fines levied against Richard Graham Jr., Herbert Heinze, James Anadelle, Bobby Lee Taylor, Robert Slak, Eugene Walker, Herbert Van Auwaeler, Dale Kreil, Paul Jaquette, Robert Karpay, Jim Griffin, and William Prah because of their postresignation work for Badger Pattern Works, Inc. during the strike that began about 28 June 1983 and refund to them any moneys they may have paid as a result of such fines, with interest.

(c) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Badger Pattern Works, Inc., if willing, at all places where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our governing documents League Law 13 of the constitution of the Pattern Makers' League of North America to the extent it provides:

> (Resignation) and/or (Trade Dispute)
>
> 13. No resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.

WE WILL NOT restrain or coerce employees who have resigned from, and are no longer members of, the Union in the exercise of the rights guaranteed them by Section 7 of the Act by imposing court-collectible fines on such employees because of their postresignation conduct in working at Badger Pattern Works, Inc. during the strike that began about 28 June 1983.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL expunge from our governing documents the portion of League Law 13 of the constitution of the Pattern Makers' League of North America set forth above.

WE WILL rescind the fines levied against Richard Graham Jr., Herbert Heinze, James Anadelle, Bobby Lee Taylor, Robert Slak, Eugene Walker, Herbert Van Auwaeler, Dale Kreil, Paul Jaquette, Robert Karpay, Jim Griffin, and William Prah because of their postresignation work for Badger Pattern Works, Inc. during the strike that began about 28 June 1983, and WE WILL refund to them any moneys they may have paid as a result of such fines, with interest.

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, PATTERN MAKERS' ASSOCIATION OF MILWAUKEE AND VICINITY

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Washington Gas Light Company *and* International Union of Gas Workers. Case 5–CA–12052

7 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 17 December 1980 Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed cross-exceptions and the Charging Party filed a brief in response to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

This case concerns whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with employees' disciplinary records which the Union requested in preparation for an arbitration hearing concerning the discharge of employee Howard Smith. The judge found no violation. We disagree.

On 26 September 1979 Smith had two drinks prior to reporting to work. He refused his foreman's order to take a blood test and a urinalysis, pursuant to the Respondent's policy. He was discharged, and he subsequently filed a grievance.

Approximately a week prior to the arbitration hearing, the Union learned that four employees in the past had been disciplined, but not discharged, for being intoxicated. Consequently, it requested that the Respondent furnish it with "All records of disciplinary action relating to the following employees or former employees: Philip Gore, Clarence Fullen, George Tharrington, and Satterwhite." (Fullen and Gore were no longer employees.) The Respondent's attorney replied that employee files were confidential and that its practice was not to release information from the file without employee consent. He suggested that the Union contact the four people and ask them to review their files with the Union. Alternatively, the Union could have the individuals sign a written release or call the personnel department, identify themselves, and give an oral release authorizing the Union to look at the file. The Union's attorney rejected the Respondent's proposed alternatives because it claimed an unqualified right to the information requested. The disciplinary records were never furnished. Ultimately, the arbitrator ordered Smith reinstated.

The judge found that the disciplinary records requested by the Union were relevant to the issue in arbitration of whether Smith had been treated disparately from other employees who had been disciplined for being intoxicated. Relying on rationale of the Supreme Court in *NLRB v. Detroit Edison Co.*, 440 U.S. 301 (1979), however, the judge found reasonable the Respondent's position that the employees' personnel files were confidential in their entirety. In particular, he noted that some of the files contained medical reports concerning intoxication or explaining lengthy absences from work. Having accepted the legitimacy of the Respondent's confidentiality claim, the judge found that the Respondent reasonably refused to release any portion of a personnel file to the Union without the individual's consent. Noting that the Union had not stated why the Respondent's conditional offer could not meet its needs, the judge recommended dismissing the complaint in its entirety.

It has long been held that an employer has an obligation to provide a union with information which is reasonably necessary for the union's performance of its representative duties, including the processing of grievances.[2] The test for the union's need for the information is whether the information sought is probably or potentially relevant to the execution of those statutory duties.[3] We agree with the judge's finding that the information requested by the Union here was relevant to the handling of Smith's grievance.[4]

The Supreme Court held in *Detroit Edison*, however, that a union's interest in arguably relevant information does not always predominate over all other interests. Rather, the Court indicated that determining the employer's duty to supply such information when it is assertedly confidential requires a balancing of the union's need for the information against the legitimate and substantial confidentiality interests of the employer. The party asserting the claim of confidentiality has the burden of proof.[5]

We find that the Respondent has failed to prove that its general confidentiality claim with respect to all material in employee personnel files outweighs the Union's need for the information requested

[1] The Union's request for oral argument is denied as the record and the briefs adequately present the issues and positions of the parties.

[2] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Doubarn Sheet Metal*, 243 NLRB 821 (1979).

[3] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

[4] E.g., *Pfizer, Inc.*, 268 NLRB 916 (1984).

[5] *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976).

here. There is no evidence of a clear past practice or policy of confidentiality to support that claim. The Respondent has never informed the employees that their files were confidential; the employees have not requested a confidentiality policy. The Respondent's own officials had free access to the files, and they freely disclosed to the Union certain disciplinary information subsequently recorded in the files. Finally, the Board has recognized that the normal practice in private arbitration is to compare employee work records in deciding whether contested discipline was discriminatory.[6] Consequently, this case is fundamentally different from *Detroit Edison*, where the employer had promised the employees that the information requested would remain private.[7] Further, even assuming that the Respondent had a confidentiality plan, the Board has repeatedly rejected the blanket confidentiality claims as an inadequate defense for an employer's per se refusal to furnish any information from an employee's file.[8] There must be a more specific demonstration of a confidential interest in the particular information requested.

The Respondent raised a more limited confidentialilty defense for the first time at the Board hearing. It maintained that it could not unconditionally turn over the disciplinary records to the Union because they contained references to medical problems such as alcoholism as well as a recommendation for an employee to seek counseling for alcoholism. In response, the Union has disclaimed any interest in securing medical information. It only desired records relating to "the level of discipline imposed on the four individuals."

The Board has found the identity of individuals who suffer from medical disorders to be confidential.[9] From examining the disciplinary records introduced at the hearing with the individual names deleted, however, it is evident that not all of the requested disciplinary records contained references to medical problems. The possibility that the furnishing of the disciplinary records may include some references to a medical problem does not excuse the Respondent from complying with the request to the extent that it includes information as to which an adequate defense has not been raised.[10] The Respondent breached its collective-bargaining obligation when it refused to provide the Union with the disciplinary records requested, at least to the extent that they did not contain references to medical problems. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act.[11]

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, we shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action necessary to effectuate the policies of the Act.

We shall, inter alia, require the Respondent to furnish the Union, on request, the disciplinary records of employees or former employees, Philip Gore, Clarence Fullen, George Tharrington, and Satterwhite to the extent the records do not include medical information.

ORDER

The National Labor Relations Board orders that the Respondent, Washington Gas Light Company, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Union of Gas Workers by refusing to furnish the requested disciplinary records of employees or former employees Philip Gore, Clarence Fullen, George Tharrington, and Satterwhite to the extent that such records do not include individual medical information.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) On request furnish the Union the requested disciplinary records of employees or former employees Philip Gore, Clarence Fullen, George Tharrington, and Satterwhite to the extent that such records do not include individual medical information.

(b) Post at its office copies of the attached notice marked "Appendix."[12] Copies of the notice, on

[6] *Pfizer, Inc.*, supra at 918–919.

[7] This case is likewise distinguishable from *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789 (3d Cir. 1983). There, the court found that an employer had lawfully refused, on the basis of an established employee confidentiality plan and the lack of written consent of the employee involved, to hand over highly personal and sensitive absence and tardiness records.

[8] E.g., *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980); *Fawcett Printing Corp.*, 201 NLRB 964 (1973).

[9] *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980).

[10] *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983); *Fawcett Printing Corp.*, 201 NLRB 964 (1973).

[11] Inasmuch as the Union has never sought the confidential medical information, we shall order the Respondent to furnish the Union the disciplinary records with the medical information deleted.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request furnish International Union of Gas Workers the requested disciplinary records of employees or former employees Philip Gore, Clarence Fullen, George Tharrington, and Satterwhite to the extent that such records do not include individual medical information.

WASHINGTON GAS LIGHT COMPANY

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on October 21, 1980, at Washington, D.C., upon the General Counsel's complaint which alleges that the Respondent violated Section 8(a)(5) of the National Labor Relations Act by refusing to turn over to the Charging Party certain personnel records of employees and former employees. The Respondent denied that it has committed any unfair labor practices.

On the record as a whole, including briefs and arguments of the General Counsel, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent, Washington Gas Light Company, is a corporation organized under the laws of the District of Columbia, and is engaged in the operation of a public utility, supplying natural gas to customers in the Washington, D.C. area. The Respondent annually receives in excess of $250,000 in gross revenues and annually purchases and receives goods and services valued in excess of $50,000 directly from points outside the District of Columbia. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The International Union of Gas Workers (the Union or the Charging Party) for many years has represented the Respondent's production employees and has negotiated successive collective-bargaining agreements. The one in effect when the events here occurred was from June 1, 1979, to May 31, 1980. It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

On September 26, 1979, employee Howard L. Smith was discharged for being under the influence of alcohol. Briefly, Smith had two drinks of vodka prior to reporting to work on the morning of September 26, and appeared to his foreman to be under the influence. Thus, pursuant to the established procedure in such matters, the foreman ordered Smith to a medical laboratory to take a blood test and urinalysis. Smith refused to do so which, according to the Company, was tantamount to an admission of being intoxicated. Following an extended altercation he was dismissed. An arbitrator concluded that the discharge was unreasonable, that company officials had led Smith to believe his refusal to take the lab tests would result only in a 10-day suspension. Further, when Smith was advised that he was being terminated, he agreed to take the tests, but the Company then refused to let him. Accordingly, the arbitrator sustained the grievance, ordering the discharge reduced to a 10-day suspension.

About a week prior to the date set for the arbitration hearing, the Union's attorney requested four items from the Respondent, including "All records of disciplinary action relating to the following employees or former employees: Philip Gore, Clarence Fullen, George Tharrington, and Satterwhite."

The Respondent refused to furnish this material, taking the position that the personnel files of employees are confidential, and their contents will not be released to a third party. However, Paul Ford, an attorney with the Respondent, did advise the Union that the individuals in question were at liberty to review their own files and could bring along anyone they wished. Ford suggested two other alternatives: that the individual sign a written release authorizing whoever to look at his file; or the individual could just call the personnel department, identify himself appropriately, and give an oral release.

Gary Lieber, counsel for the Union, rejected these proposals by Ford, contending that the Union had an absolute right to this information inasmuch as the disciplinary actions against these four were relevant to the

Union's defense of the Smith discharge. The Union had been advised that each had been disciplined, but not discharged, for intoxication. Lieber testified:

> That is the way he [Ford] did offer to make them [the disciplinary records] available; through the Union's obtaining a waiver from the employees which I indicated was unacceptable. Particularly, at that late date, but at any event unacceptable.

B. *Analysis and Concluding Findings*

Citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the General Counsel contends that the Respondent's refusal to give the Union this material was a breach of its bargaining obligations inasmuch as it was "potentially relevant and useful to the representative in processing grievances under the contractually established grievance procedure."

The Respondent argues that the Union does not have an absolute right to look at the personnel files of employees; that the contents of employees' personnel files are confidential; and that its offer to release the information conditioned on the individual's consent was not unlawful. The Respondent relies on *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). I agree with the Respondent.

It should first be noted that the material requested by the Union was clearly relevant to one of the material issues in the Smith grievance—whether he had been treated disparately from others disciplined for intoxication. Indeed, excerpts from the personnel files of the four individuals named (offered in evidence with the names excised) show that one or more of them had in fact been disciplined but not discharged for intoxication, and one had declined to take the lab tests.

In preparing for arbitration, counsel for the Union learned that the four individuals named in his demand had been disciplined for intoxication. Thus it was important to have records which show how the Company perceived these instances (as distinguished from the individual's recollection of what happened) in order to establish that Smith had been treated disparately. While the Union may have had no firm idea concerning the nature of the disciplines for intoxication, there is nothing in the record to indicate that the request of this particular material was not made in good faith. Again, as the material itself shows, such was clearly relevant to issues in the arbitration proceeding. Accordingly, the Union would be entitled to have access to this information in order to perform its duty as the representative of employees, including Smith.

However, the Union and the General Counsel argue, in effect, that having established the relevancy of the material, the Union has an unfettered right to it—that other considerations, such as the confidentiality of one's personnel file, must yield. It is on this point, I conclude, the Supreme Court's decision in *Detroit Edison* is controlling.

Specifically, Ford stated that the Respondent would release the information with consent of the employee in question.[1] Indeed, mindful that the arbitration hearing was imminent when the demand was made, Ford told Lieber that the consents need not be in writing—that an oral communication to the personnel office with some kind of identification would suffice.

The Company's position that personnel files are confidential is, I believe, reasonable. Personnel files contain information of a sensitive nature. For instance, some of the material demanded by the Union relating to discipline include medical reports establishing why the individual in question had been absent for a prolonged period, as well as medical reports concerning intoxication. In short, that the Respondent treated employees' personnel files, including those portions relating to discipline, as confidential is certainly not unreasonable.

Hence, it was not unreasonable for the Respondent not to release any portion of a personnel file to the Union without the employee's consent. This was "unacceptable" although no reason was given why the Union could not or would not seek the consent of the individuals named in the demand letter. There is no evidence that the Union sought to obtain consents.

In any event, as the Supreme Court said in *Detroit Edison*, 440 U.S. 301, 317–318 (1979), with regard to test scores which the company there claimed to be confidential:

> Nevertheless we agree with the Company that its willingness to disclose these scores only on receipt of consents from the examinees satisfied its statutory obligations under Section 8(a)(5).
>
> The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted. This we believe is one.

Here no reason was advanced why the Company's conditional offer to furnish the requested material would not have met the needs of the Union. Thus, on the facts here, I conclude that the Respondent did not violate its obligations under Section 8(a)(5).

[Recommended Order for dismissal omitted from publication.]

---

[1] Two of the named individuals were no longer employees at the time the request was made; however, there was no showing that the Union could not find them in order to obtain their consent or that the Union even tried.

Carthage Heating & Sheet Metal Co. *and* Local Union No. 36, Sheet Metal Workers International Association, AFL-CIO. Case 17-CA-11741(E)

7 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 25 June 1984 Administrative Law Judge Benjamin Schlesinger issued the attached supplemental decision. Applicant Carthage Heating & Sheet Metal Co. filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

It is ordered that the application of the Applicant Carthage Heating & Sheet Metal Co., Carthage, Missouri, for an award under the Equal Access to Justice Act be dismissed and that the Applicant's motion for a protective order prohibiting public disclosure of its financial statement be granted.

[1] Member Dennis does not rely on the judge's citation to the unpublished judge's decision in *Capitol Boiler Works*, JD-179-83.

SUPPLEMENTAL DECISION ON APPLICATION FOR AWARD OF ATTORNEYS FEES AND EXPENSES

BENJAMIN SCHLESINGER, Administrative Law Judge. On July 25, 1983,[1] Local Union No. 36, Sheet Metal Workers, International Association, AFL-CIO (the Union) filed an unfair labor practice charge alleging that Carthage Heating & Sheet Metal Co. (the Applicant) had violated certain provisions of the National Labor Relations Act (the Act). On September 8, the Regional Director for Region 17 issued a complaint, alleging that the Applicant failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act. A hearing was scheduled to take place on October 17. However, on October 13, the Regional Director issued an order dismissing the complaint, withdrawing the notice of hearing, and closing the proceeding.

[1] All dates refer to the year 1983, unless otherwise stated.

On November 14, the Applicant filed an application for award of fees under the Equal Access to Justice Act, Public Law 96-481, 94 Stat. 2325 (the EAJA) and Section 102.143 of the Board's Rules and Regulations and an application for permission to furnish its financial statement in a sealed envelope as confidential financial information. By order of the Board, dated November 18, the application was referred to the Chief Administrative Law Judge for appropriate action; and by order dated May 23, 1984, the application was assigned to me.

On December 1, 1983, General Counsel moved to dismiss the application on three grounds: (1) the Applicant is not a prevailing party within the meaning of 5 U.S.C.A. § 504(a)(1) of the EAJA;[2] (2) special circumstances in this proceeding make an award unjust;[3] and (3) the Applicant failed to provide an itemized statement for services incurred solely in connection with the instant unfair labor practice complaint proceeding.

In Section 202(a) of the EAJA, the Congress found that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings. Thus, Congress expressed in Section 202(b) that it was the purpose of the EAJA to diminish the deterrent effect of seeking review of or defending against governmental action by providing in specified situations for an award of attorney's fees, expert witness fees, and other costs against the United States.

The Committee on Small Business in its report, H. Rep. 96-1005, part 1, 96th Cong. 2d Session, at page 5, noted that the legislation was intended to respond to a chronic problem small business owners have in contesting or challenging the unreasonable exercise of governmental authority because of the time and expense required to challenge the vast resources of the Federal Government. The report noted: "It is expected that this bill will cause agencies to be more deliberate in their regulatory activity." Furthermore, the committee noted at page 7:

> In cases involving Government action, small business does not have the resources to defend itself against unjustified claims. Further, the costs of vindication routinely exceed the amounts at stake. Lastly, the Government does not have the economic incentive or disincentive to closely evaluate the reasonableness of its case before proceeding. For these reasons it appears that the American Rule [that each party must bear his/her own cost of litigation] is inappropriate in actions involving the Government and individuals or small business.

[2] Sec. 504(a)(1) provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding unless the adjudicative officer of the agency finds that the position of the agency as party to the proceeding was substantially justified or that special circumstances make an award unjust.

[3] *Ibid.*

And at page 8, the committee wrote:

> It must be noted that the real aim of this legislation is not to spend great sums to pay the costs of fighting unwarranted Federal action. Rather, it is intended that the act will force the Federal departments and agencies to substantially improve the quality of their enforcement and other proceedings. But let there be no mistake, your committee clearly intends that where a small business or individual prevails against the Government either in toto or in substance, reasonable costs and fees shall be paid to him unless the Government can show that its action was substantially justified.

Thus, the essence of the EAJA is not only to reimburse those who have been taken advantage of because of the greater resources and expertise of the United States but also to deter the United States from taking advantage of small business and other organizations by ensuring that the Government carefully reviews and evaluates those matters which it ultimately seeks to litigate.

The Act provides that any person is entitled to file a charge alleging the commission of unfair labor practices. Upon filing, the General Counsel must conduct an investigation to ascertain whether a complaint should issue. In accord with the General Counsel's fixed procedures, both the charging and the charged party are entitled to submit evidence in support of their respective positions, and the General Counsel will frequently take investigatory affidavits from witnesses who may be helpful in resolving factual disputes. Only when the General Counsel is satisfied that there is reasonable cause to believe that a violation has occurred will a complaint issue. But, before a complaint issues, the charged party will be given a final opportunity to avoid a formal proceeding by entering into a settlement agreement.

The Applicant seeks to be reimbursed for 30.95 hours of work, but its services total 35.60 hours,[4] of which 14.50 hours were performed prior to September 8, the date the complaint issued. Because no adversary proceeding had commenced prior to that date, these could not be allowed. As stated above, the purpose of the EAJA is to prevent governmental abuse of its power by commencing legal proceedings without justification while permitting the Government to analyze its claim to ensure that there is substantial justification for it. The Applicant, in effect, seeks partial expenses solely because the General Counsel was doing what the Act entrusted him and required him to do. Under no reading of the EAJA can such expenses be justified. In addition, the Applicant's expenses appear to include services related to its Federal court action and the Union's counterclaims, discussed below, as well as services rendered in the preparation of a letter citing legal authorities why the unfair labor practices complaint should not have issued, which letter arguably should have been prepared and filed prior to the issuance of the complaint. If the sole issue on this motion were the validity of the Applicant's specification of services rendered, I would grant the General Counsel's motion to dismiss, permitting the Applicant to amend its application to set forth only those legal services rendered in connection with the unfair labor practice proceeding.

However, I conclude that the Applicant has made no showing that it is the prevailing party in this proceeding and that the General Counsel's motion has merit.[5] The unfair labor practice complaint alleged that the Applicant violated Section 8(a)(5) and (1) and Section 8(d) of the Act by failing since about January 26, 1983, to comply with two collective-bargaining agreements which required the Applicant to make payment to various fringe benefit funds, including the Union's and its International's industry funds, on behalf of various employees who were employed within the units represented by the Union. The complaint alleged that the Applicant did not make contributions on behalf of its employees who were not members of the Union.

The Applicant's answer denied the substantive allegations of the complaint and further contended that the complaint should be dismissed because: (1) Since February, the Union and the employees engaged in a strike which constituted a substantial and material breach justifying the Applicant in rescinding the agreement, a recission in which the Union acquiesced, and the Applicant was thereby released from any further obligations under any agreement since February; (2) all employees from whom the Applicant failed to make contributions were expressly exempted from coverage pursuant to an agreement made about April 19, 1982, between the Applicant and the Union's agent; (3) in the event that neither item (1) or (2) applies, then the Applicant had no duty to bargain in good faith with the Union since February, because the strike was in violation and a repudiation of the collective-bargaining agreement; (4) the payment of contributions was a nonmandatory subject of bargaining because the Applicant had no duty to bargain in good faith with the Union since February, because the strike was in violation and a repudiation of the collective-bargaining agreement; (4) the payment of contributions was a nonmandatory subject of bargaining because the Applicant had no authority or control or right to participate in the selection of employer trustees, a violation of Section 302 of the Act; (5) similarly, contributions to the industry promotion funds are not mandatory subjects of bargaining under Section 8(a)(5) of the Act; and (6) the Union committed various acts constituting a refusal to bargain under Section 8(b)(3) of the Act and, therefore, it would be unfair and inequitable to require the Applicant to make the contributions complained of or otherwise to be found in violation of the Act.

The litigation of this complaint and the answer, including the above defenses, were avoided by the settlement agreement entered into by the Applicant and the Union; but, in order to understand that agreement, it is necessary to digress and refer to a civil action brought by the Applicant against the Union in the Circuit Court of

[4] Affidavit of Donald W. Jones, dated November 10, 1983. Additionally, the Applicant seeks expenses for the preparation and prosecution of its EAJA application.

[5] The General Counsel's motion was supported by documentary evidence, to which the Applicant took no exception. I have treated this motion as one for summary judgment.

Greene County, Missouri, which action was subsequently removed by the Union to the United States District Court for the Western District of Missouri, bearing Case 83-3505-CV-S-4. The Applicant's petition alleged three causes of action. First, it sought a declaratory judgment concerning whether it was covered by a collective-bargaining agreement with the Union; whether it was bound by that agreement and to what extent; and whether it was bound by an arbitration award rendered pursuant to the agreement, which award required the Applicant to pay $10,500 to the Union's apprenticeship committee. The Applicant contended that it was not bound by the agreement or, alternatively, was bound only as to three union members so long as they worked for the Applicant. Alternatively, the Applicant claimed that it was not bound by the agreement for essentially the same reasons expressed in its answer to the unfair labor practice complaint and that the arbitration award was illegal, void, and unenforceable because it constituted a penalty, contrary to the common law of the State of Missouri and Federal common law under Section 301 of the Act. Second, realleging all of the allegations of the first cause of action, it attacked various procedural irregularities concerning the arbitration hearing and award and sought to set aside the award. Third, it alleged that the Union, by its actions in fostering the strike and not giving proper 8(d) notices, should be required to pay $90,000 in damages.

The date that this action was commenced is not clear, but it must have been after the award was rendered; and the award was mailed to the Applicant on July 1. Furthermore, the Union filed two counterclaims to the Applicant's petition, but when and what they alleged is not in the record. What is in the record is the parties' three-page settlement agreement, which is dated September 27 and which explains the desire of both parties to settle all claims, disputes, and matters which had been raised in the Board proceeding and the civil action, including the Union's two counterclaims. From my perspective, not having heard any evidence involving any of the pleadings capsulized above and not knowing what were the "gut" issues which separated the parties so grievously, it is difficult to assess just what results the parties sought, what their thought processes were, where they felt themselves vulnerable, and where they felt their strengths lay. Settlements are reached by sometimes strange and obscure methods. It is because the parties are so intimately familiar with the result they desire to reach that, traditionally, both employers and unions have been averse to the notion of compulsory arbitration, feeling that no arbitrator could conceivably fathom all issues with the depth of understanding that the parties possess.

Perhaps that is the beauty of the collective-bargaining process, the promotion of which is perhaps the Act's prime purpose and which the Act fosters to enable the parties to sit down and thrash out their problems face to face, frankly, and with open minds. More often than not, a settlement is the result of compromise. It has been said, but sadly I do not know to whom to attribute it, that the best settlement is one in which neither side is happy. Certainly, there is "give and take," and the parties' settlement agreement herein is no exception.

First, pursuant to the thought expressed in the preamble, all legal proceedings were to be withdrawn. The Union was to request from the arbitrators that their award against the Applicant be withdrawn. The settlement was conditioned on the arbitrators approving the withdrawal. The Applicant was to move for the dismissal of its civil action with prejudice, and the Union was to take similar action with respect to its counterclaims. The Union was to request withdrawal of its unfair labor practice charge, and the settlement was conditioned on the Regional Director's approval of the withdrawal request.

Second, in addition to wiping clean the slate of legal actions, the slate of past claims was also to be erased. No moneys were due from the Applicant prior to September 27 and the collective-bargaining agreement was rescinded as of February 15. However, the subsisting union collective-bargaining agreements immediately became binding on the Applicant and the Applicant also agreed to be bound by the next union agreement with the Southwest Missouri Chapter of the Sheet Metal Contractors' Association, sight unseen, and agreed to continue the other of its agreements for the term of that Association agreement. However, if the Applicant were not a member of the Association, it need not make contributions to the industry funds but would pay the amount in additional wages to the employees as would have been due as contributions to the funds. The settlement also provided other modifications to the agreements, apparently to suit the Applicant's personal needs.

In sum, there is in the settlement agreement something for everyone. The liability of the Applicant, if any, for money due from February to September 27 was extinguished. But new obligations, not in being in February, arose. The remedy which the Board may have ordered was only partly extinguished, because, if it were found that the Applicant refused to bargain in good faith, it would have been ordered to do so. It is true that certain specific relief was avoided, but the Union appears to have traded the past 7-month liability for a longer and more stable relationship. And that is what the Act is all about. Faced with an all-ecompassing agreement which reconciled the parties' positions, little would be gained by the Regional Director by not acceding to the parties' wishes and refusing to approve the Union's withdrawal requested. I might add that, had I been assigned to hear this unfair labor practice proceeding and been given settlement agreement, I would have without hesitation approved the settlement, even unilaterally if the Regional Director had refused to go along with it, because the purposes of the Act are clearly effectuated by the avoidance of a hearing and the accompanying long delays which, unfortunately, presently plague this Agency, by the stabilization of industrial relations, and by the promotion of collective bargaining.

Clearly, then, the approval of the settlement and dismissal of the complaint, for those who are aware of the workings and thinking of the Board, are not admissions that the Applicant was correct all along and that its defenses to the unfair labor practice complaint were legally justified. Rather, in the broader view, the dismissal repre-

sents not a decision on the merits but an encouragement of the process of private settlement of disputes through collective bargaining and without governmental interference. The parties know far better what they want than even we administrator and administrative law judge supposedly expert in labor relations. The Act can ask no more than the parties engage in collective bargaining, and the public's right and interest are protected and enhanced by the Regional Director's final order dismissing the complaint.

In these circumstances, the Applicant cannot show that it prevailed in the underlying proceeding. Rather, the Applicant acknowledged the Union as the representative of its employees, agreed to be bound by the union agreements, and agreed to make contributions to the fringe benefit programs. That is hardly consistent with its defense to the unfair labor practice complaining that the agreement was rescinded by the Union's unlawful acts. Indeed, if the Applicant had prevailed, the complaint would have been dismissed. No order would have issued requiring the Applicant to comply with the very same agreement which, by the settlement, has been resurrected and, certainly, no order would have issued requiring the Applicant to comply with the following agreement, which is not in esse. It is true that the Applicant may have finally entered into an agreement protecting what it wanted in the first place, but not in this adjudicative proceeding. This is not to say, either, that the Respondent lost and the Government won. In the present posture, neither won nor lost, but clearly a prime purpose of the Act, the promotion of collective bargaining, was well served.

For the foregoing reasons, I conclude that the Applicant is not a prevailing party within the meaning of the EAJA. See generally *Capitol Boiler Works*, JD–179–83.[6]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

1. The application of Carthage Heating and Sheet Metal Co. for attorneys' fees and expenses under the Equal Access to Justice Act is dismissed.

2. The Applicant's motion for a protective order prohibiting public disclosure of its financial statement is granted.

---

[6] Because I find that the Applicant was not the prevailing party herein, there is no need to dispose of the other ground of the General Counsel's motion to dismiss.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Herman Brothers, Inc. *and* Local 289, Bakery and Confectionery Workers International Union of America, AFL–CIO. Case 4–CA–14122

7 December 1984

DECISIONS AND ORDER

CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 25 June 1984 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Herman Brothers, Inc., Treichlers, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

For the reasons stated in our recent decision in *Connecticut Light & Power*, 271 NLRB No. 124 (July 31, 1984), we adopt the judge's finding that Local 289 did not tacitly agree to reopen the contract, thereby incurring a bargaining obligation, simply by agreeing to discuss the Respondent's proposed midterm wage modifications and offering its own counterproposals.

Chairman Dotson and Member Hunter, however, do not adopt the judge's dicta that, even if Local 289 had agreed to reopen the contract midterm, the Respondent would not have been free to unilaterally institute its last final wage offer upon an impasse in negotiations. As they have previously stated, in their view during negotiations pursuant to a midterm reopener agreement "an the employer may, absent any indication in the contract to the contrary, unilaterally modify wages and benefits following a genuine impasse in negotiations." See *Kelly-Goodwin Hardwood Co.*, 269 NLRB 33 at 38 (1984).

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On March 16, 1983, Respondent Herman Brothers, Inc. entered into a collective-bargaining agreement with Charging Party Local 289, Bakery and Confectionery Workers International Union of America, AFL–CIO (Union),[1] for a term commencing July 1, 1982, through June 30, 1985. Among other things, the agreement provides that drivers shall be paid a mileage rate of $.2788 per mile and $9.24 per hour, effective July 1, 1983; $.2938 per mile and $10.04 per hour, effective July 1, 1983; and $.3088 per mile and $10.79 per hour, effective July 1, 1984. It also provides that employees who are hired after July 1, 1982, will be paid a percentage of the hourly or mileage rate which is in effect at the time of hire which shall progress in 12 months increments, as follows: for the first 12 months, 70 percent of the applicable rate; for the second 12 months, 80 percent of the applicable rate; for the third 12 months, 90 percent of the applicable rate; and thereafter, 100 percent of the applicable rate. The agreement contains no reopener provision.

Respondent, faced with the renegotiation of its agreement for the transportation of flour for its principal customer, ConAgra, which was to expire in September 1983,[2] attempted to renegotiate midterm the wage structure to which it had previously agreed. On June 19, William H. Williams, Respondent's director of labor relations, met with the drivers and mechanics of Respondent's Martins Creek, Ironton, and Triechlers operations and explained that the wage rates paid by organized trucking companies in similar businesses in the area were less than that which Respondent then paid and that the substantial increase in wages due on July 1 would place Respondent in a worse competitive position to bid for ConAgra's business. Williams discussed the matter with the union president and business agent, Leroy Linsenbigler, on June 25 and explained Respondent's plight. The union membership met on June 26 and voted to reject the request to reduce wages, and Respondent was so advised. Williams and Linsenbigler again spoke on June 30 and arranged to meet later.

A meeting followed on July 17 during which Williams thoroughly reviewed Respondent's cost factors and explained that Respondent was looking for a wage freeze until September, at which time there would be a reduction of wages based on the results of Respondent's negotiations with ConAgra. The wage freeze had already been imposed, effective on July 1. Williams requested a vote, but Linsenbigler stated that not all union members were present and, in order to change the contract, the members were entitled to be given notice of what they would be voting on. Another meeting was held on July 20, at which Williams stated that 42 cents of each dollar received represented Respondent's total labor costs, of which 26 cents were pure wages. Williams insisted on a

[1] I find, as Respondent admits, that it is a Nebraska corporation engaged in the bulk hauling of products from its terminals located throughout the United States, incluidng its terminals at Martins Creek, Ironton, and Treichlers, Pennsylvania, and that, during the year preceding the issuance of the complaint herein, it received in excess of $50,000 from the performance of its interstate services. I conclude that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., and also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] All dates hereinafter set forth refer to the year 1983, unless otherwise stated.

freeze; and the Union countered with a proposal to base wages on the amount of 26 cents of each dollar received, but not less than $9.24 per hour, and to increase the percentage paid to new employees to 80 percent for the first 6 months and 90 percent for the next 6 months. Respondent called its home office and returned to state that it would not agree to the Union's proposal to guarantee wages of at least $9.24 per hour.

The wage freeze continued until November 13, when Respondent called a meeting with Linsenbigler and various drivers and explained that ConAgra had accepted Respondent's offer. However, Respondent had to reduce its bid in order to retain the business; and, because of that, the employees would have to take a wage reduction to $7.81 per hour. Otherwise, Respondent would have to close its terminal. After some discussion, Respondent offered to reduce wages to $8.53 per hour. On November 20, the union membership rejected Respondent's proposed wage reduction; but Respondent nonetheless on November 21, 1983, reduced wages to $8.53 per hour and mileage rates to 23 cents per mile.[3] However, simultaneously, Respondent increased the percentage rate for new employees to 80 percent of the reduced hourly rate for the first year of employment and 90 percent of the reduced hourly rate for the second year of employment. The Union's unfair labor practice charge soon followed.[4]

In defense of its changes to the agreement, Respondent contends that it and the Union agreed to the wage freeze. However, I discredit Williams' testimony that Linsenbigler had agreed on June 25 and, again, on June 30, to forgo the scheduled July 1 wage increase.[5] In his letter to Linsenbigler, dated July 1, Williams made no mention of such an agreement. Instead, he requested Linsenbigler to consider Respondent's argument that "a wage increase, at this time, does not make good sense" and requested another meeting for July 17. There was no reason for Williams to contend that a wage increase did not make sense if he had already received the Union's consent to waive the increase. Williams testified that, on July 20, he stated to Linsenbigler that Respondent could not implement the wage increase because it could not pass the cost on to ConAgra. There was no reason he would have made that argument if he had previously agreed with the Union to the wage freeze. In Williams' notes for the November 13 meeting, he acknowledged that, subsequent to the meetings of June and July, the employees voted to strike over Respondent's failure to implement the increase due on July 1. Williams assuredly knew that union ratification was necessary to approve any change to the agreement and that the members not only did not ratify Respondent's proposal but also rejected it.

The most that I can conclude from this record is that Linsenbigler held out some hope that the employees might be receptive to forgoing the July 1 increase. Williams testified only that Linsenbigler said that he had talked to some of the drivers who were willing to accept a wage freeze. That is a far cry from a commitment by the Union, but is, at best, an indication that its members might agree to a freeze. Even if I were to credit Williams, and I do not, I find that the Union agreed to a freeze, Williams countered with a proposal that the freeze would be contingent on Respondent's completion of its negotiations with ConAgra and further reduction of wages. An acceptance of the Union's counteroffer must be clear and unambiguous. It cannot vary, add to, or qualify the terms of the offer; if it does, it constitutes a rejection of the offer. 1 Williston, *Contracts* § 72–73 (3d ed. 1957 & Supp. 1983). Respondent's brief contends that Respondent agreed to the freeze as an interim solution, but the Union did not offer it with that condition (if it indeed offered it). In any event, Williams agreed to the freeze while simultaneously looking towards a wage reduction, a distinct variance of the Union's proposal, and no contract was formed.

What Respondent is attempting to do is bifurcate the series of proposals so that there is an acceptance to a counterproposal while the original proposal is still outstanding and while Respondent rejected the remainder of the Union's offer. I know of no legal authority which sustains Respondent's argument. Reduced, perhaps, to be absurd, Respondent's argument on another day, in a different economic climate, would permit a labor organization to continue to hold out substantial wage increases, while agreeing piecemeal to lesser wage increases offered by an employer.

I conclude that the Union never agreed to the freeze. The Union's actions were consistent with this conclusion. The Union filed a grievance on August 16 protesting that Respondent violated its agreement by failing to pay the wage increase. Rather than pleading what at hearing was alleged to be an agreement, Respondent answered the grievance merely by stating: "Do [sic] to particular facts presented grievance is denied."[6] It is probable that, had there been an agreement to freeze wages, Respondent would have stated precisely that. Furthermore, additional actions of the Union sustain the conclusion that it never agreed to anything. For example, as noted above, the Union voted to reject Respondent's first proposal and to strike to protest the freeze. At the November 13 meeting, Linsenbigler made a counterproposal to Respondent's demand that wages be reduced by requesting that Respondent pay its employees "what [it] owed [them] up to date" and the Union would accept a freeze until the following July.

Respondent next contends the Union agreed to reopen the contract, but once again I find no support for its arguments. In sum, Respondent had a problem of retaining its contract with ConAgra and approached its employees and Linsenbigler with its problems and requests for wage

[3] The record, although not precise, indicates that the reduction affected both drivers and mechanics engaged in the hauling of flour.

[4] The relevant docket entries in this proceeding are as follows: The Union filed its unfair labor practice charge on December 5, 1983; complaint issued on January 13, 1984; and the hearing was held on May 1, 1984.

[5] Linsenbigler did not recall the contents of the June 25 conversation and could recall only that, on June 30, he agreed to meet with Williams. Despite his lack of recollection, the remainder of his testimony, which I credit, indicates that he made no agreement to freeze wages.

[6] Respondent agreed during the hearing that it does not desire to defer to arbitration pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971).

concessions. The Union was receptive insofar as listening to Respondent's pleas, but the Union never said, in substance. "We will reopen the agreement. If we do not reach agreement on the reopener, you, Respondent, can do anything you like."[7] There is nothing in this record other than talking, listening and the possible hint of an accommodation, except for evidence that Linsenbigler on one occasion used the word "renegotiate." There is certainly nothing to support Respondent's thesis that, once having agreed to listen to Respondent or even to "renegotiate," the agreement became a nullity and that Respondent was free to comply with it or violate it, at its pleasure. To find that, once the Union agrees to listen to and to talk about midterm modifications, it waives all its rights under a written collective-bargaining agreement, would forever deter any labor organization from talking about any changes, no matter what the circumstances, and would destroy even the possibility of discussing an employer's financial difficulties.

Surely, the Act is intended to encourage bargaining, and not to impede it, as would follow from the adoption of Respondent's arguments. Indeed, Section 8(d) "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." The General Counsel cogently argues that "discuss or agree" permitted the Union to discuss, but imposed no obligation on the Union to agree. And, if there is no obligation to agree, Respondent may not impose its own proposals as if the Union had agreed, thus nullifying the Union's statutory privilege to agree.

Section 8(d) of the Act also provides that no party to a contract shall modify a contract unless the party desiring such modification (1) serves a written notice on the other party of the proposed modification, (2) offers to meet with the other party, (3) notifies the Federal Mediation and Conciliation Services and any state agency established to mediate and conciliate disputes within 30 days after such notice, and (4) continues in force all the terms of the existing agreement for a certain period. There is no question that Respondent did not serve the notices required by Section 8(d)(1) and (3) or modify the agreement without the consent of the Union. Respondent was required to serve such notices, because the Union sought to modify and did modify the existing agreement. In addition, Respondent contends that its inaction was not alleged in the complaint and that it would violate due process to find a violation in this respect. However, the complaint clearly encompassed Respondent's failure to comply with Section 8(d) by its unilateral change and Respondent was not misled into failing to litigate this issue. Rather, it stipulated to facts at the beginning of the hearing which were relevant only to the 8(d) notice issue. In addition, although Respondent alleges a failure of due process, it neglects to advise what it omitted from the record because of its alleged lack of understanding of the complaint.

Finally, I turn to the second change the reduction of wages. I have already rejected Respondent's contention that there was any commitment to reopen the agreement. But, even if there was, no mention was made about what was to happen if the parties failed to reach agreement. Respondent puts the burden on the Union to fix the terms of the reopener agreement, despite the fact that it was Respondent who desired to change the agreement. Respondent's argument, in essence, is that because there was no agreement either to arbitrate or to continue in effect the terms of the existing agreement, the parties were freed from all structures of the agreement and could take such economic action as they deemed desirable. I find this contention unreal and groundless. I find no basis in anything said by anyone that at the point the Union agreed to discuss the financial problems of Respondent, the collective-bargaining agreement became a nullity, to be disposed of at the whim of Respondent. Nor do I find that the Act, as a matter of law, requires such a peculiar result. The law is so clear as to be without doubt; and various of Respondent's contentions raised at the hearing and in its brief have been fully answered by Administrative Law Judge Robert A. Giannasi in *La Porte Transport Co.*, JD–152–84, as follows:

> It is undisputed that Respondent implemented changes in an existing collective-bargaining agreement without the Union's consent. Such conduct is violative of Section 8(a)(5) and (1) of the Act because Section 8(d), which defines the duty to bargain, prohibits such changes. In pertinent part, Section 8(d) provides that "no party to [an existing collective bargaining agreement] shall terminate or modify such contract" unless certain notice provisions and other conditions are met. Section 8(d) continues, "and the duties so imposed shall not be construed as requiring either party to *discuss or agree* to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract" [emphasis added]. In this case, the Union did not agree to Respondent's proposed modifications. In these circumstances, the Board and the Courts have clearly and consistently found an employer's mid-term modification of a fixed term contract to be unlawful. See *Oak Cliff-Golman Baking Company*, 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (C.A. 5, 1974), cert. denied 423 U.S. 826 (1975); *C & S Industries, Inc.*, 158 NLRB 454, 457–458 (1966); *We-Care Trading Company, Ltd.*, 265 NLRB No. 56, slip op. at 7 (1982).[8] This is true even though continued compliance with the contract will cause the employer financial hardship. See, *Ross Crane Rental Corp.*, 267 NLRB No. 50, slip op. at 6 (1983); *Oak Cliff-Golman, supra*, 207 NLRB at 1064.

[7] I discredit, in general, Williams' testimony and, in particular, Respondent's notice posted on November 21 in which Respondent claimed that the Union's negotiating committee agreed to reopen the agreement on June 19. The negotiating committee was not present at the June 19 meeting. I also discredit the self-serving statement in Respondent's November 15 letter to its employees that the Union's negotiating committee agreed in June to reopen the agreement. No testimony was adduced that the committee met in June.

Respondent alleges that it was justified in unilaterally implementing its proposals to alter the existing agreement, notwithstanding the Union's refusal to agree to the alterations, because (1) an impasse existed; . . . [This allegation is] patently without merit.

First, an impasse in negotiations is irrelevant in a situation where a party seeks unilaterally to change an existing agreement. Respondent had agreed to a contract in April of 1982 and less than a year later sought to change specific provisions of that agreement whose terms were to continue through March of 1985. Section 8(d) provides that this cannot be done without the Union's consent. As the Board stated in a case where, as here, an employer proposed mid-term contract modifications, the union indicated a willingness to discuss the matter and the employer subsequently declared an impasse and implemented its proposed modifications without the union's consent:

> The Union's consent was required if management's proposed modifications were to take effect. When the Union lawfully withheld its assent, a stalemate did obtain. The Trial Examiner correctly found, however, that although an employer may unilaterally institute changes when an impasse occurs during the negotiations for an initial bargaining agreement or following the expiration date of an expiring contract, the employer may not do so where, as here, the contract has not yet terminated. Accordingly, the Trial Examiner correctly ruled that Respondent was not free in the manner sought to modify the unexpired agreement over the Union's objections, but was obligated to maintain in effect all preexisting contractual commitments for the contract term. We affirm, therefore, the Trial Examiner's finding that by unilaterally publishing and implementing terms and conditions of employment inconsistent with the extant collective-bargaining agreement, Respondent violated Section 8(a)(5) and (1) of the Act. [Footnote omitted.]

The Standard Oil Company, 174 NLRB 177, 178 (1969).

. . . .

Section 8(d) specifically prohibits such unilateral changes. Indeed, in the absence of a contractual reopener clause, a party may refuse even to discuss proposed changes. See *C & S Industries, supra*, 158 NLRB at 457. However, where mid-term bargaining does take place pursuant to such a clause, compliance with the Section 8(d) notice requirement simply permits a party to thereafter resort to a strike or lockout. See *NLRB v. Lion Oil Company*, 352 U.S. 282, 291–292 (1957). Compliance with the notice provisions of Section 8(d) does not confer upon a party the right to unilaterally change an existing agreement particularly since Section 8(d) specifically prohibits such conduct.

[6] Additionally, in order for a violation to occur, the provisions of the collective-bargaining agreement which are unilaterally modified must constitute mandatory subjects of bargaining. See *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). There is no dispute that the provisions of the contract which are the subject of the instant case do constitute mandatory subjects.

Accordingly, I conclude that Respondent has violated Section 8(a)(5) and (1) and 8(d) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, including the posting of the attached notice. In particular, I shall recommend that Respondent be ordered to rescind its unilateral changes retroactive to July 1, 1983, and to make whole the employees covered by the collective-bargaining agreement for the loss of wages that they sustained as a result of Respondent's unlawful conduct of both not increasing wages on July 1, 1983, as its agreement requires, and reducing wages on November 21, 1983. Such payments shall be made with interest thereon as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record,[8] I issue the following recommended[9]

ORDER

The Respondent, Herman Brothers, Inc., Treichlers, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 289, Bakery and Confectionery Workers International Union of America, AFL–CIO by unilaterally modifying and refusing to comply with the provisions of its collective-bargaining agreement with the Union, dated May 16, 1983, concerning hourly wages and mileage rates.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Bargain with the Union by restoring, placing in effect, and complying with all the terms and conditions of employment provided for in its collective-bargaining agreement with the Union, retroactive to July 1, 1983.

(b) Make whole the employees in the unit covered by the collective-bargaining agreement for any loss of

[8] Transcript errors have been noted and corrected.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

wages which the employees sustained as a result of Respondent's unlawful conduct, in the manner set forth in the section of this decision entitled "The Remedy."

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Martins Creek, Ironton, and Treichlers, Pennsylvania facilities copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain with Local 289, Bakery and Confectionery Workers International Union of America, AFL–CIO by unilaterally modifying and refusing to comply with the provisions of our collective-bargaining agreement with the Union, dated May 16, 1983, concerning hourly wages and mileage rates.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain with the Union by restoring, placing in effect, and complying with all the terms and conditions of employment provided for in our collective-bargaining agreement with the Union, retroactive to July 1, 1983.

WE WILL make whole the employees in the unit covered by the collective-bargaining agreement for any loss of wages which the employees sustained as a result of our unlawful conduct, with interest.

HERMAN BROTHERS, INC.

Lawyers Cooperative Publishing Company *and* Office and Professional Employees International Union, AFL-CIO-CLC *and* Stanley A. Dash, *Jr. and* Robert H. Carduner *and* Irving Kensler. Cases 30-CA-5603, 30-CA-6152, 30-CA-6332, and 30-CA-6339

7 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 19 August 1982 Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The Respondent is engaged in the publication and sale of law books, and it markets its products through approximately 100 commissioned sales representatives. The Respondent's supervisory hierarchy consists of President Gosnell, Vice President of Marketing Anderson, National Sales Manager Bissett, Vice President of Personnel Bennett, Personnel Manager Roth, and approximately 11 regional managers. The regional managers are the immediate supervisors of the sales representatives.

The sales representatives became dissatisfied with the Respondent's "subscription growth" plan of compensation, and in December 1979 sales representative Stanley Dash initiated a union organizing drive. The Respondent became aware of the organizing activity on 9 January 1980,[2] and subsequently launched a campaign in opposition to the Union. On 5 May the sales representatives voted against union representation and, beginning in late May, Dash took a leave of absence because he had been under stress. The Respondent threatened to discharge Dash on 30 May, and in June it delayed his receipt of disability benefits and refused to provide him with a copy of its insurance policy. Dash returned to work on 22 September after the Respondent required him to undergo a psychiatric examination. On 5 November the Respondent discharged Dash, and it subsequently challenged his application for unemployment compensation benefits. The Respondent also discharged Regional Manager Warner on 22 May, sales representative Kensler on 25 August, Regional Manager Carduner on 11 October, and sales representative Redd on 23 October.

On 14 January the Union filed unfair labor practice charges in Case 30-CA-5603, and on 28 March the General Counsel issued a complaint. The complaint as later amended alleged that during the organizing campaign and prior to 5 May the Respondent engaged in violations of Section 8(a)(1) and (3). The parties subsequently reached a settlement agreement which was signed by the Respondent on 15 September, signed by the Union on 18 September, and approved by the Regional Director on 1 October.

On 12 November Dash filed a charge in Case 30-CA-6152. The Regional Director set aside the settlement agreement on 7 January 1981 and issued a consolidated complaint on 15 January 1981. The complaint alleged, inter alia, that on 15 August the Respondent violated Section 8(a)(3) by acting to delay Dash's return to work until 22 September. It further alleged that the Respondent violated Section 8(a)(3) by transferring Dash to a different region and manager on 22 September and by discharging him on 5 November. The complaint also alleged that the Respondent unlawfully threatened to discharge Dash on 30 May.

The complaint, as later consolidated and amended, also alleged that the discharges of Warner, Kensler, Carduner, and Redd were unlawful. It further alleged that the Respondent violated the Act by appealing Dash's unemployment compensation award, by refusing to provide Dash's attorney with a copy of its disability insurance policy, and by delaying the payment of Dash's disability benefits. The complaint was also amended to allege additional unlawful conduct prior to the 5 May election.

The judge found that the Respondent engaged in violations of Section 8(a)(1) prior to the 5 May election. He also found that the Respondent violated Section 8(a)(3) by requiring Dash to undergo a psychiatric examination before his return to work on 22 September. The judge further found that, after the settlement agreement, the Respondent violated Section 8(a)(3) by discharging Dash and by appealing his award of unemployment compensation. The judge concluded, and we agree, that the remaining postsettlement allegations should be dis-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Unless otherwise specified, all dates herein refer to 1980.

missed.[3] Consequently, the only remaining postsettlement allegations involve Dash's discharge and the Respondent's appeal of his unemployment compensation award. Because we find no merit to those allegations, we shall dismiss the complaint and reinstate the settlement agreement.[4]

1. The complaint alleges that on 15 August the Respondent violated Section 8(a)(3) by delaying Dash's return to work until 22 September. In this connection the judge found that the Respondent discriminatorily required Dash to undergo a psychiatric examination before returning to work from his leave of absence. We note that this conduct occurred prior to the settlement agreement, and we therefore consider it only for the purpose of shedding light on the Respondent's motive for its postsettlement conduct. We conclude, for the reasons below, that the Respondent was motivated by legitimate concerns in requiring the examination.

Dash took a leave of absence from late May until 22 September after his psychologist informed him that he was suffering from a "gross stress reaction." On 9 June Roth sent Dash a disability form and a letter stating that the Respondent was immediately placing him on disability status. Dash's attorney sent the Respondent a letter from Dash's psychologist, which stated that the purpose of the leave of absence was to enable Dash to obtain "relief" from the job-related factors causing him stress. Roth testified that, because the letter did not state that Dash was unable to work, he began to doubt whether Dash was eligible for disability benefits. On 30 June Dash's attorney returned the completed disability claim form, which stated that Dash was totally disabled from a "gross stress reaction." However, in an accompanying letter Dash's attorney stated:

> You have requested that Mr. Dash complete and submit this form. His cooperation in doing this should not be construed as any admission on his part that he is "ill" or "disabled" within the meaning of these programs or for any other purposes. While Mr. Dash may indeed be entitled to benefits under these programs he does not yet have sufficient information to determine whether it is in his interest to submit a claim or accept benefits under them.

The attorney's letter also noted that Dash had not signed that portion of the form which authorizes a general release of medical information to the Respondent's insurance carrier. The letter indicated that, because of its "personal and sensitive" nature, such information would be released only pursuant to "specific" and "reasonable" requests by the insurance carrier.

On 15 July Roth stated that the Respondent could not treat Dash as being on sick or disability leave because he would not release information or admit that he was ill or disabled. Roth stated that Dash was instead being placed on inactive status pending clarification of his medical condition, and he indicated that the Respondent was reserving the right to have Dash examined by a physician of its choosing before permitting him to return to work. On 21 July Dash's attorney replied that the release of medical information would be authorized if such information were "reasonably necessary to evaluate" Dash's claim. The attorney requested a copy of the Respondent's insurance policy and indicated that Dash "is unable to determine whether he is ill or disabled within the meaning of the company insurance policy since he does not have a copy of the policy." On 30 July Roth responded that, because of the uncertainty created by the attorney's 30 June letter, the Respondent would continue to keep Dash on inactive status pending clarification of his medical condition. Roth also enclosed a copy of the Respondent's personnel policy concerning illness and injury.

On 12 August the attorney informed Roth that Dash had received his psychologist's approval to return to work, but on 15 August Roth indicated that before resuming work Dash would have to undergo an examination by the Respondent's physician. Roth stated that this procedure was necessary to ensure that Dash was "fully capable" of return-

---

[3] We agree with the judge that the Respondent lawfully discharged Hubert Redd on 23 October and Robert Carduner on 11 October. In its exceptions the General Counsel notes that the judge failed to find whether the Respondent acted unlawfully by discharging Carduner instead of merely demoting him to a sales representative position. For the reasons cited by the judge to find Carduner's discharge lawful, we find that the Respondent did not violate the Act by refusing to demote Carduner.

We also agree with the judge that the Respondent did not violate the Act by assigning Dash to a different regional manager on 22 September, assuming, arguendo, that this conduct can be characterized as postsettlement conduct.

[4] A settlement agreement will be set aside if its provisions are breached or if postsettlement unfair labor practices are committed. *Cambridge Contracting*, 259 NLRB 1374, 1381 (1982); *Ann's-Schneider Bakery*, 259 NLRB 1151, 1152 (1982). Therefore, we must initially determine whether the Respondent engaged in any postsettlement misconduct which violated the settlement agreement. However, the Board has observed that presettlement conduct may be considered as background evidence in determining the motive or object underlying a respondent's postsettlement conduct. *Vore Cinema Corp.*, 254 NLRB 1288, 1291–92 (1981); *Laborers Local 185 (Joseph's Landscaping)*, 154 NLRB 1384 (1965). We have given appropriate consideration to the judge's findings concerning the Respondent's presettlement conduct but, in our view, these findings do not warrant the conclusion that the Respondent's postsettlement conduct was unlawfully motivated. Although the Respondent's presettlement conduct may constitute background evidence in support of the General Counsel's prima facie case, we conclude, for the reasons set forth, infra, that the Respondent would have discharged Dash and appealed his unemployment compensation award, even in the absence of his union activity. In this connection we also emphasize our conclusion, discussed infra, that prior to the settlement the Respondent was motivated by legitimate concerns in requiring Dash to undergo a psychistric examination before returning to work from his leave of absence.

ing to his duties, and he requested that Dash's medical records be forwarded to the Respondent's physician. On 2 September Dash's attorney reiterated that the medical records were "obviously of a highly personal and confidential nature," and there is no evidence that those records were ever released. On 9 September Dash was examined by a psychiatrist selected by the Respondent, and he resumed working as a sales representative on 22 September.

We conclude that the Respondent had legitimate reasons for requiring that Dash undergo a separate medical examination prior to his return to work. We note particularly that Dash, through his attorney, was seeking disability benefits while refusing to concede that he was ill or disabled and while resisting the release of medical information. We also note that the initial letter from Dash's psychologist in June did not state whether Dash was able to work, and that Dash's 12 August offer to return to work was unaccompanied by any medical documents. We agree with the Respondent that Dash's communications raised legitimate questions concerning the nature and extent of his medical problems and his ability to resume his duties.

Further, the evidence indicates that in requiring the examination the Respondent was motivated solely by these legitimate concerns and not by Dash's union activity. The Respondent consistently communicated its doubts about Dash's condition by informing the attorney that his letters had created "uncertainty" and that Dash would remain on inactive status pending clarification of his condition. The Respondent reserved the right to require an examination by a physician of its choosing a full month before Dash indicated his availability to resume work. This suggests that the Respondent decided on this requirement in response to unusual circumstances, and that it did not simply present Dash with a hastily conceived obstacle to delay his return to work.

Contrary to the judge, we decline to draw an inference of proscribed motive from the fact that Dash was the first employee required to undergo a separate medical examination. Although other disabled employees were permitted to return to work without such an examination, we are not persuaded that their circumstances were similar to Dash's. Evidence is lacking that the medical condition of the other employees was ever in doubt, or that those employees hesitated to release medical information concerning their condition. We also find, contrary to the judge, that the favorable report by the Respondent's psychiatrist does not undermine the Respondent's contention that it was concerned about Dash's ability to perform his job. In view of the foregoing, we find that the Respondent was motivated solely by legitimate concerns in requiring the examination.

2. The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging Dash on 5 November. We find merit in the Respondent's exceptions and for the reasons below we find that Dash's discharge was lawful.

The record discloses that on 4 November Dash telephoned the Respondent's customer service department and spoke with Patrina Fulton, a collection correspondent. It is undisputed that Dash and Fulton became involved in an argument concerning a problem with a customer's account, and it is also undisputed that Fulton immediately reported the incident to Michael Santangelo, the supervisor of the Respondent's customer service department. Santangelo then telephoned Dash to ascertain his version of the incident, but there is conflicting testimony about the conversation that ensued. The judge did not resolve the conflict between the testimony of Dash and Santangelo, but he concluded that Dash's discharge was unlawful even assuming the accuracy of Santangelo's version. Contrary to the judge, we conclude that the Respondent did not violate the Act even if the accuracy of Dash's version of the conversation is assumed.[5]

According to Dash, Santangelo began the conversation by stating in an "insulting" tone of voice that he had just spoken with Fulton and that he now wanted to hear Dash's side of the story. Dash responded, "Mike, what you want and what you get are two different things." He told Santangelo that he was late for work and that "right now" he did not want to talk about the incident. Santangelo then said, "[Y]ou don't want to talk to me right now?" When Dash said, "That's right," Santangelo responded, "Who do you think you are? You will talk to me or I will rip up, return or lose every order of yours that comes through this department for clearance." Dash testified that at that point he "blew [his] cork" because his livelihood was being threatened, and he conceded that he "could very well have" used profanity. Dash and Santangelo began "shouting" at each other, and after 2 minutes they simultaneously hung up their phones.[6]

---

[5] The Respondent contends that Dash was discharged because of his conduct during the conversation with Santangelo. It does not contend that Dash's conduct with Fulton was sufficient to warrant discharge.

[6] According to Santangelo, Dash responded to his first question by saying, "F—k you . . . I don't have to tell you a f—king thing." Santangelo told Dash to calm down and discuss the problem, but Dash stated that he did not have to do what Santangelo said. Dash's voice became extremely loud, and Santangelo stated that if Dash did not calm down he would "personally watch over" all of Dash's orders and reject those which did not have every "i" dotted and "t" crossed. When Dash continued to raise his voice and told Santangelo not to threaten him, Santangelo hung up.

Uncontradicted testimony establishes that Santangelo immediately related the conversation to National Sales Manager Bissett and Personnel Manager Roth, and then repeated it in the presence of Vice President of Marketing Anderson, Vice President of Personnel Bennett, Vice President of Finance Fogel, his own supervisor, Smith, and Bissett.[7] On the same day Santangelo and Fulton again discussed the events with Bennett and the Respondent's attorney. Dash testified that on 5 November he received a phone call from Bissett, who told him that he was immediately discharged because the Respondent was tired of his "rude, abusive treatment" of employees.[8] Bissett declined to listen when Dash offered to explain his conduct.

Even if we assume, arguendo, that Dash's protected activity was a motivating factor in the Respondent's decision to discharge him, we find that the Respondent met its burden of establishing that Dash would have been discharged even in the absence of his protected activity. In reaching this conclusion, we place particular reliance on the extensive background evidence establishing that the Respondent had long considered Dash to be an employee with serious behavioral problems.

The record establishes that as early as 17 October 1977, the Respondent's national sales manager observed in a memo that Dash harbored a "negative attitude" and often exhibited an "argumentative" and "loud" voice. The memo indicated that Dash's behavior was a "longstanding" problem which "may eventually lead to termination." Subsequently, the Respondent began to receive complaints from customers about Dash's conduct. In June 1978 Marcia Koslov, the Wisconsin state law librarian, informed the Respondent that Dash's behavior in a sales meeting had been "rude" and "arrogant." In a memo to Regional Manager Murrell, the Respondent's national sales manager described the Koslov complaint as "one more" problem among the "ongoing" problems that the Respondent was encountering with Dash. The Respondent directed Dash to write a letter of apology to Koslov.

On 26 April 1979 the Respondent received another customer complaint from Gary Monson, a Wisconsin attorney, who stated that Dash's conduct had been "extremely arrogant, offensive, unprofessional, and extremely obnoxious." The letter also indicated that Dash's "attitude and demeanor" had been "disgusting." Vice President of Marketing Anderson apologized in writing to Monson, and Dash was removed from the account. In connection with this incident, Anderson wrote a memo to Gosnell in which he noted that Dash suffers from "moments of irrationality."[9]

The judge found, and we agree, that on 9 January Murrell properly threatened to put Dash on probation after he argued with some of the Respondent's customer service correspondents in the fall of 1979.[10] The judge also found that in late May Dash began his leave of absence without first informing his regional manager,[11] and that on 30 May the Respondent sent him a telegram threatening him with discharge if he did not contact the office within 4 days. We agree with the judge that the 30 May threat was not improper.

When viewed against this background, Dash's conduct on 4 November was simply an egregious manifestation of a longstanding behavioral problem.[12] Santangelo was conducting a legitimate investigation of the Fulton incident, but Dash refused to cooperate at the outset when he belligerently stated, "[W]hat you want and what you get are two different things." Dash conceded that he became extremely angry, and it is clear that he never gave substantive answers to Santangelo's questions.

The record therefore establishes that over several years the Respondent was repeatedly confronted with the issue of Dash's behavior, and we infer from its previous reactions that the Respondent would have discharged him on 5 November even in the absence of his union activity. Its previous reactions first demonstrate that it viewed the problem as serious long before the onset of union activity. The memo of 17 October 1977 discloses that 2 years before Dash initiated the organizing drive,

[7] As noted above, we are considering the issue of Dash's discharge in a light most favorable to Dash. Consequently, we are assuming, arguendo, that Dash's version of the facts represents what actually transpired, that those facts were related to the Respondent's officials by Santangelo, and that it was on those facts that the Respondent based its decision.

[8] According to his own testimony, Dash also told Bissett that his discharge did not come as a surprise in view of his union activity. Dash's testimony does not indicate whether Bissett responded to this statement.

[9] The documents in connection with the Koslov and Monson incidents, as well as the 17 October 1977 memo, are relevant in determining the Respondent's perception of Dash's behavioral problems and the motive underlying its discharge decision. We need not make factual findings with respect to what actually transpired during Dash's encounters with Koslov and Monson, and we do not rely on the documents for that purpose.

[10] The judge also found that Murrell discussed the Koslov and Monson incidents with Dash when he threatened him with probation.

[11] Dash contends that he sent a telegram to the Respondent's national sales manager, but the judge found that the Respondent never received it.

[12] In fact, our dissenting colleague tacitly concedes the existence of this problem by, inter alia, agreeing that the Respondent's requiring Dash to be examined by a psychiatrist prior to his return to work was "motivated by legitimate concerns." In this regard, contrary to our dissenting colleague, we find it irrelevant that the psychiatrist hired by the Respondent cleared Dash of "any problems," since the Respondent discharged Dash for his unacceptable behavior on the job, not for a medical disorder. Thus, as we noted earlier, the favorable medical report does not undermine the Respondent's contention concerning Dash's ability to perform his job.

one of the Respondent's highest officials recognized that his "longstanding" behavioral problem "may eventually lead to termination."

The Respondent's reactions also demonstrate that it took progressively stronger measures over time to control Dash's conduct. The Respondent first compelled him to write the letter of apology noted above, then threatened him with probation on 9 January, and finally threatened him with discharge on 30 May before actually terminating his employment on 5 November. This progressive response indicates that the discharge decision was the logical culmination of the Respondent's previous reactions over several years. What emerges from the record as a whole, therefore, is that the Respondent gave Dash every opportunity to rectify his behavior, but that it finally discharged him when confronted with his insubordinate obstruction of Santangelo's legitimate investigation. In view of all the above evidence, we conclude that Dash's discharge did not violate Section 8(a)(3) and (1).[13]

3. The judge found that the Respondent's appeal of Dash's award of unemployment compensation benefits was discriminatorily motivated. We agree with the Respondent that its conduct was not unlawful.

Dash applied for unemployment compensation benefits following his discharge. The Respondent contested the application, but the Wisconsin Department of Industry, Labor and Human Relations (DILHR) determined that Dash qualified for benefits. The Respondent filed an appeal of the award and a "telephone hearing" was held before an examiner of the Appeal Tribunal of the DILHR. The examiner issued a decision which upheld the award of benefits, and the Respondent petitioned for review to the Wisconsin Labor and Industry Review Commission (Review Commission). The Review Commission dismissed the Respondent's petition, finding that it was untimely filed. The Respondent filed a complaint in the circuit court of Dane County, Wisconsin, naming the State of Wisconsin, the DILHR, the Review Commission, and Dash as defendants. The complaint requested that the court set aside the decision of the Review Commission, reverse the examiner's decision, and remand the proceeding to the Appeal Tribunal of the DILHR to reopen the hearing de novo. At the time of the hearing in the instant proceeding, the Respondent's action in the circuit court was still pending.

In *Bill Johnson's Restaurants v. NLRB*, 103 S.Ct. 2161 (1983), the Supreme Court set forth the test which the Board must apply in determining whether a state-court lawsuit may be enjoined as an unfair labor practice. The Court stated (103 S.Ct. at 2173) that

> . . . the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit.

A suit has a reasonable basis in fact if it raises "a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts."[14] A suit has a reasonable basis in law "if there is any realistic chance that the plaintiff's legal theory might be adopted."[15] Applying this test to the instant case, we find that the Respondent had a reasonable basis in fact and law to support its appeal of Dash's award of unemployment compensation.

We find at the outset that the Respondent had a reasonable basis for pursuing its appeal of the DILHR's initial determination. The examiner's decision discloses that the issue at the hearing was whether Dash's conduct with Santangelo on 4 November[16] constituted "misconduct connected with

[13] We are aware that the Respondent did not attempt to ascertain Dash's version of the 4 November incident before discharging him, but we conclude in the circumstances of this case that its failure to do so does not warrant a finding of unlawful motive. Although the Respondent's failure to consult Dash is among the factors to be considered, contrary to our dissenting colleague, we conclude that it is outweighed in this case by the extensive evidence discussed above that the Respondent could no longer retain Dash in the face of his persistent misconduct. We also find it noteworthy that the 4 November incident was given extensive consideration by several of the Respondent's highest officials. Santangelo discussed the incident with Bissett and Roth, and then discussed it again in the presence of Anderson, Bennett, Fogel, Smith, and Bissett. Santangelo and Fulton then engaged in further discussions with Bennett and the Respondent's attorney. We do not minimize the Respondent's failure to ascertain Dash's version, but in light of the above evidence we cannot say that the Respondent did not investigate the 4 November incident before deciding to discharge Dash.

In concluding that the Respondent's motive was unlawful, our dissenting colleague emphasizes Dash's previous performance as a sales representative. We do not dispute that Dash had been an excellent salesman, but we think it fair to conclude that the Respondent determined that his sales performance eventually came to be overshadowed by his longstanding behavioral problems.

Finally, in ascertaining the Respondent's motive, we also disagree with our dissenting colleague that Dash did not present any problems to the Respondent which were not common to the rest of the sales force. Although the record contains examples of sales representatives who were not disciplined after engaging in various types of abrasive conduct, there is no evidence that any other sales representative exhibited the consistent behavioral problem which the Respondent had long recognized in Dash. There is also no evidence that any sales representative had escaped discipline after obstructing a supervisor's legitimate investigation of an employee dispute. An inference of unlawful motive based on disparate treatment is therefore unwarranted.

[14] 103 S.Ct. at 2171.

[15] 103 S.Ct. at 2172.

[16] The decision also referred to alleged arguments with two unnamed customers in 1978 and 1979.

his employment" within the meaning of the applicable Wisconsin statutory provision.[17] In his decision the examiner noted that the Supreme Court of Wisconsin has interpreted this statutory language to include:

> Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.[18]

As noted above, there is a factual dispute as to the substance of the 4 November argument between Santangelo and Dash. According to Santangelo, the argument became quite heated, and Dash used profanity and refused to answer questions about the Fulton incident. Dash conceded that he "blew [his] cork" and "could have" used profanity, but asserted that he did not become angry until he was provoked by Santangelo's threat to destroy his orders.

In view of the dispute between Dash and Santangelo as to the substance of their argument, we find that the Respondent's appeal was based on a genuine issue of material fact.[19] The appeal also had a reasonable basis in law because under Santangelo's version Dash's conduct at least arguably fell within the category set forth in the Wisconsin statute as interpreted by the Wisconsin Supreme Court.[20] We cannot say that there was no "realistic chance" that the Respondent's legal theory could have been adopted.

Furthermore, we are not persuaded that the Respondent acted unlawfully by continuing its appeal after the examiner issued his decision. The Respondent contends that it was denied an opportunity to present witnesses and be represented by counsel at the "telephone hearing" as a result of ambiguous and misleading instructions from the DILHR. On 2 January 1981 the Respondent received instructions which indicated that the 13 January proceeding would be a "telephone hearing" in which the Respondent would participate by telephone from its office in Rochester, New York, while Dash appeared in person at the DILHR's office in Madison, Wisconsin. In pertinent part, the instructions further stated that:

> This case has been scheduled for a telephone hearing. Your testimony will be taken and recorded over the telephone. The average hearing length is one hour.
>
> . . . .
>
> Immediately telephone the Office Manager if you wish to:
>
> A. Have witnesses present at the hearing; (Requires personal appearance hearing),
>
> B. Be represented by an attorney or another person; (Requires personal appearance hearing)
>
> . . . .
>
> Personal appearance hearings will be scheduled only upon your request.

Although there is no evidence that either the Respondent or Dash requested that a "personal appearance hearing" be scheduled, Dash nonetheless appeared at the hearing on 13 January with his attorney. When apprised of this situation, Personnel Manager Roth stated over the telephone that he had interpreted the instructions to prohibit counsel at a "telephone hearing," and he requested an adjournment to obtain counsel for the Respondent. The examiner denied the request and subsequently asked Roth whether he intended to present any witnesses. Roth again stated that he had interpreted the instructions to prohibit witnesses at a "telephone hearing," and the examiner denied his request for an adjournment to permit the Respondent to call witnesses. Subsequently, in his decision upholding the award of benefits, the examiner relied on the Respondent's failure to present any witnesses and found that it had failed to meet its burden "to introduce competent, admissible evidence" concerning the circumstances of Dash's discharge.[21] The Respondent's subsequent petition to the Review Commission, as noted above, was dismissed solely on the ground that it was untimely filed.[22] In the complaint which it filed in the circuit court of Dane County, Wisconsin, the Respondent alleged a violation of due process and requested that the hearing be reopened to permit it to present witnesses and be represented by counsel.

We find that the Respondent had a reasonable basis in fact and law for continuing its appeal after

[17] Under this provision, an employee who is discharged for "misconduct connected with his employment" is ineligible for benefits.

[18] The examiner quoted the decision of the Supreme Court of Wisconsin in *Boynton Cab Co. v. Neubeck & Ind. Comm.*, 237 Wisc. 249 (1941).

[19] Although we have found the discharge to be lawful even if Dash's version is deemed accurate, we cannot say that the conflicting versions would not be of significance to a Wisconsin state court attempting to apply the test set forth above.

[20] We need not consider whether Dash's conduct, according to his own version, arguably fell within the statutory category.

[21] The examiner stated that Roth "had no first-hand knowledge" of the incident between Dash and Santangelo.

[22] Although the Respondent's petition was dated 26 January, it was not received by the Review Commission until 30 January. The filing deadline was 28 January.

the examiner's decision. The instructions set forth above present a genuine issue of material fact, since they arguably prohibit legal representation and the presentation of witnesses at a telephone hearing. In view of this ambiguity in the instructions, we find that the Respondent reasonably could have contended, as it did in its complaint before the Wisconsin court, that it was prejudiced by the examiner's refusal to adjourn the hearing to permit the Respondent to obtain counsel, and by the examiner's reliance in his decision on the Respondent's failure to produce witnesses. We cannot say that there was no "realistic chance" that the court could have adopted the Respondent's legal theory that it was denied due process.

Because we find that the Respondent's appeal had a reasonable basis in fact and law, we are precluded from enjoining the appeal regardless of the Respondent's motive. In any event, we also find no evidence that the appeal was unlawfully motivated.[23] The judge inferred the existence of an unlawful motive from his finding that the appeal was marked by dilatory tactics, by lack of a serious effort to prosecute the action, and by strategies that differed from previous proceedings involving unemployment compensation benefits. In concluding that the Respondent engaged in dilatory tactics, the judge apparently relied on his finding that the Respondent "waited until the last day" to appeal the initial determination. The DILHR issued the award on 1 December and the Respondent requested an appeal by telegram on 15 December. The latter date does represent the filing deadline, but we find that the Respondent's timely filing of its request, 2 weeks after the issuance of the decision, hardly warrants the conclusion that it engaged in dilatory tactics.

In finding that the Respondent did not make a serious effort to prosecute the action, the judge found that the Respondent "chose" not to present witnesses or affidavits at the 13 January hearing. As discussed above, however, the hearing instructions arguably prohibit the presentation of witnesses at a telephone hearing. We are not of the view that the Respondent's confusion over the proper procedure is sufficient to support a finding that its effort was less than serious.

[23] In *Bill Johnson's Restaurants v. NLRB*, 103 S.Ct. 2161 (1983), the Supreme Court stated that if genuine material factual or legal issues exist, the Board must await the results of the state court adjudication. The Court further stated that "[i]f the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief." 103 S.Ct. at 2173. At the time of the hearing the state court had not rendered a final judgment. We consider the Respondent's motive at this point only to avoid further proceedings should the state court render a judgment adverse to the Respondent.

Contrary to the judge, we see no reason to draw an inference of unlawful motive from the fact that the Respondent made a personal appearance, rather than a telephonic appearance, at a prior unemployment compensation proceeding involving another employee in New York. The Respondent was simply acting within its rights under Wisconsin procedure by participating by telephone in the 13 January hearing. We can find no significance in the fact that the Respondent chose to pursue different strategies in different proceedings, particularly since the record discloses little evidence of the circumstances surrounding the prior New York proceeding. Indeed, if the limited evidence of that proceeding establishes anything, it establishes only that the Respondent's challenge to Dash's claim was not without precedent.

We therefore find no evidence that the Respondent's appeal of Dash's award of benefits was unlawfully motivated. In view of this finding and our conclusion above that Dash's discharge was lawful, we find that the Respondent did not violate the Act after the settlement agreement. Consequently, we shall reinstate the settlement agreement and dismiss the complaint. *Cambridge Contracting*, 259 NLRB 1374, 1381–83 (1982); *Ann's-Schneider Bakery*, 259 NLRB 1151, 1160 (1982).

ORDER

The complaint is dismissed.

IT IS FURTHER ORDERED that the settlement agreement in Case 30–CA–5603 be reinstated.

MEMBER ZIMMERMAN, dissenting in part and concurring in part.

I dissent from my colleagues' reversal of the judge's finding that union activist Stanley Dash was discharged in violation of Section 8(a)(3) and (1) of the Act. Notwithstanding the factors cited by the majority, the fact remains that Dash was an excellent sales representative who had won sales prizes and been considered by the Respondent for a position as regional manager, and whose previous activities noted by my colleagues had always been condoned by the Respondent. Indeed, the Respondent was aware prior to the organizing campaign that aggressive behavior which sometimes became abusive or profane was not unusual among the sales representatives, and management tolerated such behavior as long as the representative was successfully making sales. That Dash's union activity was the sole motivating factor in the Respondent's decision to discharge him on 5 November 1980 is evidenced by the fact that the Respondent not only failed to seek out Dash's version of the precipitating incident with Santangelo, but refused

to listen when Dash tried to explain his side of the story. The Respondent's determination to hear only Santangelo's version establishes that its interest was in finding a plausible pretext for the discharge, and not in ascertaining what actually occurred.[1]

Because I find Dash's discharge unlawful, I would not honor the parties' settlement, as my colleagues do. Rather, I would consider and essentially affirm the judge's finding that the Respondent committed numerous violations of Section 8(a)(1) of the Act.

I do, however, concur in my colleagues' finding that the Respondent did not act unlawfully when it earlier required Dash to undergo a psychiatric examination before returning to work following a prior leave of absence,[2] or when it appealed his award of unemployment compensation benefits. In contrast to its discharge of Dash, the record indicates that the Respondent was motivated by legitimate concerns with respect to these two actions, and I agree with my colleagues that these allegations of the complaint should be dismissed.

[1] The fact that any number of the Respondent's highest officials may have participated in the decision to discharge Dash does not detract from the undisputed fact that these officials did not ascertain Dash's version of the incident for which he was allegedly discharged prior to the decision to discharge him. Contrary to my colleagues, who find that the Respondent's failure to consult Dash about the incident is outweighed by the "extensive evidence . . . of his persistent misconduct," I find it more likely that Dash's union activities eventually overshadowed his excellent sales performance in the Respondent's view.

[2] My colleagues conclude that I tacitly concede the existence of a longstanding behavioral problem on Dash's part because I agree with them that the Respondent's requiring Dash to be examined by a psychiatrist prior to his return to work following an earlier leave of absence was motivated by legitimate concerns. To the contrary, I find the fact that the psychiatrist selected by the Respondent itself gave Dash permission to return to work establishes that whatever psychiatric problems the Respondent may have perceived Dash to have had in the past did not warrant the Respondent's later actions in firing him. Thus, the judge found: "The psychologist who interviewed Dash on the Company's behalf completely cleared him of any problems and issued a fairly impressive report about the state of Dash's condition." Notwithstanding this finding, however, I find that the evidence was insufficient to sustain the judge's conclusion that this examination was motivated by unlawful reasons. Dash refused to concede that he was ill or disabled and resisted the release of his medical information while at the same time seeking disability benefits from the Respondent. In these circumstances, the General Counsel failed to establish by a preponderance of the evidence that the Respondent's requiring Dash to undergo an examination to determine his condition was discriminatorily motivated.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Charges were filed against Lawyers Cooperative Publishing Company (Respondent) on January 14, 1980, by Office and Professional Employees International Union, AFL–CIO–CLC, on November 12, 1980, by Stanley Dash, on February 20, 1981, by Robert Carduner, and on February 20, 1981, by Irving Kensler, each resulting in the issuance of complaints against the Respondent. All of the individual cases were consolidated for hearing. The consolidated complaint alleges that during the course of a union organizing campaign and thereafter the Respondent has unlawfully interrogated its employees, created the impression of surveillance of its employees, threatened its employees because of union activity, granted benefits during the course of the union campaign, discharged employees Stanley Dash, Robert Carduner, Irving Kensler, Richard Warner, and Hubert Redd, and disciplined employee David Outlaw because of union activity. The consolidated cases were heard in Milwaukee, Wisconsin, on July 20–30, 1981; in Washington, D.C., on August 11–19, 1981; and again in Milwaukee, Wisconsin, on August 24–25, 1981. Briefs were received from the General Counsel and the Respondent.

I. THE BUSINESS OF THE RESPONDENT

Lawyers Cooperative Publishing Company (LCP) of Rochester, New York, engages in the sale and publication of law books and other legal publications on a nationwide basis. It has admitted the jurisdictional allegations of the consolidated complaint. I find that it is an employer within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Office and Professional Employees International Union, AFL–CIO–CLC is a labor organization within the meaning of the Act.

III. UNFAIR LABOR PRACTICE ALLEGATIONS

A. *Background*

Lawyers Cooperative Publishing Company of Rochester, New York (LCP), is one of the nation's leading publishers of law books and other legal publications. It markets its products primarily through a large sales force of commissioned salespersons. The Company has divided its sales territory into various regions managed by regional managers, who report to a national sales manager. This manager is directly responsible to LCP's vice president of marketing and its president.

The basis for the involved union organizing campaign had its inception in 1977 when the Company abandoned its former compensation plan for sales representatives and introduced what it calls a "subscription growth" plan. The details of this plan are unnecessary to the decision of this proceeding. It is sufficient to know that the plan had the effect of reducing sales commissions for many senior sales representatives because of various factors beyond their control. The operation of the subscription growth plan from the outset caused dissatisfaction among many of the Company's field sales representatives. Although this dissatisfaction was made known to management in a variety of ways, LCP's management was and is committed to the subscription growth plan. Some adjustments to the plan were made in the first 2 years after its introduction to cure some of its deficiencies, but opposition to the plan remained among the Company's sales representatives. One of the LCP sales

representatives, Stanley Dash, determined that the only solution to the problem was to have the Company's field sales representatives form or join a union. He also believed that with the aid of a union solutions could be found to other perceived problems including the Company's pension plan, its disparate treatment of salespersons in the field compared with personnel in the home office, and the manner in which sales quotas were computed.

In early December 1979, Dash organized a conference call between himself and several other sales representatives including alleged discriminatee Irving Kensler. Dash indicated that he had received union authorization cards from the Chicago branch of the Office and Professional Employees International Union (the Union) as well as advice on an organizing campaign with a list of do's and don'ts to be used during the campaign. The sales representatives participating in the conference call indicated interest in the Union, and Dash had authorization cards sent to these persons for distribution to the remainder of the sales force.

Knowledge of the organizing campaign which resulted in a Board election on May 8, 1980, came to the Company's management on January 9, 1980. Though some of the Company's lower-level management may have known or heard rumors that such a campaign was being conducted at a slightly earlier date, I credit the Company's witnesses that its top management did not become aware of the campaign until January 9. Immediately following receipt of knowledge of the campaign, the Company contacted its attorneys for advice on how to combat the organizing drive. LCP admits that it did not want the Union and sought advice on how to win the campaign.

Acting on advice of counsel, Company Vice President of Marketing Richard Anderson and National Sales Manager Peter Bissett called each of the 11 regional managers on January 10 and 11 and sought their knowledge of any union organizing campaign. The regional managers expressed no knowledge of the campaign. Shortly thereafter, again after meeting with counsel, the regional managers were called by Bissett and Anderson and asked to telephone one or two of their sales representatives to state that they had heard a rumor about union organizing and ask if the representatives were aware of it. The regional managers were instructed to say nothing further, not to inquire who was involved, not to inquire whether authorization cards had been distributed or signed, and not to ascertain underlying issues or grievances. However, it is clear from the evidence that though these instructions may have been given, the regional managers in varying degrees failed to carry them out with care. The regional managers violated the Act by illegally interrogating their sales representatives, creating an atmosphere of surveillance, and implying that benefits would result from staying nonunion. After the initial canvass of the sales representatives by the regional managers, it became clear that an organizing campaign was well underway. Acting upon advice of counsel, LCP decided to have the regional managers explain in one-on-one conversations the significance of union authorization cards. The instructions given the regional managers were to: (1) meet face to face with each sales representative, (2) state that the Company was aware of the organizing attempt, (3) state that cards had been sent out, and (4) state that the Company wanted its sales representatives to know the significance of the cards.

The Company also instructed the regional managers not to ask questions about any individual's participation in union activities and to state that they were not interested in whether the representatives received a card, signed it, or sent one back. The regional managers were also told not to make any threats and not to promise anything. In explaining the significance of the authorization cards, the regional managers were to make the following statements: (1) If a majority of the sales representatives signed the cards and sent them back, the Union can go to LCP's management and say, "We have a majority of the people who want a union and we want to represent them." The Company can agree and there will be no election (2) if a majority of the people sign the cards and send them in resulting in an election, though the election may be lost by the Union, it could go to the National Labor Relations Board (NLRB) and tell it they had a majority, that the Company must have done something to cause the election against them, and a new election can be held or the NLRB can direct the Union to be the representative and (3) if the cards were signed, you can request the cards to be returned.

The regional managers were told to listen and answer questions, if questions were asked, but not to ask or question anybody about anything. They were also instructed to report to Bissett and keep him informed but to be extremely careful about what they said and how they handled themselves.

The face-to-face meetings between the regional managers and the individual sales representatives took place generally between January 14–18, 1980. After these meetings, LCP conducted its campaign primarily through letters and the use of the other officials in the Company, including Thomas Gosnell, its president, Donald Bennett, Vice President of Personnel Anderson, and Bissett. Following the regional manager-sales representatives meetings about the authorization cards, LCP gave the regional managers further guidelines on how to conduct themselves during the organizing drive. On January 22, LCP mailed to each regional manager a four-page summary of dos and don'ts for supervisors. On February 4–6, a meeting for regional managers was held in Chicago at which time LCP's labor counsel explained the election process, elaborated on the dos and don'ts, talked of probable union campaign techniques, and explained how LCP's campaign would be run.

At the same meeting, the regional managers were asked to fill out questionnaires on the sales representatives working in their regions. These questionnaires, among other things, required the regional managers to give their best estimate of their sales representatives union sympathies.

Following the Chicago meeting, LCP carried out a campaign based on letters from President Gosnell, communication meetings with Gosnell, and informational meetings where Bennett, Bissett, and Anderson explained LCP's benefit programs and marketing procedures. The

General Counsel urges that the initial meetings of the regional managers with the sales representatives, the meeting of company management with groups of sales representatives, the company letters to the sales representatives, and changes in the company's pension program and compensation program during the course of the campaign, all constitute violations of the Act.

During the course of the campaign, LCP threatened Stanley Dash with probation and placed sales representative David Outlaw on probation for 6 months. Following the election in May 1980, which the Union lost, the Company discharged one of its regional managers, Richard Warner. It also engaged in a course of harassment of Stanley Dash which is discussed in detail at a later point in this decision. Region 30 and LCP entered into a comprehensive settlement in Case 3–CA–5603 in September 1980, which was set aside when LCP discharged Dash in November. Earlier in August LCP discharged sales representative Irving Kensler. LCP discharged Regional Manager Robert Carduner following a meeting with company attorneys in preparation of LCP's defense of the reopened proceeding. In October, sales representative Hubert Redd was discharged. It is alleged that the motivation for all of the above personnel actions was LCP's union animus and thus each action is alleged to be a violation of the Act.

B. *Discussion and Conclusions*

1. Implementation of five-percent buffer to subscription growth plan during the campaign

On March 4, 1980, the Respondent announced the implementation of a so-called five-percent buffer, a change in the existing compensation plan. This new plan was announced to sales representatives at meetings held in March 1980. The purpose of the change was to ease some of the more adverse effects of the subscription growth plan which began in 1977 and about which there had been much controversy among the sales representatives. Development of the five-percent buffer began in April 1979, which LCP Vice President of Marketing Anderson initiated discussions with his counterpart in Bancroft Whitney, a wholly owned subsidiary of LCP. By May 1979, both vice presidents were corresponding on the elements of what was to become the five-percent buffer plan and the plan had been placed on the agenda of a July management meeting for discussion. During June 1979, Anderson had some initial figures prepared regarding the dollars that might be involved in changing the then-current compensation plan.

At the July meeting, the five-percent buffer plan was agreed on and a decision was made to implement the plan by January 1, 1980, conditioned on the Company's receiving a satisfactory indepth cost-benefit analysis. The plan, at this point, was detailed as indicated by a memorandum introduced into evidence. In August 1979, information on how much the five-percent buffer would affect the sales representatives' commissions was being collected. These figures were sent to LCP's comptroller for verification and a discrepancy was discovered in the calculations. In September, Anderson decided that the quantity of information for determining the cost-benefit analysis was not sufficient and further information was collected. The comptroller recomputed the figures and another meeting was scheduled for review of the plan in November 1979. At the November meeting management decided to get more information to further refine the calculations. Because of this information request, the Company decided that it was impossible to implement the five-percent buffer on January 1, 1980, because the final figures would still be coming in. The decision was made at this time to present the final revised plan to the regional managers at a scheduled February 1980 meeting in Hawaii before announcing it generally. It was also agreed at that point that the five-percent buffer would be made retroactive to January 1, 1980.

At the November meeting, the president of LCP gave his final approval to the five-percent buffer plan subject only to the final figures being simiar to the acceptable calculations that had already been made.

About January 3, 1980, the vice president of Bancroft Whitney asked Anderson whether the final calculation could be computed in time to announce the buffer plan at the Hawaii meeting. Anderson responded on January 8 that the figures were not yet completed but that he would do his best. Anderson also testified that he also decided at this time to hold a small meeting of regional managers from LCP and Bancroft Whitney to be sure that there would be no differences of opinion between the companies as there had been in the past. This meeting was held in Dallas[1] with satisfactory results and the five-percent buffer was announced to the regional managers at a general management meeting held in Hawaii in March. The plan was announced shortly thereafter to sales representatives.

I find from the evidence that the five-percent buffer was developed and a decision to implement it had been made prior to the beginning of the union organizing campaign and the time that the Company gained knowledge of the drive.

Thus, I find that the plan was not instituted and implemented in order to influence the election in violation of the Act. As both the decision to implement the plan and the timing for the announcement of the plan was made prior to the Company's knowledge of the campaign, I conclude that the timing of the announcement of the plan was consistent with the Company's prior actions in announcing changes in compensation plans and was not unlawful. See *B. L. K. Steel*, 245 NLRB 1347 (1979). Therefore, I recommend that the complaint, insofar as it alleges a violation of the Act in this regard, be dismissed.

2. Lowering the forecasts

The complaint alleges that LCP granted a general reduction in sales quotas to sales representatives in violation of Section 8(a)(1) of the Act. The 1980 sales quotas were given to the representatives after LCP had knowledge of the union organizing campaign. However, the forecasts themselves were prepared pursuant to a consist-

[1] The Dallas meeting is significant because it was mentioned by some regional managers to their sales representatives in advance of the meeting, with the implication that improved benefits might be forthcoming.

ent company policy at a time well before January 9. The procedure for developing forecasts begins about August of the year preceding the forecast year with sales representatives submitting their quotas. These requests are paired with company goals under a rather complicated procedure which results in final quotas by December. Additionally, though many sales representatives' sales forecasts were lowered, at least one-third of the sales representatives' forecasts were increased for the year 1981. The General Counsel failed to meet the burden of proof to support the allegation that ther Company lowered the forecasts in order to have an effect on the union organizing campaign and, accordingly, I recommend that the complaint, insofar as it alleges a violation of the Act in this regard be dismissed.

3. Washington meeting between Gosnell, Fogel, Mann, and Kensler

A meeting between LCP President Gosnell, LCP Treasurer Seymour Fogel, and sales representatives David Mann and Irving Kensler was held in Washington, D.C., in a hotel on April 11, 1980. The complaint alleges that at this meeting Gosnell interrogated the representatives concerning their union activities and sympathies, solicited complaints and grievances from Mann and Kensler, promised increased benefits and improved conditions of employment, created an impression of surveillance by asking Mann and Kensler the names of other employees involved in organizing the Union, and sought to undermine the Union's organizing drive by soliciting them to inform other employees of their antiunion sympathies in order to cause them to abandon support for the Union.

Everything about this meeting is in controversy. The General Counsel contends, through the testimony of Regional Manager Robert Carduner and Kensler, that the meeting was set up at the insistence of Kensler in a message relayed through Carduner. As to the meeting itself, its content is in complete dispute. Kensler, on the one hand, contends that his active participation was limited to a momentary attempt to explain an alternative to the Company's subscription growth plan, after which he was cut off and interrogated by Fogel and Gosnell as to the union organizing campaign and what could be done to defeat it. Gosnell and Fogel, on the other hand, submit that Kensler presented a very detailed alternate compensation plan and other ideas on how to defeat the union organizing campaign. They contend that at no time did they interrogate either representative, promise any improved benefits, or request the identities of any persons involved in the organizing campaign.

With respect to this meeting, I believe that the testimony given by Fogel and Mann is the most credible. The General Counsel points to the testimony of Carduner and Kensler to the effect that Gosnell, through Bissett, requested a meeting to be set up between Gosnell and several influential sales representatives. Bissett testified that Carduner contacted him in March or early April stating that he had been contacted by five representatives who wanted to meet with Gosnell for the purpose of resolving the union problem. Bissett further testified the he instructed Carduner to have the sales representatives contact Gosnell directly. Anderson testified that Carduner later called him to confirm that two representatives identified as Kensler and Mann wanted to speak with Gosnell. Anderson also advised that they should contact Gosnell directly. Regional Manager George Synder testified that Kensler, in late March, requested that he set up a meeting between Gosnell, Kensler, some influential sales representatives, and some regional managers.

One of the participants in the meeting, Rober Mann, testified that Carduner called him about the meeting and said nothing about acting at Gosnell's direction. Mann also recalled that Carduner said that several sales representatives were going to be included in the meeting as of the first call. Carduner testified that he was never seeking more than two. Telephone bills introduced into evidence show that during the period immediately before the meeting Carduner talked extensively with Mann and Kensler, including nine calls to Mann on April 9. As the Respondent points out, these are hardly the acts of one who is acting solely as an intermediary.

I also agree with the Respondent that the hotel arrangements indicate that Kensler and Mann initiated the meeting. A blackboard was placed in the meeting room at Mann's request. The Respondent urges, and I agree, that if Kensler and Mann were meeting with Gosnell solely at his request, the purpose of the meeting being left unstated, then no arrangements would have been made to have available a blackboard for a presentation. With respect to the events at the meeting, Kensler's and Mann's testimony conflict sharply. As noted earlier, Kensler testified that Gosnell interrogated Mann and him with respect to the identity of other union supporters, solicited grievances, and encouraged them to work against the Union. On the other hand, Mann testified that Kensler made a lengthy presentation with respect to an alternate compensation plan that he had devised and utilized notes. Kensler denies having any notes. Kensler stated that he never indicated opposition to the Union at this meeting or at any other time, although Mann testified that both he and Kensler stated at the meeting that they were opposed to the organizing drive. Seymour Fogel, a very credible witness based on demeanor and manner, verified these portions of Mann's testimony. Fogel testified that at the meeting Kensler stated his opposition to the Union and that he had a plan to defeat the Union. Kensler then explained the sales representatives' opposition to the subscription growth plan program and offered in a lengthy fashion an alternative compensation plan. Kensler utilized the blackboard to explain his program. Fogel also testified that Kensler proposed that he be reinstated as national sales manager to replace Bissett. I can find no credible evidence at this meeting Gosnell actually interrogated Kensler or Mann about the identities of union supporters or promised any benefits. However, Mann testified that President Gosnell asked him about what he doing about defeating the Union and why he was not on the telephone calling and telling other sales representatives about his view of the Union. Mann further testified that Gosnell said that was what he should be doing. Although Gosnell denies these

statements, Fogel testified that near the end of the meeting Kensler gratuitously said that he was either going to call the salespersons or if any of the salespersons called him he was going to tell them to vote against the Union. Fogel testified that Gosnell's response to that was something like, "Well, Irv, you know I cannot tell what you can or cannot do. But, if you're to do that, that would be nice" or "It's nice to know that you're on the Company's side."

I credit Mann's testimony corroborated, at least in part, by Fogel, that Gosnell urged both Mann and Kensler to take action to discourage union support among their fellow sales representatives. I find that Gosnell's actions in this regard constitute a direction to discourage other employees from supporting the Union and is a violation of Section 8(a)(1) of the Act. See *Galax Apparel Corp.*, 247 NLRB 159, 162 (1980). In all other respects, I find the actions taken by the Respondent's management at the Washington meeting to be nonviolative of the Act and will recommend that the other allegations relating to this meeting be dismissed.

4. Gosnell information meetings

During the campaign in the spring of 1980, the Respondent scheduled a series of meetings between its sales representatives and President Gosnell. At these meetings, Gosnell gave what he characterized as an unstructured presentation of the Company's point of view with respect to the Union. After this portion of the meeting, Gosnell solicited comments from the sales representatives in an attempt to answer their questions. The General Counsel urges that the meetings constituted an unfair labor practice in that they were a departure from the Company's past practices in communicating with sales representatives, that the comment sessions constituted solicitation of grievances, and that the answers given by Gosnell amounted to a promise to remedy such grievances thereby constituting an impermissible promise of benefits to discourage union support.

The Company's past practice with respect to communicating with sales representatives had been through the normal channels of management. Management views were passed through Bissett to the regional managers who then discussed whatever subject management wanted them to with the sales representatives on a one-to-one basis. Information that the sales representatives wanted to make known to the management generally passed back to management in the same fashion. However, the Company had a practice of having regional sales meetings and annual meetings at which top management did speak to the sales representatives and discuss company policy with them. Thus, Gosnell's meetings with the sales representatives were not unique to the organizing campaign. The Respondent has the right to communicate its views and its policies to the Union during the course of the campaign. I cannot find that the fact that Gosnell met with the sales representatives in and of itself was unlawful.

The question of whether or not Gosnell, by asking for comments, was soliciting grievances is another question. Clearly the Company wanted to explain its views to the sales representatives and wanted to hear the sales representatives' views or it would not have held the meetings. Gosnell carefully avoided words such as grievance when asking for comments or questions relating to the topics about which he spoke, which included working conditions, benefits, and the Company's commission plan. However, under the circumstances, he was clearly asking the employees to air their grievances. The Board has held that the vice in solicitation of grievances is that, by responding to the grievances, employers may either expressly or impliedly promise to remedy them, thus promising a benefit. From the best evidence introduced into this record with respect to what Gosnell actually said, I cannot find tha he ever promised or even implied a benefit in reponse to sales representatives' questions.

During the course of a question-and-answer session, a sales representative made a recording and thus preserved the questions and Gosnell's answers. This transcript reveals that Gosnell, at worst, defended the Company's existing policies. There is not even a hint in the transcript that Gosnell intended to change any policies, commission structure, or other matters of interest to the sales representatives. As there is no showing that there was some expressed or implied promise to remedy real or imagined grievances, I cannot find that Gosnell's responses constituted an unfair labor practice. There was some equivocal testimony given about Gosnell promising to review the Company's commission policy with respect to one set of books sold in New York. This testimony was not clear and is at odds with Gosnell's demonstrated performance as shown by the tape of an actual meeting. After reviewing all of the evidence with respect to these meetings, I have concluded that the General Counsel has failed to prove that the meetings constituted an unfair labor practice and will recommend that the allegations of the complaint, based on these meetings, be dismissed.

5. The Company's antiunion letters

During the course of the campaign, the Respondent sent a series of letters to its sales representatives dealing with campaign issues. It is contended that certain of these letters contained statements which constitute unfair labor practices. (a) In a letter dated April 2, 1980, President Gosnell wrote the sales representatives, inter alia:

> Contrary to what you have been told, *you do not need to sign a card in order to vote.* If you have already signed a card and you wish it back, you may get it back by writing to the Union requesting that it return your card to you. The Union's address is: Office and Professional Employees International Union, Local 2121, 290 Franklin Street, Room 203, Buffalo, New York 14202.

The General Counsel urges that this statement constitutes an unlawful solicitation of the employees to return their authorization cards. On brief, the General Counsel draws an analogy between the clearly unlawful supplying of stamped, self-addressed envelopes in a solicitation of employees to withdraw with their authorization cards to the Respondent's supplying the address of the Union, relying on *Deutsch Co.*, 180 NLRB 8 at 20 (1969). In that case, the Board did find it unlawful for an employer to

supply self-addressed, stamped postcards which required no more than the employee's signature to effect a revocation of his or her authorization. The question in the instant case is much closer. First, there is clearly no solicitation to withdraw the cards in the quoted paragraph. The supplying of the Union's adddress is certainly not the same as supplying a stamped postcard which only needs a signature. The employee would have to actually write a request to withdraw authorization and supply postage to effect the request. Yet supplying the address and the procedure for withdrawing the card, absent an employee request for this information, does go further than merely informing employees of their right to withdraw their authorization if they choose voluntarily to do so. On balance, in light of the strong campaign being waged by the Company against the organizing campaign, I find that the Employer in this regard has provided more than information to its employees and that its letter of April 2, 1980, does constitute an unlawful solicitation to withdraw support from the Union.

(b) Gosnell sent a letter dated April 14 to the sales representatives stating:

> I would like you to take a minute to consider what it would be like living with a Union, if the Union should win the election.
>
> NO LONGER will you be able to work directly with the company as an individual. With a Union, an adversary reltionship between you and the company will exist. As a matter of fact, the usual way we will be required to work with you is through your union steward.
>
> NO LONGER will it be possible to make "judgment calls" in individual sales situations. Strict rules and regulations as specified in a union contract will govern all aspects of your job and your relationship with the company.
>
> NO LONGER will you have individuality, flexibility, independence and ability to completely plan your own work schedule. With a union, all working onditions, sales quotas, and other job-related conditions as provided by the collective-bargaining agreement would have to be rigidly and consistently enforced.
>
> Consider what you would give up if you belonged to a union.

Although the Respondent has the right to make predictions as to what might happen as a result of a union victory based on objective facts, it does not have the right to make misstatements of law and threats of worsened working conditions. The April 14 letter is not couched in terms of what could happen as a result of bargaining. Rather, I believe it is couched in terms of what will happen. Thus, I do find that it constitutes a threat of harsher working conditions and thus is unlawful in its entirety. See *Colony Printing*, 249 NLRB 223, 224 (1980), enfd. 651 F.2d 502 (7th Cir. 1981). The letter's misstatement concerning employees' rights to speak directly to management about terms and conditions of employment is also impermissible under Board law.

(c) In a letter dated April 15, 1980, President Gosnell wrote the sales representatives, inter alia:

> What does a strike mean to you?
> It means:
> 1. Loss of income.
> 2. Loss of customers to competition.
> 3. Loss of job (in the event of an economic strike, you can be permanently replaced).
>
> Remember, the Union's only real strength is its right to strike. Don't take a chance vote "NO."

I find that this paragraph of the letter constitutes an unfair labor practice in that it both infers that permanent loss of job will be a result of a strike and fails to give even a hint of the existence of an employee's poststrike rights. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

6. Changes in LCP's pension plan

On April 10, 1980, the Respondent advised its employees that it had changed its pension plan to make it more generous. The credible evidence reveals that in April or May 1979 Company Vice President of Personnel Donald Bennett began to question whether the Company's existing plan was adequate and competitive. He initiated a study of this plan in comparison with others using private, actuarial consultants. The study was completed and given to Bennett in June 1979. Reviewing the study, Bennett decided that the LCP plan was not competitive and began a program to determine how to adjust the plan to make it more competitive. The record reflects correspondence respecting possible changes in the retirement plan passing between the consultants and LCP throughout the period of August to November 1979.

The Company initially had hoped to implement the changes in this retirement plan on January 1, 1980. The Company had historically always announced and instituted changes in its retirement program on either January 1 or July 1. Because the information required to make a final decision about the pension plan was put together too late to meet the January 1 deadline, the Company next set July 1, 1980, as the date that the new plan would be implemented. The changes were made final and approved in the latter part of March 1980. These changes were announced on April 10, 1980, 1 month before the union election.

Based on the foregoing, I believe that the changes in the benefit plan had nothing whatsoever to do with the union organizing campaign. However, I do believe that the timing of the announcement was selected because of the Company's desire to defeat the organizing effort. The timing of the announcement appears to be a substantial deviation from past practice. The Company's stated reason for the April announcement was that a large amount of clerical work had to be done to prepare the date necessary to determine the proper amounts to be paid to each retiree on July 1. The Company contends that this work could not be done in a "closet" and that it felt that the fact of the impending changes in the plan would soon become widely known. It felt, therefore, that

it had to make a public announcement. Why these reasons had never applied to the announcement of any previous changes to a pension plan is not explained in the record and I find them unconvincing. Accordingly, I find that the announcement of the pension plan changes was motivated, at least in a substantial part, for the effect it would have in resolving one of the sales representatives' primary grievances and was designed to affect the outcome of the election. Accordingly, I find that the Respondent violated Section 8(a)(1) by the timing of its announcement of the proposed pension changes.

7. Bennett's promise of a benefit

In March 1980, at a meeting in which the five-percent buffer program was described to several of the sales representatives, in a private conversation, sales representative Joseph Robinson asked Personnel Director Bennett about possible changes in the Company's short-term disability program. Bennett indicated to Robinson that the program was under review by management.

The General Counsel contends that Bennett's response implies a promise of benefits, especially so since it was made at a time when the five-percent buffer program had just been announced.

The Respondent asserts that the program had been under review for some time dating back to the fall of 1979. It also cites the testimony of Robinson that Bennett did not say anything favorable about the review and did not indicate whether there would or would not be a change in the program. There is no evidence that Bennett's response was untrue. In these circumstances Bennett's acknowledgement of the review without more does not constitute an implied promise of benefit. Accordingly, I would recommend that the complaint be dismissed insofar as it alleges a violation of Section 8(a)(1) by virtue of Bennett's response.

8. Bissett's threat of discharge of Talbot

In March 1980, at a meeting held for certain of the sales representatives in Syracuse, New York, to discuss the five-percent buffer, National Sales Manager Bissett is alleged to have had a threatening conversation with sales representative Gregg Talbot. Talbot was a young sales representative, brought into the Company by Bissett, who acted as his first regional manager. The evidence reflects that Bissett considered Talbot something of a protege. After the company meeting, the two went to dinner and then to a cocktail lounge. Bissett remarked to Talbot that he had been doing rather well for a young man, in light of his background, that "I was doing pretty good for a kid, that type of a statement."

Talbot's further testimony regarding this conversation is as follows:

> Q. What else did he say?
>
> A. Well, he said I was making a lot of money to which I said, "Well", I said, "I am paying a lot of taxes now." And that was the thrust of the conversation. Well, following that now I must say I was somewhat taken aback when I said I was paying a lot of taxes. He said, "Well, we could fix that." And I said, "How is that." And he said, "We could fire you." Which was out of the blue. I had to get my breath back. And I said, "How could that happen or how is that?" And he said "You should be careful how you act. You should remember where you came from." And that was the end of the conversation.
>
> Q. Now I would like to direct your attention to te next afternoon. Did you have another conversation with Mr. Bissett?
>
> A. Yes. We met in the lobby. There was a lot of people moving around in the Holiday Inn. And he had a completely different demeanor about him. He indicated that the future managers were coming from young people like myself. And that I had a lot of places to go. And briefly just said things like that.

The General Counsel contends that the threat to fire Talbot was a serious one and was designed to threaten him about any union activity. Bissett's version of the conversation is very similar to that given by Talbot except the motivation for the statement is far different than that suggested by the General Counsel. Bissett testified that the conversation took place out of his pride in the success enjoyed by Talbot. He explained that, in the past when he complained about paying a lot of taxes, his former boss had always told him that if he had no job he could pay no taxes. He testified that he merely repeated that comment to Talbot. He futher claimed that his comment about watching how Talbot acted was predicated on the fact that Talbot was performing far better than many of the people his own age. He was concerned that if Talbot partied with these people in the evening he could not continue to perform successfully as a sales representative. Based on the demeanor of the witnesses, I fully credit Bissett's explanation for the conversation. His remarks had nothing to do with union activity. There has been no showing in this record that as of the date of the conversation he would have had any knowledge with respect to Talbot's feelings vis-a-vis the Union. In fact, the record reflects that all input to Bissett up to that point about Talbot's union sympathies would have indicated that he was opposed to the Union. Accordingly, I find that Bissett's conversation with Talbot did not relate to union activity and therefore did not constitute a threat in derogation of Talbot's rights under Section 7 of the Act.

9. Garret-Klausing conversation

Sales representative Richard Klausing, a 23-year employee of LCP, learned of the union campaign in December in a conversation with Stan Dash. As a result of this conversation he was sent an authorization card and some union literature and signed the card, dating it December 19, 1979.

Klausing testified that he had a telephone conversation with his regional manager, Larry Garret, in late December 1979. He testified that Garret wanted to know if he had been contacted by anyone concerning the Union, asked if he had signed an authorization card, and wanted

to know who, if anyone, had contacted him concerning the Union.

I do not credit the testimony with respect to the December telephone call. Garret denies that it occurred and there is nothing in this record to support a finding that the Respondent had knowledge of the Union's organizing campaign until January. I believe that Klausing is mistaken with respect to the timing of his call, if it actually occurred and, because of the mistake in timing, I will not credit testimony regarding the telephone call. There were several other sales representatives in the region who were contacted by Garret at Bissett's request and presumably, if Garret had interrogated Klausing about the Union and others who might be in it, as alleged, he would hae made a similar interrogation of at least one of the other representatives.

Klausing testified that about January 12, 1980, he received a call from Garret requesting that he meet with him personally. According to Klausing, the two met in Lexington, Kentucky, a few days thereafter. During this meeting, Klausing testified that Garret inquired as to what complaints he had heard salesmen make and Klausing mentioned the commission setup as well as certain other perceived problems. During this conversation, Klausing testified that Garret indicated that the Company had certain long-range things that it was trying to do and that he was going to Texas to talk over a possible change in the commissions program. Thereafter, Garret asked Klausing to keep an open mind. About the same time he asked Klausing how he felt about the Union.

According to Garret, the only conversation regarding the Union took place on January 14, 1980, in Lexington, Kentucky. Garret testified that he told Klausing that the Company had become aware of union activities and asked him was he aware of such activity. Garret denied have asked Klausing who contacted him or whether Klausing had signed a card.

With respect to these alleged conversations, it is extremely difficult to determine where the truth lies. Although Klausing was a hesitant and forgetful witness, there is absolutely no reason shown in this record why he should fabricate testimony. He and his regional manager, Garret, were shown to be close friends and thus no personal animosity existed between the two which would give rise to an attempt to "get back" at either this manager or the general management of the Company. Klausing's testimony that Garret solicited complaints and told him immediately thereafter that cerain regional managers were going to Texas to discuss changing the commission program is consistent with similar conversations held between other regional managers and their sales representatives. For this reason, I credit this testimony and find that a violation of Section 8(a)(1) occurred in the solicitation of grievances was followed closely by at least an implied promise of benefits. I also credit Klausing's testimony that Garret asked how he felt about it (the Union). As of the time of the January meeting between Klausing and Garret in Kentucky, the regional manager had not been given the specific written instructions on how to deal with unions which followed shortly thereafter. As Klausing and Garret were old friends, this question, though improper, appears to me to be likely to be asked. I believe that the question, by its very nature and in the context of a conversation regarding the Union, tends to be coercive and is thus a violation of Section 8(a)(1) of the Act.

10. Tuttle's conversation with Vogel, Hoover, and Rindross

On January 15, 1980, in Chicago, Regional Sales Manager Robert Tuttle met with sales representative Paul Vogel. Based on testimony concerning this meeting, the General Counsel asserts that Tuttle created an impression of surveillance, made an unlawful promise of benefits, and threatened Vogel with a loss of benefits in order to induce him to abandon his support for the Union.

Vogel's affidavit, given to a Board agent after an investigation in this proceeding, was offered into evidence as his testimony conflicted with it in certain regards. With respect to the meeting in question, Vogel's affidavit indicates that Tuttle, upon meeting with Vogel, said, "As you probably know, there is an organization drive among the sales represenatives. I had to drop everything and take care of this and I have got to go to South Chicago, Iowa, and Southern Illinois to talk to my other sales representatives. My advice is to keep your card in your pocket and have patience because there are some changes coming which I can't get into now, but things will be better. If a contract is signed with the Union, the contests, dinners, and trips could be discontinued, so hang on, there will be changes." The affidavit goes on to state that at no time "did he [Tuttle] specifically tell me not to go into the Union, nor did he talk unfavorably about unions in general."

Vogel's testimony at the hearing was to the effect that all of Tuttle's comments were in response to questions initiated by him. Vogel testified, "Well, I think I asked him [Tuttle] a question to the effect as to when is this going to be over with. It was one way or another. I was tired of it going on. And I think he responded something to the effect of be patient, it will blow over or something like that."

Vogel further testified:

> Q. Did he initiate any statement that he was aware of of an organizing drive?
>
> A. Okay. I think the way it came about was when we sat down. I started asking him questions about, specifically, the Union. And I think I even asked him what would he do if he was in my situation since he had sold for quite a bit more time than I have. And knew the company a lot better than I did. And that's how we got into the conversation
>
> . . . .
>
> Q. What did he say about authorization cards?
>
> A. Authorization cards specifically, I don't think he talked about them. Generally I think the phrase was used when I asked him what he would do in this situation, I think he mentioned something about he would leave it in his pocket.
>
> Q. Did he initiate the statement that he would keep an authorization card in his pocket?

A. He might have used that as just a method of telling me that in his opinion that if he were in my shoes, he wouldn't be in favor of the Union.

Q. . . . Mr. Vogel, during this discussion did Mr. Tuttle say anything about contests, or dinners, or trips being discontinued by the company?

A. I think the only time that was mentioned, I did ask him what the company would do if the Union got in. I remember asking him that.

Q. What was his response?

A. First thing he said was that he didn't know. But then he said, "I'm sure that if it cost them money, the money would come from other things."

Q. And what did he say the Company would do?

A. Well, he didn't know what the Company would do. He was just trying to—I was just asking him what he would do in my shoes. And what he thought the Company would do. In other words, just a breakfast discussion. He says that if money was taken from—if the Union being in would cost the Company money, obviously there would be less money available to do other things.

The General Counsel urges that Tuttle's opening comments and remark about keeping your card in your pocket constitutes an unlawful impression of surveillance.

The campaign was at this time fairly common knowledge in the Company and I do not think these remarks would give the impression of surveillance. However, the request to hold his card, taken together with the suggestion that Vogel be patient, that things were going to get better, I find to be an impermissible promise that benefits would result if the Company remained nonunion. Likewise, the suggestion that existing company benefits may be discontinued if the Union won the election I find to be a threat designed to influence Vogel's support for the Union. The threat was not couched in terms of possible results of bargaining.

b. *Tuttle-Hoover conversations*

On January 17, 1980, Tuttle met with David Hoover, one of his sales representatives, to give him the speech on the union authorization cards as he had been directed to by Bissett. Based on this meeting, the General Counsel contends that Tuttle promised improved benefits to undermine union support, created by the unlawful impression of surveillance, and unlawfully inquired into employees' union activities.

Hoover first became aware of the Union's organizing activity through a casual conversation with a fellow salesmen in his general territory, Gary Hoad. Hoad discussed the campaign briefly with Hoover and mentioned that Stan Dash was heading up the organizing committee. Hoover called Dash in December and after the discussion Dash sent an authorization card to Hoover. On January 17, Hoover met with Tuttle at a Holiday Inn in Davenport, Iowa. According to Hoover, Tuttle opened the conversation stating "that he didn't know whether or not I had an authorization card and he didn't care whether I had an authorization card but that if I had one to please sit on it until after he comes back from Dallas which would be the following weekend." Hoover said Tuttle told him that "two or three sales managers from LCP, and two or three from Bancroft-Whitney and a few people from the home office were going to meet to go over subscription growth and possibly help offset salesmen like myself with big traveling territories with some type of incentive."

Hoover also testified that the conversation continued as follows:

> He said that he had to leave to meet Mr. Rindfuss [another sales representative] that evening for dinner, and he stated that he would have to see everyone in the region that week. And I asked him if he had seen Gary, and he said no. Gary Hoad. And he said no, it would be better to talk to Gary after he had gotten back from Dallas because he would have something with a little more substance to talk to him about because he felt that he was already deeply involved in the Union. And I asked him if I could mentioned [sic] our conversation to Gary, and he said that was entirely up to me. And I told him that I would, and he said that he expected that.

Hoover also admitted on cross-examination that Tuttle had gone through the series of statements which each of the regional managers was told to convey to their sales representatives about authorization cards and their effect.

Tuttle denies telling Hoover to sit on his authorization card, but does not deny mentioning the upcoming trip to Dallas. I credit Hoover's version of the conversation in that the urging of Hoover to keep his card, combined with he information given with respect to the Dallas meeting, is consistent with Tuttle's meeting with Vogel. I also find that Tuttle committed a violation of Section 8(a) of the Act in his regard as he did in his meeting with Vogel.

I do not find that this comments with respect to Gary Hoad constitute a violation of the Act. Hoover testified that he specifically asked Tuttle whether Tuttle was going to see Hoad. Likewise, the reason given by Tuttle for not seeing Hoad was prompted by a question on that point by Hoover. Crediting Hoover's version of the entire conversation, I agree with the Respondent that it would be a form of entrapment to find an unfair labor practice resulting from Tuttle's answers about Hoad.

c. *Tuttle-Rindfuss conversation*

After Tuttle's meeting with Hoover, he traveled to Springfield, Illinois, to meet with James Rindfuss, an 18-year employee with LCP. Rindfuss testified that, following a dinner with Tuttle, Tuttle said , "I would assume that you know why I am here." He continued to say, "There is some activity to forming a union by the representatives. I don't know what your position is. I would recommend that everyone be patient because the situation is going to be improved soon, and your potential will be greater than it has ever been." He also said, "In the event that you have signed a card, I would recommend that you ask for it to be withdrawn." Rindfuss then testified that Tuttle asked for his comments and, on Rindfuss' asking about changes in the retirement plan, Tuttle replied that he would look into it.

Tuttle denied telling Rindfuss to return his card if he had signed one. Tuttle testified that all he stated was that an employee could request his card back if he had changed his mind after signing it. Tuttle also denied promising Rindfuss anything except that, in response to Rindfuss' questions about inadequacies in the dental plan, Tuttle said that the plan would be voted on again in 3 years and, "if we have patience, we hope for better things." Based on Rindfuss' version of the conversation, I cannot agree with the General Counsel that Tuttle gave Rindfuss the impression of surveillance or inquired what his position was with respect to the Union. However, I do agree witht he General Counsel that Tuttle's conversation amounted to a request to Rindfuss to withdraw his union card if he had signed one and implied a promise of benefits. This part of the conversation is consistent with Tuttle's conversations with the other sales representatives with whom he met and who testified in this proceeding. I find that, as with other two conversations, Tuttle impliedly or expressly promised benefits to influence the outcome of the election and solicited the withdrawal of authorization cards in violation of Section 8(a)(1) of the Act.

11. Carroll's conversation with Outlaw and Redd

a. *Carroll-Outlaw conversation*

On January 16, 1980, Regional Manager John Carrol met with sales representative David Outlaw in Nashville, Tennessee. Inter alia, Outlaw testified that Carroll said to him:

> He told me that he didn't know whether I had signed a card or not, and that if I had signed a card, I could retract it.

He also told me that at one point in the conversation—"if they [the Union] had enough cards signed that they could come in and force themselves on the sales force whether they wanted it or not. And he told me that the Company had gotten the message, that it was sometimes like talking to a donkey. Sometimes you have to take a two-by-four and hit them over the head and they got the message and were willing to listen. Also, he told me that three managers from LCP were going out to Dallas the following week to meet with three managers from Bancroft-Whitney to discuss the subscription growth plan. They felt that was the major issue and problem, and that some good things would come back from the plan—would be reported to them in Hawaii which they were going to. All the regional managers were going to a couple of weeks later. And that was said, and then he summarized again and said that we could retract our card if we wanted to, and felt that things would be better without a union."

Carroll testified that he told Outlaw, with respect to authorization cards, if a majority of sales representatives signed authorization cards, the Union could become the exclusive bargaining agent for all the sales representatives.

Carroll also testified that Outlaw initiated the conversation about whether Lawyers Cooperative was going to make any changes in the subscription growth plan. Carroll stated that, with respect to this inquiry, he told Outlaw that "there would be a meeting in Dallas and that the subscription growth program is on the agenda, but I am not going to be there so I don't know what the results will be." On cross-examination, Outlaw testified that Carroll generally made the statements that he was told by Bissett. He also testified that the information about subscription growth and the meeting in Dallas were in response to a question asked by him.

Having considered the testimony of both witnesses, I credit Carroll's version of the conversation. Carroll's memory of the occasion was more complete and his testimony more detailed, yet consistent generally with much of Outlaw's version. Thus, I do not find that Carroll gave the impression of surveillance or threatened Outlaw. However, I do find that the mention of the Dallas meeting about subscription growth is an implied promise of benefits, as I have found with other manager-representative conversations. Mentioning a concrete action, i.e., the meeting in Dallas to discuss subscription growth, could only result in the listener thinking that something positive was being done by the Company.

b. *Carroll-Redd's conversation*

On January 14, Redd testified that he met with his regional manager, John Carroll, at the Augusta, Georgia airport. At this meeting, Redd testified that Carroll mentioned that it was his understanding that there were cards mailed out—union cards—to all sales representatives, and "he didn't try to find out if I had one, if I signed a card, if I had not signed one." But he stated that "with the majority of people signing cards that the majority would overrule and I would be in the Union whether or not I liked it." He said that "if I had signed a card that I could withdraw my signature, withdraw the card, and that it would not count. He said—he did not say anything about what type of plan was involved, but that there would be a plan or plans. I can't remember if it was, you know, plan or plans in the making to assist the income of the sales representatives."

Carroll testified that what he said to Redd, with respect to authorization cards, is: "That on the strength of the number of cards that might have been signed or sent in prior to an election that the Union might ask that they become the bargaining agent."

On cross-examination Redd's testimony wavered on several points but he was insistent on the point that he had been told that, if the majority signed cards, he would be in a union whether he liked it or not. I credit the testimony and find that it constitutes a threat in violation of the Act. I also credit Redd's testimony, with respect to the statement made by Carroll, that a plan or plans were in the works that would benefit the salesmen and thus find that the Respondent had made an implied promise of benefits in violation of the Act.

12. Snyder-Black's conversation

Regional Manager George Synder met with sales representative Donald Black in Miami, Florida, on January 18. According to Black, Snyder said, "Well, he said I

don't know whether you are aware of it or not, but I understand that some of the salesmen are trying to organize a union. I am not going to ask you whether you are interested in it or involved in it or not, but I want you to be aware that if a majority goes to the Union, you will be bound by the same deal. You can't say, 'Well, I am not in favor of it.'" And so I thanked him, and we ate. It was very quiet. And then you said, "I am going to Dallas next week to a meeting. What do you think if I did not fill Frank Merville's territory?"

The witness interpreted the last statement as an implied benefit as territories left unfilled were split among existing salesmen and improved their chances for increased income.

The General Counsel contends that the opening statement made by Snyder constitutes an impression of surveillance. Since the meeting came at a point in time well after the union campaign was underway and was common knowledge among the salesmen, I do not find that the statement was anything more than a conversation opener and did not give an impression of surveillance. However, I find Black's testimony about Snyder—the statement with respect to the Merville territory—to be credible and does constitute an impermissible promise of benefits.

13. Bisig-Scott's conversation

On January 14, 1980, Regional Manager George Bisig met with sales representative Chester Scott following National Sales Manager Bissett's instructions. Scott testified that Bisig stated: "Well, we talked a lot of business. We talked, then he asked me if there was a petition going around. He wanted to know if I had heard about it. I said, 'I sure have.' He said, 'Are you unhappy with anything with the Company?' I said, 'I have always been unhappy with the Company on two subjects, and that was my pension plan and no security as far as job goes. We have contract, no anything.'" George asked me then would I sign the petition the way I felt right now. I said that I would be number one on the ticket.

Bisig denies this version of the conversation in its entirety, and I credit Bisig's denial. Scott testified that Bisig made no statements whatsoever about the significance of the union authorization cards, which I find to be highly improbable because the entire purpose of the meeting was to explain the purpose of authorization cards in the terms set forth by National Sales Manager Bissett. Also, having heard the testimony of Scott, a bold forthright man nearing retirement with the Company, and an old friend of Bisig's, I have no doubt that he would have volunteered his feelings about the Union without any prompting. I find that Scott's memory of the conversation is unlikely. No other salesmen who met in the same timeframe with Bisig came forward to detail their conversations with him.

14. Warner-Robinson's conversation

It is contradicted that on January 12, 1980, former Regional Manager Richard Warner called sales representative Joe Robinson and asked him, "What if anything I knew of the union activities." I find that this question constitutes an unlawful request to Robinson to divulge activities of himself and others.

15. Murrell-Weist's conversation

At National Sales Manager Bissett's instructions, Regional Manager Dave Murrell conversed with sales representative Frederick Weist in mid-January 1980. Weist testified, "I was asked about labor activities going on in the Company and if I knew anything. And I believe at that time, if my memory serves me correctly, I was also asked about any activity I knew of relating to Stan Dash. I responded by saying that I knew very little. Only a few rumors or whatever and I didn't know any specifics."

Murrell denies asking anything specifically about Stan Dash, pointing out that he did not know that Stan Dash was involved in union activities as of the date of the phone call, January 12. Murrell testified that he did not become aware of Dash's involvement in the Union until it was brought to his attention by National Sales Manager Bissett that Dash had filed a charge against the Company. The charge was filed on January 14, 1980. I credit Weist's version of the conversation. Management has just learned of the campaign and undoubtedly Dash's identification with it. The likelihood that Murrell was trying to determine Dash's extent of involvement is overwhelming. Therefore I find that Murrell's conduct in this regard constitutes an illegal interrogation and impression of surveillance in violation of the Act.

The Respondent argues that the question of Weist, "if I knew anything about the labor activities going on in the Company," did not require Weist to disclose his own views or anyone else's on the desirability of a union. I disagree. The question is broad and does solicit any information that Weist might have about the Union. Thus I find that it is in violation of the Act.

16. Carduner's conversations with Hill, Flint, and Murphy

Carduner admitted, while testifying in the proceeding, that the evidence offered by witnesses Hill, Talbot, and Flint, in regard to their conversations, was essentially accurate. There is nothing in the record which would prove the contrary so I find the following recitation of evidence as fact.

a. *Hill-Carduner's conversation*

On January 15, 1980, sales representative Roland Hill met with his regional manager, Robert Carduner, at which time Hill testified that Carduner asked him such questions as: "[D]id I hear about the attempt to organize and start a union; did I receive a card; what did I know about it and so forth." He also told Hill at the first meeting that President Gosnell would not like a union and that the sales representatives did not need a union. He also told Hill that, if the Union came in, sales representatives would lose their pension plan, approximately half of the sales force would be fired, the sales representatives would be given a car and put on a salary, and the sales representatives would not be doing as well as they are doing now. Carduner indicated to Hill that his income would suffer if the Union got in. Approximately 10 days

later, in another conversation between the two men, Carduner repeated the questions to Hill and mentioned to Hill that Stan Dash was one of the leaders who was trying to organize the sales representatives. At another meeting between the two men on February 20, 1980, Carduner interrogated Hill, sales representative Gary Talbot, and special account representative (SAR), Theresa Gintilly, asking what they knew about the Union and had they received a card. He stated that, though they had problems with their commission growth plan, they were better off; if a problem existed, it could be solved by themselves within the region. At the February 20 meeting, Carduner also stated to the employees present that management was contemplating some changes in the commission on a set of books, raising the commission from 10 to 15 percent. He also said that quotes would be lowered for the year 1980. Additionally, he mentioned the names of Irv Kensler and David Mann as people the Company thought might be in the Union.

At yet another meeting on March 4, 1980, between Carduner, Hill, SAR Gintilly, and SAR Bob Taylor, Carduner repeated many of the things he had said before.

b. *Carduner-Talbot's conversations*

In mid-January 1980, sales representative Greg Talbot testified that his regional manager, Robert Carduner, called him on the telephone, asking him point blank, "What do you know about a union?" Carduner then asked Talbot if he received anything in the mail and did he know anyone who had received anything? Talbot also confirmed his presence at the meeting with Carduner, Hill, and Gintilly.

c. *Flint-Carduner's conversations*

Ralph Flint, a sales representative, met in mid-January at Hauppauge, New York, with his regional manager, Carduner. At this meeting, which was also attended by two other sales representatives and one of their wives, Carduner inquired about what the sales representatives felt about unions. Sales representative Anton Murphy also testified that he had attended this meeting and verified Flint's version of it.

As noted above, in response to a question while testifying in this proceeding, Carduner admitted that the testimony of the witnesses noted above was essentially correct. Therefore, I find that the General Counsel has proven the allegations in the complaint relating to Carduner and thus the Respondent has unlawfully interrogated its employees with regard to their union sympathies and activities, created the impression of surveillance, promised benefits in order to influence the outcome of the election, threatened worse working conditions if the Union were voted in, and coercively attempted to discourage support for the Union.

17. The discharge of Stanley Dash

LCP hired Dash in 1971 as a sales representative for northern Illinois. At a later point he transferred to a territory in southern Wisconsin, where he worked until his termination. During most of the period relevant to the allegations in the complaint, Dash's regional manager was David Murrell. Effective September 22, 1980, Dash was assigned to Robert Tuttle, although his territory did not change.

As noted previously, Dash was the prime mover behind the Union's organizing drive. Following the initiation of organizing activities by Dash, but before LCP became aware of the campaign, Dash returned his Christmas bonus check to LCP's home office. In November, Dash had read in one of the Company's in-house publications the Company's formula for giving Christmas bonuses to its employees. Apparently, home office and salaried employees received a bonus far in excess of the Company's sales representatives. Because Dash considered this to be unfair, he returned his bonus check as a protest. Another sales representative in Dash's territory, Peter O'Donnell likewise returned his check at Dash's request.

After this action by Dash, and following several argumentative telephone conversations between Dash and customer service correspondents in the home office, Murrell met with Dash on January 9, 1980, to explain the Company's position with respect to the Christmas bonus, to deliver Dash's sales forecast for 1980, and to discuss Dash's attitude relative to his customers and home office personnel. This meeting was the subject of an unfair labor practice charge filed by Dash on January 14, 1980.

At the January 9, 1980 meeting between Murrell and Dash, Dash was threatened with being placed on probation. It is the General Counsel's contention that the threat of probation was made because of Dash's concerted activity in retuning his bonus check. In this regard I disagree with the General Counsel. At the meeting, the matter of the Christmas bonus check was discussed, Dash's 1980 forecast was discussed, two complaints from customers about Dash's attitude[2] and some recent incidents in the fall of 1979 when Dash was involved in arguments over the telephone with the Company's service correspondents. Based on all of the testimony with respect to this meeting, I do not believe Dash's actions in returning the Christmas bonus check to the Company was a moving reason for the Company's threat of probation. At the time of the meeting, company correspondence indicated that mangement thought that Dash's actions were merely the result of a misunderstanding and not part of any organizational effort on behalf of the Union or any concerted activity on the part of Dash for his fellow employees. Nor can I consider customer complaints the reason for the threat because these had occurred at a time prior to the time when Dash was called to the Company's home office for an interview for a promotion to a regional manager's position. If LCP considered the two customer complaints serious enough, to result in probation, it surely would have disciplined Dash for these incidents before seriously considering him for a promotion. I do believe the Company's position that the probation was predicated upon Dash's arguments with the service correspondents at the home office. The Com-

[2] The so-called Koslov and Monson incidents.

pany had for some time been trying to improve its relationship between the sales representatives and the service correspondents. I believe this is a legitimate business function and would form a proper basis for disciplinary action.

Following the filing of the charge with the Board after the January 9 meeting, the probation of Dash was dropped.

The General Counsel also contends that the increase in Dash's 1980 sales quota constitutes harassment of Dash and consequently is an 8(a)(1) violation of the Act. Again I disagree. The Company's formulation of sales forecasts begins about midway through a preceeding year. The sales representatives prepare their recommendations for their personal forecast and this recommendation is forwarded through channels to the home office. Thereafter, the Company, through a complicated series of reviews and sales estimates, arrives at an overall company forecast for the following year and then breaks it down to individual sales representative forecasts. This process continues throughout the entire fall of the year preceding the year for which the forecast is made. Based on the evidence, I find that Dash's forecast was prepared finally in December 1979, before the Company had any knowledge of the Union's organizing campaign or Dash's part in it.

The General Counsel contends that Dash's forecast was increased whereas most sales representatives' forecasts were decreased in the year 1980. Thus, the General Counsel contends that Dash has been singled out for disparate treatment vis-a-vis the other sales representatives in the Company. This position is not borne out by record evidence. Although the majority of sales representatives in the Company did receive lower forecasts for the year 1980 than they had for the preceding year, a substantial number of sales representatives were increased for the year as was Dash's. Moreover, Dash's increase brought his overall forecast in line with his actual performance in the preceding year. Given the fact that the General Counsel has failed to prove that the Company had knowledge of the Union's organizing drive or Dash's relationship to it at any time prior to presentation of the sales forecast to Dash, I find that the General Counsel has failed to make a prima facie showing that the increase in his forecast violated the Act. Additionally, the General Counsel has failed to show that Dash was singled out in the matter of forecast increase.

About January 9, 1980, the Company became aware of the Union's organizing campaign and Dash's leadership position. Following the defeat of the Union in a Board-sponsored representation election, Dash, claiming a disability caused by "gross stress reaction," went on a leave of absence from May 27 to September 22, 1980. It is fair to say from the evidence that the union campaign took its toll on Dash's stamina. About May 23, 1980, Dash decided to take a leave of absence. Contrary to company procedures, he did not immediately contact his regional manager informing him of this decision. Dash contends that he did notify National Sales Manager Bissett by company telegram on May 25. LCP never received this telegram and maintains that Dash fabricated it after the fact. Regardless of whether Dash did or did not fabricate the telegram, I believe that the Company did not receive the telegram and thus for a few days was unaware of Dash's whereabouts. Dash contends that he also attempted to call his regional manager by telephone the weekend of May 24 and 25, but was unable to reach him. Early the following week, either by a call from Murrell to Dash's fiancee or vice versa, the Company learned that he intended to take off 30 days at the advice of his doctor and would be out of touch. Dash did not contact Murrell directly during this period of time though it is unclear whether or not he actually tried.

On May 30, Bissett sent a telegram to Dash threatening him with discharge if he did not contact the home office within 4 days. On receipt of this telegram, Dash did contact the office and the matter of discharge was dropped. The General Counsel contends that the telegram is evidence of the Company's intention to harass Dash and constitutes harassment to the extent that it is a separate violation of Section 8(a)(1). I disagree. Had Dash cleared his intention to take a leave of absence with his regional manager, the telegram would not have been sent. Had it been sent after notice by Dash to the regional manager, I would agree with the General Counsel. It would have constituted treatment shown on the record to be different than that given to other employees taking leaves of absences. However, in all other cases where employees have taken leaves of absences for health-related reasons, notification was given to the regional manager or to the Company or to both prior to the employee taking leave. I do find, however, that the harshness of the penalty threatened, i.e., termination, is indicative of the Company's strongly adverse attitudes toward Dash. Other evidence strongly points to the existence of this attitude and will be discussed hereafter.

Because of the Company's telegram threatening termination, Dash secured the services of a private attorney. Thereafter, the Company's reaction to his attempt to return to work, as well as the processing of his claim for disability insurance, took on all the aspects of an adversary procedure. Shortly after June 3, 1980, a conversation was held between Dash's attorney and an attorney for the Company. In this conversation, LCP was informed that Dash's doctor considered him too ill to travel to Rochester and that he was expected to be absent from work for a period of 30 to 60 days. In response to this information, LCP Personnel Manager Roger Roth wrote Dash on June 9, 1980, placing him on disability status and enclosing for Dash a disability claim form. Thereafter, the Company received a letter dated June 6 from Dash's attorney enclosing a letter from Dash's psychologist. The psychologist indicated that it was his opinion that Dash should take a leave of absence or a vacation.

The Company contends that the wording of the doctor's letter raised its suspicions about the nature of Dash's disability and, thereafter, on June 12, 1980, Roth sent a memo to the salary section of the Company directing a discontinuation of draw and disability benefits for Dash. Roth contends that discontinuation of draw is routine for a sales representative who is not working and that no disability benefits were authorized because

Dash's entitlement was not clear from the material that LCP had available to it. Roth's supervisor testified that, when there is doubt of the fact of disability, LCP does not begin paying benefits without an investigation and determination by its insurance carrier.

Roth further testified that he called Dash on June 20, asking him of the whereabouts of the claim form that had been sent to him. Dash informed Roth that the form was with his attorney and, thereafter, Roth asked an LCP attorney to inquire of Dash's attorney regarding the form. This attorney did so on June 27. On June 30, Dash's attorney returned the completed claim form on which Dash's psychologist confirmed an apparent total disability because of "gross stress reaction." Dash's attorney's letter accompanying the form, however, stated as follows:

> You have requested that Mr. Dash complete and submit this form. His cooperation in doing this should not be construed as any admission on his part that he is "ill" or "disabled" within the meaning of these programs or for any other purposes.

This apparent contradiction between the lawyer's position and that of the doctor does support the Company's contention that it was unclear as to whether Dash was ill or not. The Company also contends that it was receiving evidence that Dash was processing certain of his sales accounts during this period and thus believed that he might be working.

On July 15, 1980, Roth sent a letter to Dash's attorney explaining that, under the circumstances, Dash could not be considered as being on disability leave, but that he would be placed on inactive status with continuation of benefits until ambiguity created by Dash in his attorney's letter could be clarified. This prompted a response from Dash's attorney which, in part, stated:

> At present, Mr. Dash is unable to determine whether he is ill or disabled within the meaning of the Company insurance policy . . . .

The letter also requested a copy of the "Company's insurance policy."

Roth replied on July 30 that, because of the uncertainty created by Dash's attorney, Dash was being continued on inactive status pending clarification of his medical condition. He further informed the attorney that Dash's insurance form had been forwarded to the disability carrier for processing. Roth also included a copy of the Company's personnel policy outlining its "26-week income continuation plan." The plan included explanations of the Company's insurance carrier, disability coverage, workers compensation coverage, and supplemental disability coverage.

Dash's claim for disability benefits was rejected by the disabilty insurance carrier on July 31, 1980. It was rejected on the basis that Dash's physician considered the disability to be work related. The Company indicated that if Dash's physician changed his position on the work-relatedness of the disability then it would reconsider its denial. Following this rejection, the Company submitted Dash's claim some months later on the basis that the claim was not work related. Thereafter, the claim was again submitted to the disability insurance carrier which paid Dash benefits with company benefits called for under its personnel guidelines.

The General Counsel contends that the delay in the handling of the claim, as well as LCP's refusal to send the Company's master insurance plan to Dash's attorney, constitutes harassment in violation of Section 8(a)(1). The Company's actions in this regard in and of themselves did not constitute a violation of the Act. There was nothing done by the Company during this period that was either contrary to its policy or that could not be construed as a misunderstanding because of the communications between it and Dash's attorney. The adversary relationship, which began with the introduction of an attorney on behalf of Dash, created problems in the handling of the disability claims. With respect to the issue of the insurance policy, the Company's procedure is not to make available a policy to any employee other than top management. It did supply Dash and his attorney with a copy of the information which it normally made available to its employees. I cannot find that the actions of the Company in either of these regards violated the Act. However, as with the telegram, the overall tenor of the Company's actions support the view that the Company considered Dash to be different than other employees and in an adverse relationship with management.

In Dash's attorney's letter of August 12, 1980, requesting a copy of the Company's insurance policy, he informed the Company that Dash had been approved to return to work by his doctor. By letter dated August 15, 1980, Roth stated that the Respondent wanted Dash to come to Rochester to be examined by a doctor chosen by LCP. The record reflects that this was the first time that an employee on disability was not allowed to return to work on approval of his or own physician. Dash submitted to the doctor's examination. On September 9, the Company's doctor gave Dash permission to return to work and saw no reason why Dash could not continue to work with his regional manager.

The Company contends that Dash's disability was so unique that it required it to deviate from its normal practice and require a private examination by a doctor of its choosing. In support of this position, it relies on the fact that Dash had had psychiatric problems many years earlier and his two prior incidents with customers, the Monson and Koslov incidents. At this point, I disagree with the Company's position. As noted previously, the Company, in 1979, had Dash come to Rochester to be interviewed for a job as a regional manager. Clearly at that time the Company was not concerned with either Dash's previous brief health problems or the customer complaint incidents. During the summer of 1980, the period in which Dash was disabled, he had had some customer contracts and this fact was known at the Company. As the Company had had no complaints from its customers about Dash's behavior after the Koslov and Monson incidents to the point at which it ordered him to cease seeing customers, I do not believe it had any reasonable basis to require a unique examination.

Based on all of the evidence of its treatment of other disabled employees, including a current regional manager who had had a leave of absence because of alcoholic exhaustion problems, I find that the Company's unique requirement that Dash be separately examined by a company physician constitutes disparate and discriminatory treatment and is indicative of its adverse attitude toward Dash. The psychologist who interviewed Dash on the Company's behalf completely cleared him of any problems and issued a fairly impressive report about the state of Dash's condition. This report undermines LCP's contention that it had legitimate concern for Dash's ability to perform his job.

Dash was ordered to return to work on September 22 and was told to report to a different regional manager. Dash's territory, however, was not changed. The General Counsel contends that the switch in regional managers also constitutes harassment of Dash. On this point I cannot agree. Had the company decided to change Dash's territory, his customers, or any other normal day-to-day aspect of his employment which would have increased its difficulty or hurt his income, I would agree. However, the Company had a policy of changing managers from one territory to another and, further, the manager transferred to Dash's region was one with whom he had a good working relationship in the past.

The next and most important occurrence with respect to Dash's employment with LCP is his discharge.

On November 4, Dash telephoned LCP's customer service department to resolve a problem with a customer order and got into an argument with Patrina Fulton, a correspondent. Both she and Dash raised their voices at each other and eventually hung up. Fulton then went to her immediate superior, Mike Santagelo, and reported the argument, bursting into tears, and telling Santangelo that Dash screamed at her, twisted her words, tried to back her into a corner, and was incooperative. The Company does not contend that the argument with Fulton was serious enough to justify Dash's discharge. However, Santangelo then called Dash to determine what was going on. It was a fairly standard practice for Santangelo to call after one of his correspondents had an argument with a sales representative. Almost immediately after reaching Dash, Santangelo and Dash were in an argument. It is Santangelo's version of this argument that Dash immediately started swearing at him over the phone telling him that he did not have to talk to him or do whatever Santangelo said. Dash, on the other hand, testified that Santangelo threatened him almost immediately with at least slowing down the process of his orders, if not rejecting them outright, which threat caused him to react strongly. The sequence of the argument is considered somewhat important by the General Counsel and the Respondent. The General Counsel contends that the threat came before any swearing by Dash and that Dash's swearing was, under the circumstances, justified. The Respondent's witness contends the swearing came first and the threat was not made seriously but merely to calm down Dash.[3] In either case, the conversation upset both men seriously. Dash immediately prepared a telegram to his superiors complaining of the argument, and Santangelo immediately went directly to Dash's superior, Bissett, bypassing his own superior and head of the customer service department. As soon as Dash's name was mentioned by Santangelo, Bissett stopped him from speaking until Roth (from personnel) could be brought in to hear what he had to say.

Santangelo then explained his version of what had happened over the telephone to Roth and Bissett, leaving out any mention of a threat made by him to Dash. With no discussion, Roth and Bissett decided to terminate Dash. Shortly thereafter, when Dash attempted to contact Bissett and explain his side of the story, Bissett refused to listen.

Following his termination and the filing of a charge with the Board, Dash applied for unemployment compensation benefits. The Respondent contested this filing and, when it lost before the involved Wisconsin State Agency, it waited until the last day to appeal the decision. LCP lost the appeal with the agency and then sued the State of Wisconsin and Dash in Wisconsin's state courts. The appeal was pending as of the time of hearing.

There is no question in my mind but that Dash was terminated by LCP because of his union activities. The record reflects that Dash was an excellent salesman for the Company and was not shown to have presented any problems to the Company that were not common to the sales force generally. As I have noted elsewhere, following the union election in May, virtually every contact the Company had with Dash was one of overreaction. The threat of termination after Dash was missing for a few days in late May, the handling of the disability claim, the unique examination by a company-picked physician before Dash could return to work, the reaction of Santangelo in going directly to Bissett, rather than through channels, with his complaint about Dash, Bissett's immediate decision to terminate Dash without further investigation, and the immediate concurrence he received from his superior, Anderson, the vice president of personnel, Bennett, and Personnel Manager Roth, all indicate that Dash had been singled out for harassment and for ultimate discharge.

Santangelo's action on the day of discharge struck me as unusual at the time of hearing and still does at this date. The record reflects that there is nothing particularly unusual about sales representatives becoming angry with customer service representatives. There was nothing unusual shown about occasional cursing taking place during conversations between customer service representatives and sales representatives. Though Santangelo may have been upset at the conversation with Dash and had a valid reason to file a complaint through channels, there is nothing so unusual about the conversation that would require him to race to the national sales manager's office to tell him about it. Likewise, there is nothing so unusual about the conversation that would require Bis-

[3] I do not consider the sequence crucial because, as noted hereafter, swearing at a customer service correspondent was not uncommon, but LCP's reponse to Dash was, again, unique.

sett to discharge Dash, without even inquiring of Dash as to either the truthfulness of Santangelo's story or Dash's version of it. I believe that LCP was looking for a reason to get rid of Dash and had been looking for a reason for sometime; utilizing its own psychiatrist to examine Dash before it would allow him to return to work is consistent with this belief.

I find that LCP's discharge of Dash was made by it because of its desire to rid itself of a union activist and to discourage future union activity on the part of its employees. LCP's appeal of Dash's unemployment compensation claim with the State of Wisconsin, which was marked by dilatory tactics, constitutes further harassment of Dash and, though legal, was certainly unnecessary in all the circumstances.

LCP's appeal of Dash's unemployment compensation claim with the State of Wisconsin constitutes further harassment of Dash and I find it to be unlawfully motivated as was his discharge and the Company's other harassment of him. The appeal has been marked by dilatory tactics, by lack of serious effort to prosecute its defense (other than to drag out the appeal), and by actions taken that differ from previous appeals of unemployment compensation awards to discharged employees. For example, though it was in possession of evidence in the form of affidavits relating to Dash's discharge, and it, of course, had available witnesses to the incidents surrounding the discharge, it chose not to present either to the Wisconsin agency. The record reflects, in another instance when an employee named Deborah Davis was terminated, LCP sent both its attorney and national sales manager to the State of New York to contest the unemployment compensation. I conclude that the Respondent's only purpose in pursuing the appeal was to further harass Dash.

I have found that Dash's discharge was unlawfully motivated in violation of the Act. I similarly find that its appeal of Dash's award of unemployment compensation benefits resulting from his termination is likewise discriminatorily and unlawfully motivated and constitutes a separate violation of the Act. In order to dissipate the effect of LCP's filing of its appeal, I find and recommend that the Respondent be ordered to cease and desist from prosecuting the appeal and to withdraw it. I further find that the Respondent, in order to restore Dash to the position he would have been in absent the Respondent's action, I shall recommend that the Respondent be ordered to make Dash whole for all legal expenses he has incurred as a result of the Respondent's appeal of his award of unemployment compensation benefits. See *United Credit Bureau of America*, 242 NLRB 921 (1979), enfd. 643 F.2d 1017 (4th Cir. 1981).

The General Counsel contends that Dash's discharge and other harassment by LCP not only violates Section 8(a)(1) and (3), which I find to be correct, but also Section 8(a)(4) of the Act. I can find no evidence of the record which would indicate that Dash was discharged because of the filing of his unfair labor practice charges with the Board. It may well be that this filing did play a part in the decision, but there is no clear evidence to underlie a finding of an 8(a)(4) violation.

18. Discharge of Irving Kensler

Kensler began work for LCP in 1965 as a sales representative. In 1971 he was promoted to regional manager and in 1975 he joined the LCP headquarters as sales administrator and training coordinator. Later that year, he was promoted to national sales manager.

In April 1979, Kensler requested that he be relieved of his sales manager's duties and that he be reassigned to an open sales territory in Florida. LCP honored that request, giving Kensler full relocation allowance and continuing his sales manager's salary for 4 months. Within 3 months, Kensler requested further consideration for management opportunities. By mid-1979 he also requested a transfer to a sales territory in New York City. These requests were denied and Kensler continued work as a commission sales representative in Florida. In August 1980, Kensler was discharged.

After his discharge, in November 1980, Kensler filed a charge under the Florida discrimination statutes claiming he was discharged because of his age. Following an adverse decision in that proceeding, on February 20, 1981, Kensler filed his present charge with the Board.

I cannot find from the evidence that Kensler was discharged because of his activities on behalf of the union organizing drive or for any concerted actvity protected under the Act. Kensler was one of the initial persons contacted by Dash and he participated in the initial organizing meetings by conference call. He donated $100 to the organizing drive. However, there is no showing in this record that these facts were ever made known to LCP management. Thereafter, virtually every action Kensler took was one which would indicate antiunion bias and an active stance in support of the Company's antiunion drive. Kensler claims Bissett informed him that the Company was going to get him because of union activity and Carduner contends that Bissett told him to stay away from Kensler because of Kensler's union activity. I cannot credit either of these allegations in light of the objective facts of record and Bissett's denial that these conversations ever took place.

First, there is no showing in this record that other than the very first actions at the outset of the Union's organizing campaign Kensler ever did anything that would indicate his involvement on behalf of the Union. Virtually every action he took which would have come to the attention of management was antiunion. Perhaps the most telling action taken by Kensler, which refutes his own testimony, as well as that of Carduner, is the meeting that Kensler had with fellow salesman Dave Mann, President Gosnell, and the Company's financial officer, Seymour Fogel. The details of this meeting are discussed elsewhere in this decision. As noted at that point, the substance of the discussion at this meeting varies; however, both sides agree that the purpose of the meeting was to determine how to pacify the sales force and to defeat the Union's organizing campaign. I also find that Kensler indicated his willingness and desire to return to management to help solve the Company's problems with its sales force. I find that there is no clear evidence that the Company had actual knowledge of Kensler's feelings about the Union and, after a review of the evidence, I

cannot be sure, even at this juncture, what Kensler's views were vis-a-vis the Union. I find that one must infer from the record why he was discharged. A number of inferences are possible. Of course, one could infer that the reasons Kensler was discharged were the ones given by the Company.

The Company's primary contention is that he was discharged because he released what it considers confidential information about the Company's plans to release a new series of law books prior to public disclosure and announced that a split in sales territories would take place in North Carolina when and if LCP received a contract from the North Carolina state government to print its state code. I find two problems with this defense. First, it appears from the evidence that Kensler made his predictions about the split in the North Carolina sales territories while he was national sales manager many years before his dishcarge. Second, the information Kensler was supposed to have released about the upcoming publication of the new series of books was apparently common knowledge in the industry because of past LCP practices. Moreover, there is no direct evidence that Kensler actually ever voiced this information. Kensler denies doing so and no person to whom he was supposed to have made these statements was brought by the Company as a witness, although these persons were other salesmen for the Company.

The secondary reason given by the Company for Kensler's discharge, and one denied as a contributing reason by Bissett, the person who discharged Kensler, was Kensler's lack of success in sales after his move to Florida. The figures with respect to Kensler's sales do show that his sales were not up to par in the territory. There was also some friction evident between Kensler and his regional manager, George Snyder. However, the figures show that Kensler had acknowledged to Snyder that his sales were not up to par and that he wanted until October 1980 to reach quota or he would voluntarily retire from the Company. Given the fact that Kensler's sales were not anywhere near the worst in the Company and not nearly as bad as a number of salesmen who are still employed by LCP and, given Kensler's rather spectacular career with LCP, I find it difficult to credit the Company that it would discharge him for not making his quota in August when he had voluntarily offered to retire in October if he did not do so.

In my opinion, the evidence does not support a finding that Kensler was discharged for either of the reasons given by the Company.

One could infer that the Company did have some knowledge, unproven in the record, about Kensler's early involvement in the organizing campaign. One could also infer that current management of the Company, including Bissett and Anderson, for their own reasons, wanted to get rid of Kensler because of his desire to return to management and his support among the salesmen of LCP. However, regardless of which inference may be slightly more likely than the other, I find that there is no clear proof that Kensler was discharged because of any prounion or protected activity and that the General Counsel has failed to meet his burden of showing that Kensler's discharge was motivated by union animus or because Kensler engaged in protected concerted activity. Accordingly, I will recommend that the complaint in this regard be dismissed. See *E. R. Carpenter Co.*, 260 NLRB 91 (1982).

19. Discharge of Robert Carduner

Robert Carduner was a regional manager for the Respondent and was a supervisor with the meaning of the statute. Several of the alleged unfair labor practices in this proceeding involve actions taken by Carduner during the course of the union campaign. Following the campaign and the filing of unfair labor practice charges involving him, in preparation for trial on the issues, Carduner was ordered to the Company's headquarters at Rochester for a meeting with the Company's attorneys. Following the meeting between the Company's attorneys and Carduner, which will be discussed in detail below, Gosnell, Company attorney Ulterino, Anderson, and Bennett determined to discharge Carduner. Subsequently, after the Company's national sales meeting approximately a month later, Carduner was discharged with Bissett informing Carduner of the decision. Bissett, one of Carduner's closest friends, was not informed of the early decision to discharge him until after the national sales meeting so as not to impair the performance of Bissett at that meeting. The reasons given by the Respondent for Carduner's discharge was the likelihood of his failure to follow company instructions in the course of the union organizing campaign and thus the likelihood that he actually did commit certain unfair labor practices, his uncooperative attitude at the meeting with the Compnay's attorneys prior to trial in Case 30–CA–5603, and problems with respect to Carduner's managerial abilities within his region.

Carduner was admittedly against the union campaign from its inception. The Respondent cannot be accused of discharging Carduner because of any prounion activity. Thus, as he was not caught up in the campaign, the only protection afforded Carduner under the Act is if his discharge was calculated to thwart the Board's processes, i.e., being discouraged by the Respondent from testifying truthfully in Case 30–CA–5603. Regardless of whose version of the meeting between the Respondent's attorneys and Carduner in Rochester one accepts, I find that it is clear that Carduner was not responsive and cooperative with the attorneys at that meeting. Lack of cooperation with the Company's attorneys in preparation for their case is clearly a lawful reason for his discharged by the Company if it chooses to do so. The evidence reveals that at the meeting Carduner, either purposely or otherwise, was unable to supply any details with respect to the portions of the involved complaint directed to him. He was unable to tell the Company's lawyers whether or not these allegations were true or untrue. There are hints in this record, alluded to in the General Counsel's brief, that there may have been an attempt on the part of the Respondent to encourage perjury by Carduner and thereby undermine the integrity of the upcoming Board hearing. However, there is no allegation in the complaint in this regard and I can find no proof that any attempt to

influence Carduner to testify untruthfully was made by the Respondent or its attorneys.

After the meeting with the Company's attorneys, the Respondent's officials and attorneys determined to settle the issues in Case 30–CA–5603 in a settlement entered into with the involved Region. For reasons other than those relating to Carduner, this settlement has been set aside.[4] Given the extremely limited scope of protection afforded by the Act to supervisory personnel, I cannot find that the Respondent has violated the Act by discharging Carduner for his failure to cooperate in preparation for trial absent a clear showing that an attempt was made by the Company to encourage him to testify untruthfully. There is no such showing in this record, and I find that the Respondent has not violated Section 8(a)(1) and (4) of the Act by its discharge of Carduner and recommend that the complaint in this regard be dismissed.

20. Discharge of Richard Warner

Richard Warner was hired by LCP as a sales representative in January 1971. During his early career with the Company, Warner was a leading salesman. In 1975 he became regional manager of the Company's region 38, where he also performed in an excellent manner. In early 1979, he was transferred to region 63 as a regional manager. Region 63 was a problem region for the Company from the standpoint of sales and continued to remain a problem for the Company during the time in which Warner was its regional manager and thereafter a problem. The General Counsel asserts that Warner was terminated by the Company in May 1980 because of his association with Kensler as part of the Campany's alleged campaign to rid itself of those shown to be involved in the campaign and to impress upon the remaining employees the Company's union animus. It is clear that Warner was a supervisor within the meaning of the Act.

In defense of the allegations made by the General Counsel, the Company has a number of defenses, all having merit. First, the Company raises a Section 10(b) defense as Warner's discharge occurred on May 22, 1980, and the only charges to which allegations concerning Warner can be tied are those filed by Dash. As no charges were timely filed by Warner, allegations concerning Warner must be "closely related" to those filed by Dash. Although I have found the Company committed an unfair labor practice in its termination of Dash for his union activity, I cannot find that the Company's action with respect to Dash is closely related to its action with respect to Warner. First, Warner was clearly opposed to the Union and cooperated fully with the Company's campaign to defeat the Union's organizing campaign. The General Counsel strongly suggests that Warner was discharged because of his close ties to Kensler who he alleges was discharged because of his union activities. As I have previously found, that the Company did not have knowledge of Kensler's activities on behalf of the Union or know that Kensler was actually in support of the Union, I likewise cannot find that the discharge of Warner, because of the close relationship with Kensler, was based in any part on the Company's union animus. As Warner was admittedly a supervisor, he is not afforded protection of the Act except in limited circumstances. There is no allegation that Warner was discharged because of prospective testimony before the Board or discharged in any manner to thwart any of the Board's processes. The General Counsel asserted, through testimony given by Carduner, that Warner was to be discharged because the Company believed that he was a pipeline of company information to Kensler. Perceived disloyalty by a supervisor to management is a legitmate ground for discharge of a supervisor.

Additionally, the Company introduced credible evidence that it was dissatisfied with Warner's performance as a regional manager in region 63. General Sales Manager Bissett was dissatisfied with the performance and held several meetings with Warner to seek to improve his performance. While the General Counsel will admit that Warner's performance within the Region was not adequate to meet the Company's expectations, he defends his performance by pointing that other managers within the same Region had not performed well and were still employed by the Company and that other managers throughout the Company's system performing similarly were not discharged. There are differences, however, in the evidence in Warner's performance and that of some other regional managers whose performances were was not up to company standards. Warner had been given warnings in November 1979 prior to the beginning of any organizing campaign that he was not spending enough time with his sales representatives. He was given at that time and over the next several months several specific instructions by Bissett designed to improve the region's performance. Many of these he failed to carry out. Bissett's efforts to improve the region's performance culminated in a letter written to Warner in May 1980 requesting Warner to give Bissett a detailed report on what steps Warner intended to take to improve the region's performance. The report submitted by Warner was introduced into evidence is but a cursory response to the request from Bissett. Bissett then terminated him. I credit Bissett's assertion that the decision to discharge Warner was motivated by genuine business concerns. Therefore, I cannot find that the Company's action in regard to terminating Warner violates that Act in any regard.

21. Discharge of Hubert Redd

From November 1978 until October 1980, Redd was an LCP sales representative for parts of Georgia and South Carolina, under Regional Manager John Carroll. The General Counsel urges that Redd was discharged in October 1980, because of his known prounion sentiments. In this regard, the General Counsel produced evidence that Redd had indicated on more than one occasion to fellow sales representatives that he was in favor of the Union, that the Company had knowledge of his signing

[4] The Respondent at the hearing and on brief urges its motion to dismiss this allegation because the Regional Director abused his discretion in setting aside this settlement. The motion was denied by order of Associate Chief Administrative Law Judge John M. Dyer dated June 23, 1981. I concur with Judge Dyer's ruling.

of the union authorization card, that he had expressed his prounion sentiments to his regional manager, Carroll, and that, at an information meeting conducted by President Gosnell, Redd asked a number of questions which would indicate prounion sympathies.

In defense of its action, the Respondent denies having any knowledge of Redd's union sympathies, raises a Section 10(b) defense as no charge had ever been filed by Redd against the Respondent as of the hearing, and pointed out that it had legitimate business reasons for discharging Redd relating to his personality and performance. There is no clear showing that Redd's union sympathies were known to the Company or played any part in the Company's decision to terminate him. The closest showing made by the General Counsel in this regard is that the Company knew that Redd gave an affidavit to a Board agent, in anticipation of this testimony before the Board, in a hearing resulting from the original charges filed by Dash. However, it was shown that a number of company representatives gave affidavits to the Board with regard to that complaint and that it was known to the Company that Redd did not desire to testify in the proceeding. There has been no discipline by the Company of any of the other employees who gave affidavits to the Board.

I also find that, contrary to the General Counsel's contentions, Redd was not a model employee of the Company and that it did in fact have legitimate reasons for discharging him which were not pretextual. From the outset of his employment, Redd had problems with LCP. During his initial sales training, in Rochester, New York, Redd overcharged the Company for expenses. Later, ostensibly to complete a house move, Redd took off 2 weeks after telling his supervisor that he would only be gone over a long weekend. According to credible testimony given by Redd's supervisor, Carroll, Redd's sales techniques were not satisfactory. He was disparaging of other company's products in front of customers and when he could not deal with the customer he would not call on him again. Carroll also credibly related problems relating to Redd's willingness to give customer service or aid in making collections.

Perhaps more importantly, it is clear that Redd had problems in dealing with his regional manager, Carroll. On one occasion, because of a mixup in communication, Carroll and Redd engaged in an oral confrontation, for which Carroll later apologized. It appears from the evidence, that at least thereafter, the relationship between Carroll and Redd was strained on several occasions. Carroll suggested to Bissett that Redd be disciplined or terminated. A number of times, the incident which resulted in Redd's termination took place at the Company's annual sales meeting in New Orleans, Louisiana, in October 1980. There, in a public restaurant, after becoming intoxicated, Redd told Bissett that he could not work for Carroll and that Carroll was a "son-of-a-bitch." Upon being apprised of this conversation by Bissett, Carroll requested that Redd be terminated as he did not believe that he could motivate Redd nor work with him further. Bissett complied. I find that this discharge was not motivated by union animus or any activities by Redd on behalf of the Union.

22. Discipline of David Outlaw

Outlaw was a 3-year sales representative with LCP who was placed on probation in March 1980 by the Company for failure to properly submit required reports. It is admitted by all parties that prior to his suspension Outlaw consistently failed to submit adequate reports of calls on prospective customers and was warned repeatedly during his tenure of employment about this problem.

Outlaw was a supporter of the Union's organizing campaign and was its treasurer. It was his testimony that he informed his supervisor in the course of the campaign that he was a union supporter. Although his regional manager, Carroll, denies the conversation, in completing the sociogram on Outlaw, Carroll indicated that he believed that Outlaw was in support of the Union.

The Company had a legitimate interest in seeking better compliance with its reporting requirements by Outlaw; however, a question is left as to whether the timing of the probation given Outlaw was primarily the result of union animus and whether the severity of the punishment, i.e., 6 months' probation, was a result of a legitimate desire to improve his performance or motivated by union animus.

Between September 1978 and February 1979, Kensler, who was then LCP's national sales manager, sent a number of letters to Outlaw's then regional manager, Carroll, in which he stated that Outlaw was not submitting his reports. Kensler further stated that such failure was intolerable and could be grounds for Outlaw's termination. Kensler demanded that Outlaw bring the reports up to date. In November and December 1978, Carroll sent memoranda to Outlaw directing him to bring his reports up to par or he would be terminated. Carroll was replaced as Outlaw's regional manager in June 1979 by Bissett, who again informed Outlaw of the reporting requirements. However, in August 1979, Outlaw submitted call reports for only 10 of 25 reportable days. Bissett was shortly replaced as Outlaw's supervisor by Carroll who had been on a leave of absence. Carroll again warned Outlaw of the need to properly submit call reports. In October and November 1979, Carroll again warned Outlaw about his failure to properly complete such reports. In February 1980, Carroll had a compilation made of the call reports of his sales representatives for the month of January. He learned that Outlaw had reported only 18 interviews with prospective customers for the entire month of January and had made no reports for the week of January 20 to 26. Carroll then sent Outlaw a memorandum admonishing him for his poor performance and in March, when he next met with Outlaw, placed him on 6 months' probation. LCP demonstrated a positive correlation between the submission of sales call reports and performance. Outlaw's sales performance was not outstanding, and I find the Company had a legitimate reason for requiring him to submit call reports in an adequate manner. Because of the repeated warnings given to Outlaw during the entire tenure of his employment with LCP, I find that the Company did not violate the Act by its action in placing David Outlaw on probation for 6 months and would recommend that the complaint in this regard be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Office and Professional Employees International Union, AFL–CIO–CLC is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. By giving notice of improvements in its pension plan during the course of the union campaign, the Respondent has offered its employees benefits in an attempt to influence the outcome of the election in violation of Section 8(a)(1) of the Act.

4. The Respondent, by its letter from its president to its employees concerning the campaign and the Union, has threatened its employees with harsher working conditions and the possibility of permanent replacement in violation of Section 8(a)(1) of the Act.

5. The Respondent, by the actions of its president in a meeting with sales representatives in Washington directed them to discourage fellow employees from their support of the Union in violation of Section 8(a)(1) of the Act.

6. The Respondent, by the actions of its regional managers in meetings with individual sales representatives in January 1980, has interrogated its employees with regard to thier union sympathies, solicited withdrawal of authorization cards, given the impression of surveillance, threatened its employees, and impliedly offered benefits and improved working conditions to influence the outcome of the election in violation of Section 8(a)(1) of the Act.

7. By requiring Stanley Dash to be examined by a doctor of the Respondent's choosing before he could return to work from a health-related leave of absence, by discharging him on November 4, 1980, because of his activities in support of the Union, and by its appeal of his award of unemployment compensation benefits, the Respondent has violated Section 8(a)(1) and (3) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not engaged in other unfair labor practices as discussed above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

I recommend that the Respondent, having discriminatorily discharged Stanley Dash for engaging in union activity, be required to offer him immediate and full reinstatement to his former position, without prejudice to whatever seniority and other rights and privileges he would have enjoyed had the Respondent not discriminated against him, dismissing, if necessary to make a position available for him, any employee hired to a position he would have held but for such discrimination and shall make him whole for any loss he may have suffered by reason of the discrimination against him. All backpay due under the terms of this Order shall be computed, with interest, in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1960), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The Respondent shall expunge from its personnel files, or other records, any reference to the discharge of Stanley Dash on November 4, 1981, and notify him in writing that this has been done and that the evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

In order to dissipate the effect of the Respondent's filing of the appeal of the award of unemployment compensation benefits to Stanley Dash, I shall further recommend that the Respondent be ordered to cease and desist from prosecuting the appeal and to withdraw it. In order to restore Dash to the position he would have had, in absent the Respondent's unlawful appeal, I shall recommend that the Respondent be ordered to make Dash whole for all legal expenses he has incurred as a result to said appeal.

[Recommended Order omitted from publication.]

Molded Acoustical Products, Inc. ***and*** **Teamsters Local 773, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 4–RC–15481

10 December 1984

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in and objections to an election held 30 December 1983 and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 60 for and 55 against the Petitioner, with 8 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations,[1] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 773, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees of the Employer at its 110 Main Street, West Easton, Pennsylvania facility; BUT EXCLUDING all other employees of the Employer, including office and plant clerical employees, professional employees, leadmen, confidential employees, guards and supervisors as defined in the Act.

MEMBER HUNTER, dissenting.

Contrary to the Regional Director, I find that the Petitioner engaged in objectionable conduct by making an impermissible offer to waive its initiation fee. Accordingly, I would set aside the election.

It is undisputed that the Petitioner, Teamsters Local 773, distributed to the employees a campaign letter, dated 19 December 1983, which stated in pertinent part:

> [A]ll employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters to represent them. Also dues will not be payable until there is a signed contract.

The Regional Director found that although the Petitioner's statement "may have been inartfully drafted," it was sufficiently clear that the statement meant that the Petitioner would waive the initiation fee for all unit employees, without distinction, if the Petitioner won the election and became their collective-bargaining representative. He further found that the statement did not require the employees to join the Union or to take any other action before the election as a condition of the offer to waive the initiation fee. The Regional Director concluded that the waiver was offered to all employees unconditionally and that therefore the Petitioner's statement was not violative of *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

Contrary to the Regional Director, I find that the Petitioner's statement in its 19 December 1983 letter with respect to the waiver of the initiation fee is ambiguous on its face. In the Regional Director's view the above statement is to be read as an unconditional offer to waive the initiation fee for all unit employees. However, the Regional Director's interpretation is not the only plausible interpretation. Rather, the statement is equally susceptible of the interpretation that the offer to waive the initiation fee was conditioned on the individual employee's vote in the election and in my view the employees reasonably could have so construed the statement.[1] Such a waiver offer is impermissible under *Savair*. It is also well established that in circumstances, as here, in which a union's offer to waive initiation fees is ambiguous, it is the union's duty "to clarify that ambiguity or suffer whatever consequences might attach to the employees' possible interpretations of the ambiguity." *Crane Co.*, 225 NLRB 657, 659 (1976). See *Inland Shoe Mfg. Co.*, 211 NLRB 724, 725 (1974). It is apparent that

[1] Chairman Dotson emphasizes that the interpretation urged by the Employer of the Union's statement that "All employees in the bargaining unit will not have to pay the $50.00 Initiation Fee if they vote for the Teamsters"—i.e., that only those employees who voted for the Union would qualify for the waiver—is unreasonable in light of the Board's fully publicized secret-ballot procedure.

[1] I cannot agree with Chairman Dotson that this interpretation of the Petitioner's statement is unreasonable in light of the Board's fully publicized secret-ballot procedure. In my view, the Chairman's reliance on the Board's secret-ballot procedure necessarily leads to the conclusion that waivers of initiation fees which are conditioned solely on how an employee votes in an election are permissible. Such a conclusion is clearly contrary to *Savair*. Thus, I note that in *Savair* the Court set forth the Board's analysis in *DIT-MCO*, 163 NLRB at 1021–22, that "it is completely illogical to characterize as improper inducement or coercion" a waiver of initiation fees for those who vote "yes" when the whole problem can be avoided by voting "no," and that the Court specifically rejected that analysis as ignoring the realities of the situation. See 414 U.S. at 277–278.

the Petitioner here did not clarify its offer to waive the initiation fee.[2]

Accordingly, I find, contrary to the Regional Director, that the Petitioner's offer to waive its initiation fee was violative of *Sawair* and I would sustain the Employer's objection, set aside the election, and direct a second election.

I therefore dissent from my colleagues' adoption of the Regional Director's report.

[2] In this regard, I note that in its brief in opposition to the Employer's exceptions the Petitioner, in arguing that no hearing is warranted in this case, states: "In this case the letter containing the waiver language speaks for itself. There is no dispute as to any issue of material fact because the only material fact is the letter itself."

Repco Distributing, Inc. *and* **Glass Warehouse Workers & Paint Handlers, Local Union No. 206, International Brotheroood of Painters and Allied Trades, AFL-CIO.** Cases 29-CA-7861 and 29-CA-7904

10 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 18 June 1981 Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, dissenting in part.

I dissent from my colleagues' adoption of the judge's decision with respect to two issues. I would find that the Respondent violated Section 8(a)(3) and (1) of the Act on 13 March 1980[1] by discharging employee Robert Monsky because of his union organizational activities. I would also find that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees Harold Baylis and Nick Buttacavoli about the Union.

Monsky's Discharge

The Respondent is a small, family-run automobile parts wholesale distributor. Other than company officers, managers, and supervisors, it has only 12 employees. In early 1980, employee Monsky called the Union to express an interest in gaining representation for the Respondent's employees. Around 4 March, Monsky invited employees to his home for an 8 March organizational meeting. On 5 March, Monsky told the Respondent's vice presidents Wachler and Mastrobuoni that he was interested in forming a union and that he was concerned that unionization could affect adversely their positions with the Respondent as independent contractor-glass installers. Wachler and Mastrobuoni told him that as corporate officers their positions would not be affected by unionizing and that Monsky should do whatever he liked, but that the Respondent's owner Grasso "would never go for it." At the 8 March meeting, Monsky and fellow employees Baylis and Buttacavoli signed cards authorizing the Union to act as their representative. On 10 and 12 March Monsky successfully solicited two other employees to sign cards. Further, Baylis testified that there was a great deal of discussion about the Union among the employees throughout the week after the meeting at Monsky's house.

On the afternoon of 13 March the Respondent's general manager Lawlor informed Monsky that he was terminated. Lawlor told Monsky that the Respondent was dissatisfied with Monsky's work and that an incident which occurred earlier in the day was the last straw. This final incident involved Monsky's selection of the wrong type of glass for a customer's order. Monsky inadvertently pulled from inventory a safer, more expensive piece of safety plate glass instead of the safety sheet glass called for in the order. The error was corrected before the glass was sent. Grasso testified that Monsky was never more than a marginal employee who exhibited sloppy work habits, a lack of enthusiasm, consistent tardiness, inadequate care for company property, and inattention to job responsibilities. This last incident involving the wrong glass allegedly prompted him to tell Lawlor to let Monsky go.

With respect to Monsky's work record, the evidence is that he had initially worked for the Respondent for several months during 1978, left on

[1] In dismissing the allegation that Robert Monsky's discharge violated the Act, we agree with the judge that its timing—coming shortly after Monsky signed a union authorization card—raises a suspicion of a causal connection. However, as the judge correctly points out, a suspicion is not proof. Even assuming the Respondent's knowledge of Monsky's activities, there is no evidence that the Respondent threatened employees, promised them benefits, or displayed any intent to retaliate against employees because of their union activities. In these circumstances, we have at best an unsupported inference that the termination was unlawful. Moreover, the judge credits the Respondent's testimony that Monsky's work habits provided a legitimate basis for discharge. Therefore, unlike our dissenting colleague, we are unwilling to engage in building inferences upon speculation to arrive at the tenuous conclusion that the Respondent violated the Act.

We correct an error in the judge's discussion of the Monsky discharge incident. The judge refers to the customer's order as calling for AS—2 "plate" glass. The correct designation of the AS—2 glass is "sheet" glass.

[2] In adopting the judge's conclusion that the Respondent's 14 March 1980 questions to two employees as to what they knew about the Union do not constitute unlawful interrogation in violation of Sec. 8(a)(1), we rely on the absence of evidence of hostility toward the Union, the generalized nature of the inquiries, the informal and noncoercive atmosphere in which the questions were asked, the absence of threats or promises accompanying the questions, and the forthrightness of the employees' replies which indicates that no intimidation or coercion existed. *Rossmore House*, 269 NLRB 1176 (1984). We note moreover that employee Buttacavoli could not recall such an interrogation.

[1] All dates are in 1980, unless otherwise indicated.

his own initiative, and then was readily rehired by Grasso in February 1979. Monsky was given a $20-a-week raise in August 1979 as an inducement from Grasso to remain with the Respondent rather than accept an offer from a competing employer. Grasso had also repeatedly expressed satisfaction with Monsky's performance by promoting him to warehouse foreman, complimenting him in front of customers, reassuring him of his position with the Respondent, and, just a week before terminating him, telling him that he had done a good job while Grasso was out of town.

The judge accepted as valid and legitimate the Respondent's justification for discharging Monsky. In recommending dismissal of the complaint, he also noted particularly the Respondent's lack of demonstrated union animus and of direct knowledge of Monsky's involvement in protected union activities. Contrary to my colleagues, I find error in the judge's findings with respect to animus, knowledge, motivation, and, ultimately, the occurrence of an 8(a)(3) violation.

As discussed below, I would find that Grasso unlawfully interrogated employees about the Union only a day after Monsky's discharge. Apart from this evidence, Wachler and Mastrobuoni admitted the Respondent's union animus when they told Monsky that Grasso "would never go for" unionization. This same encounter between Grasso and the Respondent's officers clearly established knowledge of Monsky's activities no later than 5 March. In addition, the small size of the Respondent's family-run business and the open in-plant organizational activities of Monsky further support the inference that the Respondent must have known about those activities before his discharge. In reliance on the foregoing evidence, I would find that the Respondent clearly knew about and was opposed to Monsky's union activity.

I would further find that Monsky's general work performance and his error in selecting plate glass were blatant pretexts designed to mask the Respondent's antiunion discriminatory motivation for discharging him. Although there is evidence that Monsky was not always a model employee, the record shows that the Respondent nevertheless considered him sufficiently valuable to overlook his deficiencies, offer encouragement and reassurance of his tenure, grant him increased responsibilities, and even increase his salary rather than risk his loss. The Respondent was willing to overlook whatever inadequacies Monsky may have demonstrated without so much as a disciplinary warning until Monsky's union activities began. It is far too improbable to believe that Monsky's mistake in pulling a more expensive, safer, higher quality piece of glass than called for in a customer's order, a mistake which was corrected before the glass was even loaded on the delivery truck and which resulted in no additional expense for either the Respondent or the customer, was such a drastic departure from or exacerbation of his previously condoned conduct as to justify his precipitate discharge. The Respondent's sudden strictness with regard to Monsky's work betrayed its pretextual character.[2] Accordingly, I would find and conclude that Monsky's discharge on 13 March violated Section 8(a)(3) and (1).

The Unlawful Interrogations

On Friday, 14 March, the date after Monsky's discharge, Union Representative Gableman telephoned Grasso and told him that the Union represented a majority of the Respondent's employees and that he wanted to negotiate a contract. According to Grasso's own account, he followed up on this phone conversation by asking employees Baylis and Buttacavoli what they knew about the Union. My colleagues have adopted the judge's recommendation to dismiss these alleged interrogations as noncoercive, isolated, and trivial in nature. I disagree.

It is well established that questions probing into employees' union sympathies reasonably tend to coerce employees in the exercise of their Section 7 rights even absent accompanying threats of reprisal or promises of benefits. Here, according to the Respondent's own witness, the Respondent set out to discover which employees supported the Union simply by asking individual employees what they knew about the Union. Such inquiries undoubtedly tend to inhibit employees' concerted activities. Particularly within the context of this case, in a small 12-employee plant where only 1 day earlier the Respondent unlawfully rid itself of the leading union activist, these interrogations by the Respondent owner cannot be characterized as either trivial or isolated. Therefore, I would find that Grasso's questions to Baylis and Buttacavoli violated Section 8(a)(1) and warrant appropriate remedial action. See *Brooks Cameras*, 250 NLRB 820 (1980).

[2] Both Grasso and Lawlor testified about the wrong glass incident and the decision to terminate Monsky. Their asserted concern about the safety aspects of such an error should it have occurred in reverse, i.e., that a lower quality glass might be substituted for an order requiring the better quality product, seems particularly contrived in light of the circumstances actually presented.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. These consolidated cases were tried before me on December 17, 18, and 19, 1980, and April 1, 1981.[1] The charge in Case 29–CA–7861 was filed by the Union on March 18 and the charge in Case 29–CA–7904 was filed on April 4. Pursuant to these charges, a consolidated complaint and notice of hearing was issued by the Regional Director for Region 29 on May 30. In substance, the complaint alleges:

1. That, about March 13, a majority of the Respondent's employees in a unit of service, production, and maintenance employees designated the Union as their collective-bargaining representative.

2. That, about March 14, the Union requested the Respondent to recognize and bargain with it as the representative of the employees.

3. That the Respondent discharged its employees Phil Vito on March 12, Robert Monsky on March 13, and Greg Galano on March 18 because these employees joined or supported the Union.

4. That, about March 14, and on various other unknown dates in March, the Respondent by Joseph Grasso and by other unknown agents and supervisors interrogated employees concerning their membership in, activities on behalf of, and sympathy for the Union.

5. That the Respondent's conduct, as heretofore alleged, prevented the holding of a fair and free election and therefore a bargaining order is required.

On the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits the jurisdictional allegations of the complaint. Therefore, it is found that the Respondent is a New York corporation located at 157A Grant Avenue, Islip, New York, where it is engaged in the wholesale distribution of automobile parts and related products. Annually, the Respondent purchases goods and materials valued in excess of $50,000 which are delivered directly to it in interstate commerce from States other than the State of New York. Accordingly, it is concluded that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Although the status of the Union as a labor organization was denied, it is clear from the testimony of Charlie Gableman that it is an organization in which employees participate and which exists for the purpose of representing employees vis-a-vis employers regarding wages, hours, and other terms and conditions of employment. It therefore is concluded that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The first contact between the Union and employees of the Company occurred in January or February 1980. In this respect, employee Andrew Agosta was approached by Union Agent Gableman and asked if he wished to join the Union. Agosta then told Joseph Grasso, the Respondent's owner, of this approach and the latter responded, "Don't worry about it." No further contact was made between the Union and the Respondent's employees until early March 1980.

In early March, Robert Monsky called the Union indicating his interest in having representation and arranged for a meeting at his home on March 8. On March 4 or 5, Monsky spoke with various employees inviting them to the meeting. According to Monsky, around March 5 he spoke with Robert Wachler and Gaspar Mastrobuoni in the shop, told them that he was interested in forming a union, and asked if this would jeopardize their positions with the Company. Monsky states that he asked them this because he understood that Wachler and Mastrobuoni were independent contractors who installed glass for the Company and he was concerned that under a union contract they would not be able to continue in that relationship. Monsky states that they responded that a union would not affect them because they were officers of the Company and that they would "like to see the look on Joe's face because he would never go for it." Monsky also states that they said that he should do whatever he liked.

Since the above transaction involved Wachler and Mastrobuoni, it would be useful at this point to describe their status with the Company. It appears that both individuals do glass installation work for the Company and in connection with their functions do not have any supervisory duties or responsibilities. However, both were made vice presidents by Grasso, about January 1, 1979,[2] and Mastrobuoni is the latter's nephew. According to Grasso, he made Wachler a vice president because he was very dedicated and loyal.[3] (Lawlor and Mastrobuoni were also made vice president at that time, no doubt because they were relatives.) Grasso also testified that the designation of Wachler and Mastrobuoni as vice presidents did not bring them any added compensation or any equity in the Company, although he did have an understanding that ultimately, when he left the business, the vice presidents would take over.[4] In effect, the arrange-

[1] Unless otherwise indicated, all dates are in 1980.

[2] About January 1, 1979, Wachler, Mastrobuoni, and Lawlor were made vice presidents, and Grasso's wife, Frances, became the Company's president. Lawlor is concededly a supervisor within the meaning of the Act, and is Grasso's son-in-law. Frances Grasso is the Company's bookkeeper.

[3] The testimony also establishes that Wachler owned his own truck, has his own company, and was assumed to be an independent contractor by Grasso.

[4] Although the General Counsel contends that Wachler and Mastrobuoni should be excluded from any unit found to be appropriate, it is noted that she does not allege that they are supervisors or agents of the Respondent.

ments made in 1979 appear to be a kind of insurance policy to provide for the continuation of this small family-owned business if and when Grasso left the Company for health or retirement reasons.

Getting back to the main plot of the story, a meeting was held at Monsky's home on Saturday, March 8, which was attended by Union Agents Gableman and Bondi and by employees Robert Monsky, Harold Baylis, and Nick Buttacavoli. At this meeting where the union agents spoke of the benefits of unionization, the three employees signed cards authorizing the Union to represent them for collective-bargaining purposes. However, subsequent to the meeting Baylis, after speaking with his wife, decided that he did not want to join the Union and on several occasions during the next week asked Monsky for his card back. In this regard, Monsky's testimony was that he could not recall if Baylis asked for his card back but it could have happened. I credit the testimony of Baylis that he did ask for his card back.

According to Monsky, about March 10 or 11 he asked Greg Galano and Phil Vito to sign union cards. These two employees did sign such cards, Galano's being dated March 10 and Vito's card being dated March 12. Therefore, in toto, five employees signed cards for the Union.[5]

On Wednesday, March 12, Phil Vito was told by Lawlor that he was discharged. According to Vito, about a week before, he took his truck to a gas station where, in addition to getting gas, he bought a pack of cigarettes which were put on the bill charged to the Respondent. He explained that he did not have change to buy the cigarettes but that the attendant told him that they were put on the gas bill. Vito testified that he intended to pay the Company for the cigarettes when he got back. Although the impression was given during direct examination that this event took place on the same day that Vito was discharged and that he tendered the money as soon as he returned to the Respondent's premises, it soon became apparent that Vito "forgot" to repay the money for about a week and that on March 12, when Lawlor approached him, Lawlor accused Vito of charging cigarettes on the Company's credit card and that it "was the principle of the thing" with which he was concerned.

According to Lawlor, he had received a call from the gas station on the morning of March 12 pursuant to which he visited the station and learned that Vito was making a habit of charging cigarettes to the Respondent. He states that, when he confronted Vito about this, the latter admitted it. Lawlor testified that he therefore decided to discharge Vito. In connection with the discharge of Phil Vito, I note here that there was no direct evidence that either Lawlor or any other company agent had knowledge of the fact that Vito had signed a union card earlier that day. It also is noted that there was evidence that, on one other occasion when an employee was suspected of stealing, he was given the option of resigning.

On March 13, Monsky was discharged. That morning Monsky, who is in charge of the warehouse, received an order calling for the delivery of plate glass designated as AS–2 for the side window of a bus. In this regard, there are various types of glass used in motor vehicles, among them being glass designated as AS–1 and AS–2. The former (AS–1) is required by Federal law for windshields, is clearly marked as such on the glass itself, and is somewhat more expensive than AS–2 glass. AS–2 glass, on the other hand, can be used for any window on a vehicle other than the windshield.[6]

Having received the order, Monsky went back to the warehouse to get the glass and, instead of pulling out a piece of AS–2 glass, pulled out a piece of AS–1 glass. According to Monsky, after pulling the glass Grasso yelled at him "Don't you know what you are pulling. You're pulling out a more expensive piece of glass." Monsky states that in response he said that the glass was marked wrong, "so how was I supposed to know."[7] He then testified that he responded further by saying that he did not have the other piece of glass, apparently meaning that he did not find the AS–2 glass in stock. At one point in Monsky's testimony he stated that Grasso said that he had pulled AS–1 instead of AS–2 glass, but he later testified that Grasso did not say anything about AS–1 or AS–2.[8] Monsky further testified that "it was not a big thing, as far as I was concerned." According to Monsky, later in the day Lawlor told him that he was fired. Monsky states that Lawlor told him that he was not productive, not happy, that the Company was family owned and he could not go further, and that Lawlor had unsuccessfully tried to get raises for Monsky.[9] Therefore, ac-

[5] As of March 14, when the Union made a demand for recognition, the General Counsel asserts that the following people comprised an appropriate collective-bargaining unit: Harold Baylis, Ernie Phillips, Nick Buttacavoli, Phil Vito, Greg Galano, and Robert Monsky. The Respondent asserts that the unit should include Robert Wachler, Gaspar Mastrobuoni, Andrew Agosta, Harold Baylis, Ernie Phillips, George Puleo, Nick Buttacavoli, Mike Reissman, but excluded Vito, Galano, and Monsky.

As to Vito and Monsky, the General Counsel asserts that they should be included in the unit notwithstanding the Respondent's contention that they no longer were employed because she asserts they were illegally discharged. As to Galano and Vito, the Respondent contends that they essentially did office work whereas the General Counsel asserts that they were drivers. With respect to Wachler and Mastrobuoni, the General Counsel contends that they should be excluded from the unit because they are vice presidents and because of their special relationship with the Company. The General Counsel also objects to the Respondent's contention that Reissman and Puleo should be included in the unit as she argues that the former was a management trainee and that the latter was on extended sick leave. Finally, the General Counsel takes no position as to Andrew Agosta.

[6] For safety reasons, the National Highway and Safety Administration is empowered to adopt safety standards pursuant to which items of motor vehicle equipment cannot be sold unless meeting safety standards. 80 Stat. 722. Pursuant to the statute, Motor Safety Standard No. 205 was promulgated which deals with glazing materials and requires, inter alia, that such materials conform to the American National Standard "Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways." The American Standard Safety Code, in turn, designates AS–1 glass as being suitable for windshields and AS–2 as not being suitable for windshields. Pursuant to the statute, a violation of the law or any attendant regulation can subject a company to a fine.

[7] Monsky conceded, however, that AS–1 glass is clearly marked as such with the designation etched onto the glass.

[8] Early in his testimony, Grasso said that Monsky pulled out AS–2 glass rather than AS–1 glass which was called for by the order. He later corrected himself and testified that it was AS–2 glass which was called for in the order and not AS–1 glass.

[9] According to Monsky he had been pressing the Company repeatedly over several months for a raise but was continuously put off.

cording to Monsky's account Lawlor did not mention the glass incident when he was being discharged.

While Lawlor acknowledges telling Monsky that he felt that Monsky was not happy with his work, he states that he specifically told Monsky that the glass incident was the final straw. In this regard, Lawlor testified that, when Monsky pulled the wrong piece of glass, he questioned Monsky about it and the latter said that he could not find the right glass. Lawlor further testified that he told Monsky, "This was not right," and that if he could not find it he should ask. According to Lawlor, he gained the impression from Monsky's response, and the fact that Monsky was supposed to be in charge of the warehouse and know its inventory, that Monsky did not really care if he pulled the wrong glass which could, in the future, result in the wrong glass being pulled when AS–1 glass was required. As such, Lawlor concluded that Monsky showed a lackadaisical attitude and a disregard of his responsibilities, a conclusion which tends to be supported by Monsky's testimony that his pulling of the wrong glass was not a big thing as far as he was concerned.

As part of the General Counsel's case, she adduced through Grasso that, prior to March 13, he considered Monsky to have had poor work and personal habits for a substantial period of time and had tolerated this. She also established that Monsky had received a raise in the summer of 1979 when he indicated that he was offered a job by a competitor. From this, the General Counsel argues that, if the Respondent considered Monsky to be a poor or indifferent worker for so long a period of time and tolerated this condition, then the only logical intervening factor which could have precipitated the decision to discharge him was his union activities.

On Friday, March 14, Gableman, on behalf of the Union, called Grasso on the phone and said that the Union represented a majority of the Company's employees and that he wanted to negotiate a contract. According to Gableman, Grasso replied that he could visit the shop and speak with him on March 17 at 10 a.m. Later in the day, according to Grasso, he told Lawlor about the call and asked Baylis if he knew anything about the Union. According to Grasso and Baylis, the latter said that he signed a union card but had unsuccessfully asked Monsky for its return. Also, in his pretrial affidavit, Grasso said that he also asked Nick Buttacavoli about the Union. However, Buttacavoli, in his testimony, could not recall such an interrogation, asserting instead that Grasso, without mentioning the Union, merely asked if he was happy with his job and if he had any complaints. In connection with these incidents, I credit Grasso's testimony that he questioned Baylis and Buttacavoli, after receiving the telephone call from Gableman.

On March 17, Gableman and Bondi went to the Company's premises only to discover that Grasso was not in. They then left and did not return. On March 18, the Union filed a petition for an election in Case 29–RC–4909 which was later withdrawn on June 30, 1980. Given normal mail delivery, the petition would therefore have been received by the Respondent on March 19 or 20.

On March 18, Greg Galano was discharged. As will be recalled, Galano had signed a union authorization card on March 10. However, apart from signing this card, it does not appear that Galano participated in any other union activities and there is no direct evidence that the Respondent's agents were aware that Galano had signed a union card.

Galano had been hired about 4 weeks before March 18 and, according to the Respondent, he was hired as a probationary employee to work mainly in the office taking orders over the phone. Galano maintains, however, that he was never told that he was on probation. He does concede that the major part of his work was in the office taking orders over the phone. He asserts, however, that he also drove a good deal of the time.

According to Galano, on March 18 Lawlor told him that he was being discharged. Galano states that when he asked why, Lawlor said that he was not the type of person that the Company was looking for. He further states that when he asked if his layoff had anything to do with the Union, Lawlor paused and said, "I've heard some rumors." According to Galano, he then asked Grasso why he was fired and states that Grasso said that he was not the right type of person for the job, that they were looking for someone with more schooling, and that Galano liked to be out on the road which was not challenging enough for him. He also states that Grasso said something about sending out a wrong piece of glass which Galano denied ever happening.

According to Lawlor, he and Grasso decided on March 18 to discharge Galano because, in their opinion, he was not suited for the job that he was hired to do. In this respect, they testified that Galano did not have a good telephone personality, that he was too rough on the phone, and that since he was hired mainly to take calls from customers, Galano was not sufficiently useful to the Company. Lawlor testified that he had discussed this problem with Grasso prior to March 18 but that, when Galano did not improve, it was decided to let him go. As to his conversation with Galano on March 18, Lawlor conceded, after being shown his pretrial affidavit, that Galano did ask him if his discharge had anything to do with the Union. Lawlor asserts that he answered "no" to this inquiry.

It appears from the testimony of Agosta that, after Monsky was fired, the Union established a picket line at the Company's premises and that Monsky participated in that picketing. According to Agosta, Grasso, on one occasion, on seeing Monsky on the picket line, said that he did not understand why Monsky would "go that route, join the Union, and that the "guys didn't come to him and . . . try to work something out before setting up this union." It is noted that apart from these statements made to Agosta and the two instances when Grasso questioned employees as described above, there was no other evidence that any other representatives of the Respondent's management communicated to any employees about the Union much less expressed, in any way, any intention to retaliate against employees who joined or supported the Union.

IV. ANALYSIS

In my opinion, the critical issue in this case is whether the Respondent illegally discharged Robert Monsky, Phil Vito, and Greg Galano because of their union activities or whether they were discharged for other reasons. In cases such as this, it must first be ascertained whether the General Counsel has made a sufficient showing "to support the inference that protected activity was a 'motivating factor' in the employer's decision," which, if shown, requires the Respondent "to demonstrate that the same action would have taken place even in the absence of protected conduct." *Wright Line*, 251 NLRB 1083 (1980).[10]

It is self-evident that the timing of the three discharges (Vito on March 12, Monsky on March 13, and Galano on March 18), occurring shortly after they signed union cards, does suggest, at the very least, a suspicion that a causal connection exists. Nevertheless, suspicion is not the same thing as proof and while timing may justify an inference of antiunion animus, inquiry must be made into all of the circumstances leading up to the discharges including, inter alia, whether the employer had knowledge of the union activities, other evidence union animus, whether any intervening transactions occurred which may have caused the discharges, and whether the reasons asserted by the employer were pretextual in nature or were contrary to its normal custom and practice.

In the present case, the General Counsel contends that the Employer had knowledge of its employees' union activities through a number of transactions which occurred, in addition to the fact that this was a small shop.[11] The first of these transactions involves the conversation between Agosta and Grasso wherein the former, in January or February, told the latter that he was approached by the Union and where Grasso replied, "Don't worry about it." Nevertheless, despite the fact that Grasso became aware of this contact a month or two before the discharges in question, it also appears that, after this single contact between the Union and Agosta, no further organizational efforts were made until early March when Monsky and other employees came in contact with the Union. Therefore, as the Union was not engaged in organizing activities from its first approach to Agosta until March, and as no other employees had met with the Union during the intervening period, it can only be said that the Employer had knowledge of the first tentative contact between the Union and Agosta. Accordingly, it does not seem to me that the conversation between Agosta and Grasso can, of itself, be the basis for concluding that the Employer had knowledge of the subsequent organizing efforts by the Union or the later activities of Monsky, Vito, and Galano. Moreover, the response given by Agosta would appear to manifest a singular lack of concern by Grasso about the Union's contacts with his employees.

The second transaction relied on for establishing knowledge of union activities prior to March 12 was Monsky's conversation with Wachler and Mastrobuoni about March 5. As noted above, Monsky testified that he told these two men that he was interested in forming a union. He also testified that they replied that he should do as he liked and that they would "like to see the look on Joe's face because he would never go for it." The next question is whether their knowledge of Monsky's interest in the Union can be imputed to the Respondent. In this regard, although it was conceded that these two individuals had the titles of vice president and that Mastrobuoni is Grasso's nephew, they nevertheless did installation work for the Company and had no supervisory or managerial functions. Indeed, the General Counsel does not contend that either was a supervisor or agent of the Respondent. As such, I do not believe that I can impute, by virtue of agency, their knowledge of Monsky's activities to the Respondent, although it may be plausible that as both had a potential equity interest in the Company, and because Mastrobuoni was a relative, that they mentioned this conversation to Grasso.

Another element to be considered is whether, apart from the timing of the discharges, there is other evidence manifesting an intent to retaliate against employees who either joined or supported the Union. In this respect, Grasso by his own admission questioned two employees as to what they knew of the Union after receiving a demand for recognition from Gableman. Grasso also does not deny that sometime after Monsky was discharged and was seen picketing at the employer's premises, he stated to Andrew Agosta that he did not understand why Monsky would "go that route, join the Union" and that the "guys didn't come to him and . . . try to work something out before setting up this union." Nevertheless, the evidence herein does not disclose that the Respondent's management talked or communicated about the Union with employees on any other occasions and the record is devoid of any evidence disclosing that the Employer either threatened employees or promised benefits to them. In my opinion neither the questioning of employees about the Union nor the statements made to Agosta in the context made were manifestations of an intent to retaliate. In short, it is my opinion that the evidence adduced by the General Counsel to suggest union animus on the part of the Respondent is, apart from the element of timing, decidedly weak and unpersuasive.

With respect to Vito, the evidence establishes that he signed a union card on the morning of March 12 and was discharged later on that day. In this case there is no direct evidence of any knowledge on the part of the Company that he signed this card and there is no evidence that any supervisors or agents of the Respondent were in the vicinity when the card was solicited, signed, or returned to Monsky.

It established that, about a week prior to his discharge, Vito charged a pack of cigarettes on the Company's credit card when he purchased gasoline for the truck he

[10] It is my understanding that although the criteria set forth in *Wright Line* provides a frame work for analyzing these issues, it does not purport to alter the longstanding rule that the ultimate burden of proof rests with the General Counsel.

[11] In her brief, the General Counsel cites *Tayko Industries*, 214 NLRB 84, 87 (1974), and *Wal-Mart Stores*, 201 NLRB 250 (1973), for the proposition that in a small shop it is "likely that the employer had observed the activity in question." For an extensive discussion of what has been called the "small plant doctrine," see *American League*, 189 NLRB 541, 548–549 (1971).

was driving. It also was established to my satisfaction that Lawlor became aware of this on the morning of March 12 and that, when he confronted Vito with an accusation of misusing the credit card, Vito admitted it, whereupon Lawlor discharged him, stating that it was the principle of the thing with which he was concerned.

Although Vito testified that he intended to immediately repay the Company, he conceded that it slipped his mind for about a week and that he did not tender the money until after being confronted by Lawlor on March 12. Whether Vito did or did not intend to repay the money is somewhat irrelevant because his failure to make timely repayment would clearly have led Lawlor to believe that Vito was making personal use of the Company's credit card.

The General Counsel argues that disparate treatment was shown in Vito's case as there was evidence that another employee who was suspected of stealing was given the option of quitting. However, it is my opinion that there is not much distinction between a forced resignation and a discharge and, to the extent that the past practice of this Employer may serve as a guide, the evidence concerning the other employee suspected of stealing tends to support the Respondent's contention that it does not retain employees who are believed to have converted company property or assets.

In the case of Vito my function is only to determine whether his discharge was motivated by his support for the Union and not whether his discharge was for "good cause." As it is my opinion that on March 12 the Respondent discovered that Vito had charged his personal effects to the Company and also because this had not been reported for about a week, the Company had a reasonable basis for believing that Vito was being less than totally honest in his dealings with the Company. It therefore is concluded that this transaction rather than Vito's execution of a union authorization card on March 12 was the sole motivating factor in the decision to discharge him. Accordingly, it is recommended that the complaint, insofar as it alleges that Vito was discharged for discriminatory reasons, be dismissed.

As in the case of Vito, there is no direct evidence that the Respondent was aware of Monsky's union activities although the circumstantial evidence supporting such an assertion is somewhat stronger. Unlike the situations of Vito and Galano, the evidence discloses that Monsky was the most active employee supporter of the Union, having contacted the Union and solicited its support among the other employees.[12]

Having demonstrated that the Respondent viewed Monsky as a poor and indifferent employee for a substantial period of time before his discharge, the General Counsel contends that the only intervening event which can explain Monsky's sudden discharge on March 13 was his union activities which commenced in early March. However, the record herein also discloses another intervening event which the Respondent asserts was the last straw and which caused it to terminate Monsky's employment.

As noted above, on the morning of March 13 Monsky had to take out of the warehouse's inventory a piece of AS–2 glass for delivery. Instead of pulling the AS–2 glass, he pulled a pane of AS–1 glass which provoked a confrontation with Grasso over this mistake. In response, Monsky explained his actions by asserting alternatively that he could not find the right glass and that the glass was wrongly marked. According to the Respondent, since Monsky was in charge of the warehouse where the glass was kept and therefore was expected to be aware of its inventory, his mistake and his explanations for the mistake indicated a lackadaisical attitude toward his job which could, in the future, lead to a serious problem because Federal regulations require the use of AS–1 glass for vehicle windshields and Monsky's lack of responsibility might result in the wrong glass being delivered and installed in violation of Federal law and thereby risk the imposition of a fine. Indeed, the testimony of Monsky that the pulling of the wrong glass was not a big thing as far as he was concerned tends to support the Respondent's view that, from his actions on March 13, it came to realize that Monsky not only was a poor employee, but that he was indifferent to his responsibilities.

Given the lack of evidence showing union animus on the part of the Respondent, together with the existence of an intervening event which plausibly could have served as a sufficient reason for discharging him, it is concluded that the evidence, on balance, is insufficient to establish that the Respondent discharged Monsky because of his activities or support for the Union. I shall therefore recommend that this allegation of the complaint be dismissed.

I also conclude that the discharge of Galano was not violative of the Act. Galano had been hired approximately 3 to 4 weeks prior to his discharge on March 18 and much of his time was spent answering telephone calls in the office. Apart from signing a union card on March 10, Galano did not participate in any other union activities. Also, although the Respondent was clearly aware of the Union's organizational efforts by March 18, there is no direct and little circumstantial evidence, aside from the timing of his discharge and the size of the shop, to show that the Respondent had knowledge that Galano had signed a union card or otherwise supported the Union. Given my opinion that there was insufficient evidence of union animus and the fact that I have credited the Respondent's reasons for discharging Vito and Monsky, I shall do the same in the case of Galano's discharge. Therefore, it is concluded that the Respondent terminated the employment of Galano because it felt that he was not sufficiently good at the job for which he was mainly hired to perform, namely, dealing with customers on the phone.

In view of my conclusion that the Respondent did not violate the Act by discharging the three employees, it is clear that the refusal-to-bargain allegation of the complaint must also be dismissed as it cannot be said that, even with two instances of interrogation, the Employer's conduct prevented the holding of a fair and free election. *NLRB v. Gissel Packing Co.*, 393 U.S. 575 (1969).

[12] See *W. W. Grainger, Inc.*, 255 NLRB 1106 (1981).

Finally, although the evidence herein discloses that Grasso asked at least one, and perhaps two, employees if they knew anything about the Union, after he received the telephonic demand for recognition from Gableman, it is my opinion that this was isolated, noncoercive, and trivial in nature. Accordingly, I am of the opinion that it would not effectuate the purposes or policies of the Act to require the Respondent to remedy this allegation. *Bath Electrical Systems*, 233 NLRB 762 (1977).

CONCLUSIONS OF LAW

1. The Respondent, Repco Distributing, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Glass Warehouse Workers & Paint Handlers, Local Union No. 206, International Brotherhood of Painters and Allied Trades, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in any conduct in violation of the Act requiring remedial relief.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

It is ordered that the complaint be dismissed in its entirety.

---

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Senftner Volkswagen, Porsche-Audi, Mazda *and* Local Lodge 1426, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 18–CA–7666

10 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 September 1983 Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that employee Rudolph DeLeon held a bargaining unit position in his daytime job as automobile preparer and reconditioner, and treated him as an independent contractor with respect to his "after hours" contract for janitorial services at the Respondent's automobile dealership.[1] He found that the Respondent violated Section 8(a)(1) and (3) of the Act by virtue of Sales Manager Glaza's termination of DeLeon's janitorial duties on 12 February 1982 because the bargaining unit majority voted that day for union representation in a Board-conducted election.[2]

We affirm the judge's finding of an 8(a)(3) violation.[3] Here, the same individual worked for his employer in a dual capacity as an employee and independent contractor. Because it is impossible to separate DeLeon's employee status from his independent contractor status in these circumstances, we disagree with our dissenting colleague that termination of the janitorial duties could not have had an impact on DeLeon and other unit employees.[4] Inasmuch as DeLeon's position as an independent contractor was related to his status as an employee, we find that the Respondent violated Section 8(a)(3) by terminating DeLeon's services as an independent contractor in retaliation for the employees' union activities.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Senftner Volkswagen, Porsche-Audi, Mazda, Sioux City, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating an independent contractor in order to penalize employees for engaging in union or concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rudolph DeLeon reinstatement of his janitorial contract and make him whole for any loss of contractual revenue he may have incurred as a result of his contract being terminated, in accordance with the formula set forth in the section of the judge's decision entitled "The Remedy."

(b) Post at its Sioux City, Iowa facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[1] It is unclear whether the judge actually made a finding that DeLeon's janitorial work was performed as an independent contractor. The judge, however, did analyze the case as if he had independent contractor status. Of course, if DeLeon's janitorial work was part of his employee duties, the 8(a)(1) and (3) violation is obvious.

[2] DeLeon testified that Glaza explained to him 12 February that Mrs. Senftner "didn't want anyone who was a nonmanagement employee to have keys to the place" and that "you guys voting for the union, that was the clincher." Glaza testified that he said, "Rudy, this isn't because of the election, this is just the straw that broke the camel's back." The judge concluded that both Glaza's and DeLeon's versions of their conversation reveal that the employees' vote was the determinative reason for the Respondent's decision to eliminate DeLeon's independent contractor services.

[3] In light of this finding, Member Hunter finds it unnecessary to pass on the question of whether the termination of DeLeon's janitorial work also was violative of Sec. 8(a)(1) of the Act. Member Zimmerman would, however, also affirm the judge's finding of an 8(a)(1) violation because the Respondent's termination of DeLeon's contract work was in retaliation for, and designed to interfere with, the bargaining unit employees' exercise of their Sec. 7 rights to engage in union and concerted activities.

[4] Contrary to our dissenting colleague's misconception, the impact to which we refer is on employees' exercise of their Sec. 7 rights to support a labor organization, not on their terms and conditions of employment.

[5] We shall substitute a narrow cease-and-desist order for the judge's broad injunctive language. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, dissenting.

I dissent from my colleagues' finding that the Respondent's termination of DeLeon's independent contractor services violated the Act.

DeLeon in his role as independent contractor is expressly excluded from the Act's definition of "employee" and consequently not entitled to the protections of Section 8(a)(1) and (3).[1] His independent contractor duties and interest are so different and far removed from those of the unit employees that I am unable to conclude that the elimination of his independent contractor status "interfered with the right of employees to exercise their Section 7 rights or that his reinstatement is necessary to convey to employees the extent to which the Act protects these rights."[2]

It is important to note that DeLeon's termination as an independent contractor is the only unfair labor practice charged to the Respondent, notwithstanding the fact that DeLeon was also employed as a unit employee. It stretches the imagination to conclude that DeLeon's termination impacted on bargaining unit employees when the evidence shows that the Respondent did not act unlawfully toward any bargaining unit employee.[3]

Accordingly, I would dismiss the complaint in its entirety.

[1] Cf. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982); *Firmat Mfg. Corp.*, 255 NLRB 1213 fn. 9 (1981).

[2] *Parker Robb*, above at 404.

[3] My colleagues have engaged in speculation and gross overstatement by asserting that DeLeon's employee and independent contractor status are so merged that it is *impossible* that the Respondent's action against him as an independent contractor could not have had an impact on his employee status or on other unit employees. In fact the contrary is shown by the record in this case. The record evidence reveals that DeLeon continued in his unit position without any changes to his employment terms or conditions for approximately 8 months after his janitorial contract services were terminated. Similarly, there is no evidence of any changes with respect to the other unit employees.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate an independent contractor in order to penalize employees for engaging in union or concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Rudolph DeLeon reinstatement of his janitorial contract, and WE WILL make him whole, with interest, for any loss of contractual revenue he may have incurred as a result of his contract being terminated.

SENFTNER VOLKSWAGEN, PORSCHE-AUDI, MAZDA

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on August 2, 1983, at Sioux City, Iowa, on the General Counsel's complaint which alleged that on February 12, 1982, the Respondent relieved Rudolph DeLeon of certain duties that he had been performing in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.[1]

The Respondent generally denied that it committed any unfair labor practices, and affirmatively contends that the work from which DeLeon was terminated was providing janitorial services as an independent contractor. Thus, even though he also worked as an employee, and only his independent contractor status was altered, no term or condition of "employment" was affected. Hence the Respondent can not be held to have violated Section 8(a)(3) of the Act.

On the record as a whole, including my observation of the witnesses, briefs,[2] and arguments of counsel, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is an Iowa corporation with an office and place of business in Sioux City, Iowa, engaged in the retail sale and service of new and used automobiles. It is one of four automobile dealerships owned and managed by Gloria Senftner and her husband. In connection with this business, the Respondent derives gross revenues in excess of $500,000 and annually receives goods, products, and materials directly from points outside the State of Iowa valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Certain other allegations relating to violations of Sec. 8(a)(5) of the Act set forth in the complaint were, by order of the Acting Regional Director, withdrawn.

[2] The Respondent submitted a reply brief. While the Board's Rules and Regulations do not provide for reply briefs, the Respondent's has been duly considered in reaching the decision.

II. THE LABOR ORGANIZATION INVOLVED

Local Lodge 1426, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Undisputed Facts*

Rudolph DeLeon was hired by the Respondent on July 27, 1981, to recondition cars—wash, clean, wax and the like. He was interviewed and hired by Dennis Senftner (the nephew of the owners) who at that time was the general manager and John Glaza, who was then the new-car sales manager.

About 2 months later, DeLeon was interviewed by Senftner and Glaza to see if he would be interested in doing night cleanup work in the office and showroom areas, for which he would be paid a flat rate of $50 per week. The Respondent had been using a janitorial service for this work but was dissatisfied with the cost and quality of the work being done.

Gloria Senftner testified that when she was approached concerning this, she was advised that it would be an "independent deal." Thus, the Respondent would not be liable to pay DeLeon 1-1/2 times his hourly rate should his janitorial work along with his hours as an employee exceed 40 per week.[3]

DeLeon agreed and sometime in the fall of 1981 he began doing janitorial work for the Respondent for which he was paid $50 a week. The checks were made out to "Rudy DeLeon Maintenance." The Respondent made no payroll deductions, or otherwise include DeLeon with employees when he did the janitorial work.

In December 1981 the Union began an organizational campaign among the Respondent's employees. DeLeon signed an authorization card and testified without contradiction that he discussed the Union with Tom Brooks, the parts manager, Glenn Smith, the service manager, and Glaza.

A petition for representation was filed and an election was held on February 12, 1982. The Union received five votes with four votes being cast against the Union and there were two challenged ballots. One challenge was opened pursuant to stipulation and a final tally of ballots issued showing six votes in favor of the Union and four against. The other challenge became moot and the Union was certified.

On the day of the election, after the employees voted and the preliminary results were known, Glaza called DeLeon into his office and told DeLeon that he had just finished speaking with Mrs. Senftner. DeLeon testified that Glaza told him "that she didn't want anyone who was a nonmanagement employee to have keys to the place, which I had. And that he would have to relieve me of my job because of that." DeLeon further testified that Glaza told him that "you guys voting for the union, that was the clincher."

On February 22, the Respondent sought and received an estimate from Steve Hotvedt, a partner in a cleaning service, for both a one-time cleanup and a weekly service. While Hotvedt's firm was hired for a one-time job, the daily cleaning work was assigned to employee Donald Wilmot, a retired individual who had worked for the Respondent for a number of years and who had been rehired in January 1982 also to work on car preparation. Wilmot assumed the janitorial duties in March 1982 and performs them during normal working hours. DeLeon, as well as the previous janitorial service, had done this work after normal hours.

DeLeon continued to work at his job in car preparation but in October 1982 resigned his employment for reasons not in issue here.

Gloria Senftner testified that the Respondent had been losing money throughout 1981 and was continually seeking ways to cut costs. Thus DeLeon was hired for janitor work in the first instance as a cost-saving measure. And even then, the Respondent continued to seek ways of having the work done cheaper. An estimate from a janitorial service was sought and received in December, but was never acted on.

She further testified that sometime in January she and her husband made the determination to take the janitor work away from DeLeon and give it to Wilmot. However, since the representation petition was pending, they determined to make no changes until after the election. She further testified, and brought forth documentary evidence, to the effect that employees who had ceased working for whatever reason in early 1982 were not replaced. However, she admitted that ads were placed in newspapers for replacements.

B. *Analysis and Concluding Findings*

Given the timing of relieving DeLeon of his janitorial duties with the vote of employees in favor of the Union, the inference is inescapable that there was a connection between these two events. In addition, DeLeon testified that, when interviewed by Glaza on the day of the election Glaza told him, among other things, "and you know the reason [for his termination], you know, you guys voting for the Union, that was the clincher." Glaza testified that he said, "Rudy, this isn't because of the election; this is just the straw that broke the camel's back."

While the precise words remembered by DeLeon and Glaza differ, the import is the same—while other factors may have been involved, the employees' vote was determinative.

DeLeon was a generally credible witness. The statements attributed by him to Glaza were not denied. Nor did the Respondent deny knowing of DeLeon's involvement with the Union (having discussed the matter with management). And whatever their differences now, on February 12 Glaza was undisputably in charge of the Respondent's Sioux City operation. His words, therefore, stated the Respondent's intent. I therefore conclude that the General Counsel did establish prima facie that the precipitating cause of the Respondent's relieving DeLeon

[3] The validity of the Respondent's position concerning the legitimacy of this under the Fair Labor Standards Act is not before me and I need not pass on it.

of the janitorial duties was because of his and the other employees' union activity. Thus the burden shifted to the Respondent to prove that it would have relieved DeLeon even absent the union activity. *Wright Line*, 251 NLRB 1083 (1980). I conclude the Respondent failed to meet this burden.

In defense, the Respondent relies on two factual assertions: first, that Senftner had nothing to do with notifying DeLeon on February 12 that he had been relieved of the janitorial work; second, that the decision to relieve DeLeon and replace him with Wilmot predated the election. The first assertion is in direct conflict with the testimony of Glaza. The second is self-serving, uncorroborated, and in conflict with documentary evidence.

Senftner testified that she neither called Glaza election day nor did she talk to him personally, and that was she not physically present in Sioux City on February 12. Her testimony that she was not in Sioux City was corroborated by Helga Van Huef, the Respondent's warranty manager who was in Sioux City on the day of the election.

Senftner testified that prior to the election, she and her husband made the decision to relieve DeLeon of the cleanup work, and give it to Wilmot. This testimony is, of course, self-serving and was not corroborated. To the contrary, after DeLeon had been terminated from the cleanup work the Respondent sought an estimate for this work from a maintenance service. Such action tends to show that no decision had previously been made to take the work from DeLeon and give it to Wilmot or anyone else. It may have been that the Respondent was always seeking to find cheaper cleanup but such does not disapprove the inference I draw of a casual connection between taking the work from DeLeon and the vote of employees for the Union on February 12.

The Respondent contends that Senftner had made the decision to replace DeLeon prior to the election but she had nothing to do with notifying DeLeon on the day of the election that he was being terminated from the janitor job.

While Senftner contends that she did not talk to Glaza on February 12, she did not explain how it was Glaza told DeLeon on February 12 that he no longer had the cleanup work and to turn in his keys. She accepts that DeLeon was relieved because such was the decision of her husband and her. She apparently also accepts the fact that notification came through Glaza since there was no longer a general manager at the Sioux City facility.

To believe that Senftner did not tell Glaza on February 12 to relieve DeLeon would require believing that Glaza did so on his own initiative. While Senftner testified that the decision had already been made to relieve DeLeon, she did not testify that this decision had been communicated to Glaza (or anyone else). Thus, to believe that, Senftner would have to believe that Glaza implemented a decision of the owners without knowing that such a decision had, in fact, been made. Such is incredible. It is far more believable that Senftner contacted Glaza on February 12 and told him that the election had been lost and to get the keys from DeLeon.

Such is the thrust of the testimony of both Glaza and DeLeon. In addition to finding them both generally credible, I also find that Glaza's acting as a conduit for Senftner on February 12 is more consistent with the objective facts in this matter. Thus I conclude that Senftner contacted Glaza on February 12 and told him to relieve DeLeon and that she did so because the employees had voted in favor of representation by the Union. In short, I discredit Senftner's denial that she had any communication with Glaza on February 12. (It may be that Senftner called and was not physically present in Sioux City. Glaza's testimony seems to suggest a personal contact, but it is not really definitive on this point, which, in any event, is tangential.)

I also discount the Respondent's argument that replacing DeLeon with Wilmot was solely for economic reasons. When Wilmot began doing the cleanup work, he substantially ceased doing reconditioning of detail work but he continued to run errands. The Respondent argues that it saved $200 per month by terminating DeLeon, but did not demonstrate how. Indeed, it appears that Wilmot put in 2 to 3 hours a day doing cleanup work, which, at his rate of $4 per hour, amounted to more than $50 per week. And the one-time cleaning by Hotvedt's service was $227.

The Respondent's principal defense is that DeLeon was an independent contractor as to the cleanup work. Hence, he did not have protection of the Act as to that work, and terminating this relationship did not affect his employment. Accepting that he was an independent contractor for this work,[4] he, nevertheless, suffered a loss of earnings because he and other employees voted in favor of the Union. He was undisputedly an employee. His loss of earnings necessarily interfered with his Section 7 rights and those of fellow employees just as surely as if he had been discharged from his bargaining unit job.

The mere fact that an employee also works for his employer as an independent contractor does not mean the employer may with impunity discriminate against that employee, even if the effect of the discrimination relates only to his independent contractor work. The Respondent has cited no case where the Board has permitted such discrimination. To the contrary, the Board has long held that discharge of a nonemployee may be violative of the Act if such interferes with the exercise of protected activity by employees. E.g., *Firmat Mfg. Corp.*, 255 NLRB 1213 (1981), where the discharged individual was not an employee but where his discharge was found to be part of a plan of discrimination against employees. See also *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), affd. 711 F.2d 383 (D.C. Cir. 1983), where the Board overruled its "pattern of conduct" standard with regard to the discharge of a supervisor but reaffirmed that such a discharge is violative of Section 8(a)(1) if it interfers with employees' Section 7 rights.

Finally, in *Operating Engineers Local 400*, 265 NLRB 1316 (1982), the Board found a violation of Section

[4] In the past this work had been done by nonbargaining unit employees as in this industry it often is. DeLeon was paid a flat rate, could work when he pleased, so long as the work was done outside normal business hours, could use helpers, and was not supervised as to the manner and means of doing this work. The Respondent's argument that it did not make payroll deductions is self-serving and is not particularly relevant. Not making payroll deductions proves nothing about their being required.

8(a)(1) when the employer terminated a contract for janitorial services with an individual because her employee husband had engaged in protected activity. Terminating the independent contractor relationship of an employee's wife had a coercive effect on employees. A fortiori terminating the independent contractor relationship of an employee would have a coercive effect on him and other employees.

Accordingly, I conclude that by taking from DeLeon the opportunity to work for the Respondent as a janitor because he and other employees voted for union representation, the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act and an appropriate remedy should be ordered.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The effect of the unfair labor practices found above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that the Respondent unlawfully terminated DeLeon from his work as a janitor, the Respondent shall be ordered to offer DeLeon reinstatement to this work and to make him whole for any losses he may have suffered as a result of this discrimination against him with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977). Since the janitorial work was in addition to full-time employment, the provisions of *F. W. Woolworth Co.*, 90 NLRB 289 (1950), do not apply.

Although DeLeon subsequently quit his bargaining unit job, and there is no contention that such resulted from the Respondent's unfair labor practice, it does not follow that the Respondent's backpay liability has been tolled. There is no particular reason to believe that absent the Respondent's discrimination against DeLeon he would also have quit the janitor work. It is just as reasonable to conclude that absent the discrimination he would have continued in both endeavors. Thus I conclude that the Respondent has not met its burden of proving that the backpay period ended in October 1982. Accordingly, the Respondent's liability for backpay continues to run until such time as DeLeon is offered reinstatement to the janitor work. *Operating Engineers Local 400*, supra.

[Recommended Order omitted from publication.]

Lockheed Shipbuilding and Construction Company *and* International Brotherhood of Electrical Workers, Local 46, AFL–CIO *and* International Brotherhood of Boilermakers, Local 104, AFL–CIO *and* Clarence Spurgeon *and* George O. McDonnell *and* James O. Branson. Cases 19–CA–13226, 19–CA–13298, 19–CA–13741, 19–CA–14066, 19–CA–15002,[1] 19–CA–15003, and 19–CA–15044

10 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 31 August 1982 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed an answering brief to the Respondent's exceptions and a motion to strike affidavits attached to the Respondent's brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.

We agree with the judge that the Respondent violated Section 8(a)(5) of the Act by implementing a pulmonary function and audiometric medical screening program for the purpose of denying employment to new employees, without bargaining about the utilization of such results from the program with IBEW Local 46 and Boilermakers Local 104. The Respondent contends, however, in its Exceptions 12 and 13, that the recommended Order of the judge is overly broad, in that it would affect medical programs already in usage; and that it orders Lockheed to bargain about the implementation of medical screening programs generally, as opposed to the implementation and utilization, of such programs for the purpose of terminating new employees or refusing to hire applicants for employment. We find merit in these exceptions. It is clear that the Respondent had informed the Unions of its desire to establish such a program, but for the stated purpose of enabling the Respondent to properly place new employees in jobs within the employees' medical limitations. Thus, the understanding was that the results of such tests would not be used to "wash out," screen, or terminate employment to the tested employees, but only to establish "baseline data" for the new employees. The Unions acquiesced in the program, requesting only that a copy of the test results be furnished to each of the tested employees.

The record is also clear that the Respondent currently has in place with the Unions' approval certain testing programs, including those in "lead-bonding" and "toxic paints." There was no evidence presented, however, that these programs had been utilized to deny employment to, or terminate, any of the Respondent's employees.

While the conclusions of the judge make it clear that the Respondent's violation rests in its use of the medical screening programs for the purpose terminating new employees or refusing to hire applicants for employment, we find that his recommended Order and notice are too restrictive. Accordingly, we shall modify the Order and notice to conform with his conclusions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lockheed Shipbuilding and Construction Company, Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b).

"(a) Refusing to bargain collectively regarding the implementation and/or utilization of a medical screening program for the purpose of terminating

[1] Counsel for the General Counsel filed a motion to transfer Cases 19–CA–15002, 19–CA–15003, and 19–CA–15044, in which a consolidated complaint issued but no hearing has been held, to the Board and to consolidate those cases with Cases 19–CA–13226, 19–CA–13298, 19–CA–13741, and 19–CA–14066. The General Counsel asserts that both sets of cases involve identical factual situations. The Respondent asserts that there are different factual circumstances and different issues. We note particularly that, in its answer to the complaint in Cases 19–CA–15002, 19–CA–15003, and 19–CA–15044 the Respondent raises as an affirmative defense that the "complaint or parts thereof are barred by the statute of limitations contained in Section 10(b) of the Act." We believe that the question of whether the facts and issues are identical and the matter of the 10(b) defense can best be resolved by the administrative law judge if the cases are scheduled for hearing or by the Board on an acceptable stipulation of facts. Therefore it is ordered that the General Counsel's motion to transfer and consolidate is denied.

[2] The Charging Parties have moved to strike the affidavit attached to the Respondent's brief because it contains allegations not introduced into evidence at the hearing. We find, in agreement with the Charging Parties, that since the affidavit was not introduced at the hearing and the parties were denied the opportunity of voir dire and cross-examination, it should not be made a part of the record in this proceeding. Accordingly, we grant the Charging Parties' motion to strike the affidavit from the Respondent's brief.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

new employees and/or refusing to hire applicants for employment.

"(b) Discharging or refusing to hire any person for failure to pass a unilaterally imposed pulmonary function or audiometric medical screening program."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively regarding the implementation and/or utilization of a medical screening program for the purpose of terminating new employees and/or refusing to hire applicants for employment, and other terms and conditions of employment with International Brotherhood of Electrical Workers, Local 46, AFL–CIO and International Brotherhood of Boilermakers, Local 104, AFL–CIO as the exclusive representatives of certain of our employees within the Pacific Coast Master Agreement.

WE WILL NOT discharge or refuse to hire any person for failing to pass a unilaterally imposed pulmonary function or audiometric medical screening program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with International Brotherhood of Electrical Workers, Local 46, AFL–CIO and International Brotherhood of Boilermakers, Local 104, AFL–CIO as the exclusive representatives of certain of our employees encompassed within the Pacific Coast Master Agreement, with respect to wages, hours, and other terms and conditions of employment, including the utilization of a pulmonary function or audiometric medical screening program.

WE WILL offer employment to Adolph Bukacek, Chris Boblet, Laszlo Biro, Donald Rowe, and Bayani Alvarez in the first available job openings for which each is qualified, and make each of them whole for any loss of earnings each may have suffered because of our unlawful conduct, with interest.

LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This case was heard in Seattle, Washington, on January 21, 1982. The initial consolidated complaint issued on March 31, 1981, pursuant to charges filed in Case 19–CA–13226 and 19–CA–13298 on February 10 and 27, respectively. A second consolidated complaint issued on August 17, 1981, following the filing of the charge in Case 19–CA–13741 on July 20, 1981. The third consolidated complaint issued on December 28, 1981, following the filing of the charge in Case 19–CA–14066 on November 10, 1981. The third consolidated complaint alleges, in substance, that the Respondent unilaterally instituted a medical screening program for new employees, and refused employment to five individuals after undergoing the screening program, in violation of Section 8(a)(5) and (1) of the Act. The Respondent denies it violated the Act, and contends there was notice, bargaining and agreement over the implementation of the medical screening program and its effects, or that the Charging Party waived and/or acquiesced in its right to administer the tests and to terminate individuals whose pulmonary conditions could not be accommodated. The implementation of the tests, the Respondent claims, are completely consistent with applicable laws and regulations, the collective-bargaining agreement, and the past practices. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Briefs were filed by the General Counsel, the Respondent, and the Charging Parties, all of which have been carefully considered.

On the entire record, including the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted and found that the Respondent is engaged in the business of operating a shipyard in Seattle, Washington, and that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that International Brotherhood of Electrical Workers, Local 46, AFL–CIO and International Brotherhood of Boilermakers, Local 104, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

The Respondent, through membership in the Pacific Coast Shipbuilders Association, and the Pacific Coast Metal Trades District Council, a bargaining group of various area metal trades councils and international unions, including IBEW Local 46 and Boilermakers Local 104, have been parties to a series of collective-bargaining agreements, the most recent agreement called Pacific Coast Master Agreement, being effective from July 1, 1980, until June 30, 1983.[1] Pertinent sections of the Pacific Coast Master Agreement are set forth below:

Article 3.4 Hiring:

> (c) The Employer retains the right to reject any job applicant referred by the Unions. The Employer may discharge any employee for just and sufficient cause . . . .

Article 14. Reporting Pay and Minimum Pay

> 14.1 Employees starting a shift or called and starting to work after the starting time of a shift shall receive not less than four (4) hours pay for the first period of the shift; and if required to continue on second period of the shift, they shall receive pay for a full shift.
>
> 14.3 Employees required to report for work and not used shall receive four (4) hours straight time pay.

Article 16. Safety, Sanitation, Ventilation and Physical Examination

> 16.1 The Employer will exert every reasonable effort to provide and maintain safe working conditions and shall comply with all federal and state Safety and Health Laws and Regulations. The Unions will cooperate to that end and encourage their members to work in a safe manner . . . .
>
> . . . .
>
> 16.10 Physical Examination: There shall be no Doctor's physical examination nor age limit, except as required by law. Unless required by law, no employee shall be compelled to pay hospital or examination fees in the course of employment or as a condition to secure employment.
>
> 16.11 Where employees are assigned to work in confined spaces as described by OSHA for shipbuilding, ship repairing and ship scrapping. . . frequent checks for the employees' safety shall be made. . . .
>
> 16.12. . . Where conditions of work are such as to require special protective devices and equipment in order to protect employees from injury, such devices and equipment will be supplied by the Employer at its expense. . . .

Article 31. Effective Date and Duration of Agreement

> 31.3 All existing practices, customs, understandings or local agreements of interpretation or other local agreements of any nature whatsoever, whether expressly covered by the Master Agreement or otherwise, will continue in effect unchanged until June 30, 1983, except as specifically modified as provided herein or by mutual agreement between the parties.

The complaint alleges that on January 5, 1981, the Respondent, without prior notice to the Unions, "instituted a medical screening program for new employees," and thereafter refused to employ five individuals after they had undergone the screening program. At the conclusion of the hearing, the General Counsel stated its position to be that the Respondent could continue administering the pulmonary function and hearing testing programs involved for the purpose of determining "baseline data," but that the test scores or results could not be used to terminate or refuse to employ anyone. The Charging Parties appear to concur in this position.[2]

The record shows that in the 1974 negotiations, management proposed adding a physical examination provision to the Pacific Coast Master Agreement. That proposal was withdrawn. During the 1980 negotiations, management proposed to change the no physical examination clause in the old contract to permit physicals. The proposal read as follows:

> (a) Applicants for employment may be required to be examined by a physician selected by the Company. The expense of such examination will be borne by the Company. The purpose of such examination shall be to determine the physical fitness of the applicant to safely and efficiently perform the work of the classification for which the applicant is applying.
>
> (b) The employer shall have the right to require a doctor's medical examination of an employee when, in the employer's opinion, the nature of the work assignment could jeopardize the safety and health of the employee or the employee's co-workers. Failure of the employee to pass the medical examination based on the doctor's evaluation of the employee's condition as related to the work assignment shall result in reassignment of duties (if possible), sick leave (if a temporary condition) or termination. The cost of such medical examinations will be paid by the Employer.

The Unions objected to the proposal which was thereafter withdrawn.

The record shows that in the fall of 1980 the Respondent made arrangements to commence giving pulmonary function and hearing tests to all employees hired or recalled to work on the major overhaul of the ships SS *Sacramento* in early 1981. Paul Schell, the Respondent's manager of industrial relations, testified that in late No-

[1] It is admitted and found that the contract unit is appropriate for the purposes of collective bargaining and that the two unions involved herein are "the exclusive representatives of certain of the employees in the unit."

[2] See Br. 12.

vember or early December he met with Jack Tinker, then secretary-treasurer of the Seattle Metal Trades Council, and discussed implementation of a "medical screening program." Schell testified that Tinker was concerned that the program would be used "to wash out people and to use it just for an excuse to not hire somebody and I assured him that this was not the procedure that we were going to do, that it's used basically for placement of the person within his medical limitations, if there was a medical limitation." Schell went to assure Tinker that this was not a preemployment physical, and if there was any concern of anybody that they were not employed, they would be paid showup time, as required in the contract."[3] Schell asked Tinker to bring up the matter at the next Metal Trades Council meeting.[4] David Stoner, the Respondent's manager of personnel systems, testified that during the week of November 26, 1980, he informed Carpine that the Respondent was planning to do pulmonary and audiometric testing of employees after they were hired and put on the payroll. Carpine expressed his concern that the procedure constituted a preemployment physical, which Stoner assured him it did not. Stoner also discussed the new pulmonary and audiometric testing procedures with Nathan S. Ford Jr., assistant business manager for the Boilermakers. Ford asked what would happen if someone refused to take, or did not pass, the test. Stoner stated that the test was not intended to screen people for employment, but rather to determine what their lung function was so that the company would have a "handle" on its liabilities with respect to the Longshoremen and Harbor Workers Act. He did not know what would happen if someone refused to be tested. Ford responded that he "understood the company's need to find out what their liabilities were, and I told him that if one of our people did refuse, and if there was any disciplinary action or refusal to employ, then we were going to run into problems at that time, that I would definitely have to challenge that." Ford also discussed the testing procedure in December with John Lane, the Respondent's manager of industrial safety, who explained the purpose of the testing procedures. Ford asked what would happen if someone did not pass the test, and was told "that there was no real passing of the test, that the test merely told what the lung function in approximately four or five different areas was . . . ." Asked what would happen if someone refused to submit to the test, Lane replied, "There were no definite plans . . . they would basically have to wait and see." Ford testified that during several later discussions he was advised that the company was trying to bring people back to work and the test was not for the purpose of eliminating people from work.

Carpine reported the substance of his conversation with Schell to the Seattle Metal Trades Council Executive Board at its next meeting. The board minutes contain the following notation:

> W. D. Carpine handed out letter from Lockheed Shipbuilding re man power needed for U.S.N.S. Sacramento. He also explained that rehires or new employees will be required to take hearing and breath test. Will be on employer's payroll during this period. This test will not be used to *deny employment* per company.
>
> Discussion prevailed re testing by company doctor. The Seattle Metal Trades will write a letter stating employees be given written test results.

In accordance with the minutes, Tinker wrote Schell the following letter dated December 10:

> Dear Mr. Schell:
>
> Mr. Bill Carpine has advised us that effective January 1, 1981 you will be requesting additional manpower from all crafts. Also, we have been advised that it is the intention of the company that certain tests be given, specifically hearing and pulmonary.
>
> We understand it is the company's intention that each employee given this test will be on the existing payroll and will be paid according to the report pay provision in the Agreement during the time of testing.
>
> The one area of our concern at this point in time is in regard to test results. We are, therefore, requesting that any results obtained in this test be given to the individual employee for his own personal records. Also, it is our intention that we do not consider this a preemployment physical and hopefully that the employer concurs with our thinking in this matter.
>
> If you have any questions, feel free to give me a call.

Carpine testified the Unions had experienced problems in the past which resulted in the filing of grievances for showup pay, where people had spent considerable time in interviews and waiting around and were denied employment.

Arrangements were made for the test results to be given to each employee.[5] In addition, Schell invited the representatives of several unions, including Tinker and Carpine, to review the working of the pulmonary function testing facility on December 19. Arrangements were made for the consulting physician to be present to answer questions and explain the procedure. No union representatives showed up.

B. *Implementation of the Testing Procedures*

The testing program was implemented on January 5, 1981, with the commencement of hiring of people to work on the *Sacramento* project. The procedure followed was for individuals dispatched by the Unions to report to the personnel office where they completed an

[3] Art. 14 of Pacific Coast Master Agreement.

[4] Tinker did not testify. However, William D. Carpine, business representative for the IBEW and also president of the Seattle Metal Trades Council, testified that he had a conversation with Schell around the end of November. The substance of the Schell–Tinker and Carpine–Schell conversations is substantially the same.

[5] When in January 1981 it was learned that only those who failed the pulmonary function test received copies of the results, an immediate correction was made.

application, and were interviewed or screened for qualifications and medical limitations. Those who qualified were then placed on the payroll, assigned a badge number, given a timecard, and directed to the medical facility where a medical specialist administered the hearing and pulmonary function tests. Indoctrination and job placement followed. Those individuals receiving an unacceptable lung function score were referred to Respondent's physician, a pulmonary specialist, who reviewed all available information and established work restrictions or exposure limitations, which could require use of a respirator or assignment in an area free of respiratory irritants. A determination was then made as to whether a work assignment consistent with the doctor's recommendation could be made. Of approximately 1800 people who took the pulmonary test in 1981, approximately 16 failed to pass it but where put to work with restrictions imposed by the doctor. The five individuals involved failed to receive an acceptable test score and, consequently, medical restrictions were imposed on each.

A week or two after Respondent implemented the test, Ford received complaints that Respondent was asking employees to sign a form for release of all personal medical information. On January 20, 1981, a meeting was held between representatives of both the Respondent and the Seattle Metal Trades Council at which the Unions objected to the use of several new forms. Carpine took the position that the medical release forms, together with the new pulmonary function and hearing tests, constituted a physical examination which was prohibited under the Pacific Coast Master Agreement.[6] The question was asked as to what would happen if an individual refused to sign the medical release form, and the response was that the Company was not requiring people to sign the forms, that several had declined to sign and nothing had been done about it, but the Company would review the forms and see if they could make them less objectionable. According to Schell, the question was asked as to what would happen to an individual who failed the screening test and the Company responded that it would make an effort to place the individual within the doctor's work restrictions. According to both Carpine and Ford, at the end of the meeting Carpine objected to the testing program on the ground it constituted a prejob physical examination.

On January 29, 1981, Tinker wrote Schell the following letter:

> Dear Mr. Schell:
>
> This letter is in regard to our meeting with you on January 20, 1981. Specifically, during that meeting we discussed the company's request that new employees complete various forms pertaining to and entitled as follows: Medical History, Supplemental Questionnaire, Lung Fungus [sic] History, and Absence of Tool Clearance Policy.
>
> Also, during the course of that meeting, we informed you that in recognizing that the company had previously approached the Seattle Metal Trades Council in regard to implementing two items, which were basically pulmonary and hearing *tests*, we are again reiterating that we object to these additional forms mentioned above.
>
> You stated (at the meeting on January 20th) that management would review the matter and respond. To date, we have not heard from you, and we would appreciate your response as soon as possible.

On February 9, Schell responded as follows:

> Dear Mr. Tinker:
>
> In response to your letter dated January 29, 1981 and our meeting of January 20, 1981, the Company has reviewed this matter and feels that these forms, medical history and lung *function*, are necessary in the placing of an employee should he have medical disability.
>
> The supplemental questionnaire is not a form that is completed by the employees, but one that is filled out if required by the personnel interviewer.
>
> Your letter made mention of a form that employees complete regarding absence of tool clearance policy. I feel this was clarified in our meeting of January 20, 1981. There is *no* form for this other than a statement in our employee information sheet. This statement has been extracted from Article 18.2 of the Pacific Coast Master Agreement.
>
> Should you or any member of the Council have any question regarding this matter, please contact me.

C. *The Terminations*

Adolph Bukacek, who had never before been employed by the Respondent, was dispatched by IBEW Local 46 on January 16, 1981. After failing the pulmonary function test, he was reviewed by the Respondent's physician who restricted his work to areas free of fumes and dust and that did not involve exertion. An attempt to place him in a job within those restrictions was unsuccessful. He was therefore paid "showup" pay in accordance with the contract and released.

Chris Boblet, a former employee, was dispatched by Boilermakers Local 104 on February 13, 1981. Having failed to pass the pulmonary function test, he was reviewed by the company physician who placed similar restrictions on the work he could perform. An attempt to place him in a job within those restrictions was unsuccessful that day and he was therefore paid "showup" pay and released without having performed any work tasks.

Laszlo Biro, a former employee, was dispatched by Boilermakers Local 104 on July 1, 1981, and failed the pulmonary function test. He was dispatched that afternoon to a swing shift job and asked to return the following day for an evaluation by Respondent's physician. He did not return. He was, however, dispatched again by the Union on October 14, 1981, again failed the pulmonary function test, restrictions against work involving "excessive smoke, fumes, toxic chemicals" were imposed, and he was released with "showup" pay after it was determined no work was available within the restrictions.

[6] Art. 16.10.

Donald Rowe was dispatched by Boilermakers Local 104 on August 19, 1981. Schell, whose testimony was based on personnel files, testified that Rowe had a low pulmonary function test score, that as a consequence he was restricted to working with a respirator, that work was available to Rowe if he wore a respirator, but that Rowe declined to do so. Rowe, whom I credit, testified that he had worked as a "fitter" at Todd Shipyard until he was laid off in June 1981, and that he wore a respirator while working at Todd about 50 percent of the time. After he was dispatched by the Union to the Respondent, he was given the pulmonary function test and told he had a low rating. He was asked, and consented, to take an x-ray. Rowe testified the Respondent's physician said he recommended he be hired. He was sent back to the individual who had given him the pulmonary function test originally and was asked if he would take it again. He did and was informed his rating was too low, that the work required that he wear a respirator, which he would not be able to do, and that he could not be hired. He was taken back to the personnel office where he turned in the timecard that had been issued to him, and was released with "showup" pay. On August 25 he was dispatched back to Todd Shipyard where he was working at the time of the hearing. He wears a respirator about 7 out of every 8 hours or work.

Bayani Alvarez was dispatched by Boilermakers Local 104 on August 27, 1981, failed the pulmonary function test, was seen by the doctor who placed restrictions on the work he could perform, an attempt to find work within the restrictions was unsuccessful, and he was paid for "showup" time and released.

Unsuccessful attempts to resolve the issue raised by the unfair labor practice charges involving Bukacek and Boblet were made in April 1981. A further unsuccessful effort was made to resolve the issue through the "contract interpretation committee," who recommended the issue be resubmitted under article 16.10 of the Pacific Coast Master Agreement instead of article 3.4(c). No further action has been taken by either side in this respect.

Lane testified that in January 1981, when the Respondent commenced administering the pulmonary function test, the Respondent "had seven projects—ships—where" employees could have worked, three of which "could have had some lead exposure . . . . We did not do pulmonary functions on existing work force . . . . Just the returning members, either with seniority or without . . . . We screened them without regard to assignment, because the probability of exposure to any person working in ship repair is fairly great during his employment with us."

Conclusions

The Respondent argues it did not violate the Act by implementing the medical testing program or by terminating individuals whose pulmonary conditions could not be accommodated because (1) there was notice, bargaining, and agreement over the implementation of the testing program and its effects; (2) the Charging Parties waived and/or acquiesced in its right to administer the tests and to terminate employees; and (3) the implementation of the program was in accordance with applicable laws and regulations, the Master Agreement, and past practices.

The evidence, in my view, does not support the Respondent's contention that the charging Unions agreed that the testing programs could be utilized to reject or terminate employees, or that they waived or acquiesced in the Respondent's use of the testing programs to terminate employees. A recap of the evidence makes this abundantly clear.

In late November or early December 1980, Schell discussed implementation of the testing program with Tinker, who expressed concern that it would be used "to wash out people" and as an excuse "not to hire somebody." Schell assured Tinker his fear was unfounded and that it would be used "basically for placement of the persons within his medical limitation." About the same time Stoner discussed the matter with Carpine who expressed concern that the testing procedure constituted a preemployment physical, which Stoner assured him it did not. Stoner also discussed the new procedure with Ford. Ford asked what would happen if someone did not pass the test, and Stoner assured him the tests were not intended to screen people for employment, but rather to determine their lung function so that the Company could establish its liabilities under the Longshoremen and Harbor Workers Act. Ford recognized the Respondent's need to establish its liabilities under that Act, but went on to state that if the testing procedure resulted in disciplinary action or refusal to employ, he was opposed to it. Lane also told Ford that there was "no real passing of the test, that the test merely told what the lung function in approximately four to five different areas was . . . ." Ford was told on several occasions that the Company was trying to bring people back to work and that the test was not for the purpose of eliminating people from work. The minutes of the Seattle Metal Trades Council executive board reveal the Unions' understanding that "This test will not be used to *deny employment* per company." This same theme is reiterated in Tinker's December 10 letter to Schell, where it is stated "Also, it is our intention that we do not consider this a preemployment physical and hopefully that the employer concurs with our thinking in this matter." As late as January 20, 1981, prior to any knowledge on the part of the Unions that Bukacek had been refused employment after undergoing the pulmonary screening program, Carpine opposed the testing program on the ground it constituted a physical examination which was prohibited by article 16.10 of the Pacific Coast Master Agreement. Moreover, in his February 9, 1981 letter, Schell informed Tinker that the medical forms, medical history, and pulmonary test were "necessary *in the placing of an employee* should he have a medical disability." (Emphasis added.) Thus, while the Unions were indeed notified of Respondent's proposed screening program and did not oppose implementation of the testing procedures for the purposes of determining the Respondent's liabilities under the Longshoremen and Harbor Workers Act, it is clear the Unions did not agree that the pulmonary and audiometric tests could be used to screen out, reject, terminate, or deny employment as claimed by the Respondent. To the contrary, the forego-

ing facts show the Unions steadfastly opposed their use for those purposes, and were lead by the Respondent to believe that they would not be so used. Therefore, the Respondent's contention that the Unions waived or acquiesced in the use of the tests to terminate employees is without merit.

Article 16.10 provides explicitly that "There shall be no Doctor's physical examination . . . except as required by law . . . ." The Respondent argues that article 16 does not in any way preclude medical testing, review of medical test results by the company physicians, or the imposition of medical restrictions by the company physician. It is argued that articles 16.11 and 16.12 require that "frequent checks for the employee's safety shall be made," and that the employer shall provide special protective devices where conditions of work require employees to be protected from injury. In this regard, it is noted that in 1975, pursuant to Occupational Safety and Health Act (OSHA) regulations, the Respondent administered a "pre-placement physical" to long-term employees who were assigned to a new trade called "lead-bonder." There was no showing any employees were terminated as a result of failing to pass that examination. Beginning in 1977, a similar type examination was instituted for painters working in "tanks" and "bottoms" and other areas where toxic paints were used. The painters' physical examinations were not required by law or regulation but were administered pursuant to an agreement with the painters' collective-bargaining representative. Again, there is no evidence the tests were used to reject employees or terminate employment. Other instances where physical examinations are performed on employees are: (1) when a newly hired worker indicates on a medical questionnaire that there is a preexisting disability, in which case he is examined so that he can be assigned to a job consistent with his physical abilities; (2) all workers who are injured or become ill on the job are examined by the doctor; and (3) workers who have been off work because of an injury or illness are examined by the company doctor before returning to work. In short, there is no evidence that any physical examination heretofore performed by the Respondent, whether required by law or regulation or past practice, has even been used to disqualify workers from employment. Further, the Respondent's argument that the pulmonary and audiometric tests administered here were conducted pursuant to OSHA regulations has a hollow ring, when it is remembered that only new or returning employees were required to undergo the tests—the existing workforce was *not* required to undergo the tests.

The history of bargaining between the parties makes it obvious that physical examinations have been a point of bargaining contention on several occasions, in 1974, and as late as 1980, when the Respondent proposed a provision granting it the right, inter alia, to terminate an employee for failure to pass a medical examination based on a doctors' evaluation of the employee's condition as related to the work assignment. Upon objection by the Unions, the proposal was withdrawn. It seems obvious to me that what the Respondent could not obtain through collective bargaining, it decided to implement unilaterally. It terminated five employees for their "failure . . . to pass the medical examination based on the doctor's evaluation of the employee's condition as related to the work assignment."[7] Physical examinations being a mandatory subject of bargaining,[8] and the Respondent having failed to show that the Unions either agreed to or waived and/or acquiesced in the Respondent's use of the pulmonary and audiometric testing program for the purpose of terminating or refusing to employ employees, or that the testing program was in accordance with applicable laws and regulations, the Master Agreement or past practices, it is found that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing the pulmonary and auditory tests for the purpose of screening out, or disqualifying employees from employment. See, e.g., *Hanes Corp.*, 260 NLRB 557 (1982). In these circumstances, the refusal to employ Bukacek on January 16, 1981; Boblet on February 13, 1981; Biro on October 14, 1981;[9] Rowe on August 19, 1981; and Alvarez on August 1981, because they failed to pass the pulmonary test, also violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. IBEW Local 46 and Boilermakers Local 104 are labor organizations within the meaning of Section 2(5) of the Act, and at all times material, each union has been and is now the exclusive bargaining representative of certain of the Respondent's employees.

3. By unilaterally implementing and enforcing a medical screening program for the purpose of denying employment to new employees, and by denying employment to Adolph Bukacek, Chris Boblet, Laszlo Biro, Donald Rowe, and Bayani Alvarez, the Respondent has refused to bargain with IBEW Local 46 and Boilermakers Local 104 in violation of Section 8(a)(5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It having been found that the Respondent has unlawfully refused to bargain with the two Unions by unilaterally implementing and utilizing a medical screening program for the purpose of denying employment to new employees, it is recommended that the Respondent cease such unlaw-

[7] See the Respondent's 1980 contract proposal, supra.

[8] See, e.g., *LeRoy Machine Co.*, 147 NLRB 1431 (1964).

[9] The record does not support the allegation that Biro was refused employment on July 1, 1981, after undergoing the screening program. It is undisputed that on that date he was asked to return the following day for an evaluation by the Respondent's physician, which he failed to do. The testimony shows, however, that other individuals were in fact placed in jobs within the physicians's restrictions. Thus, the record fails to show Biro would not have been employed, or was refused employment, in July because of his failure to pass the pulmonary test.

ful conduct and offer employment to Adolph Bukacek, Chris Boblet, Laszlo Biro, Donald Rowe, and Bayani Alvarez in the first available job openings for which each is qualified and make each of them whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them. Loss of earnings for all individuals shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Lockheed Shipbuilding and Construction Company, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively regarding the implementation and utilization of a medical screening program for new employees and/or applicants for employment.

(b) Discharging or refusing to hire any person for failure to pass a unilaterally imposed pulmonary function, audiometric or other type of physical examination or medical screening program.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with International Brotherhood of Electrical Workers, Local 46, AFL–CIO and International Brotherhood of Boilermakers, Local 104, AFL–CIO concerning wages, hours, and other terms and conditions of employment of its employees and, if an understanding is reached, embody such understanding in a written agreement.

(b) Offer employment to Adolph Bukacek, Chris Boblet, Laszlo Biro, Donald Rowe, and Bayani Alvarez in the first available job openings for which each is qualified, and make each of them whole for any loss of earnings each may have suffered by reason of the Respondent's unlawful conduct herein in the manner set forth in the section entitled "The Remedy."

(c) Post at its shipyard in Seattle, Washington, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and applicants for employment are customarily posted. Reasonable steps shall be taken by theRespondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Atlas Glass & Mirror Company *and* Glaziers Local Union #1776. Case 16–CA–11309

10 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 24 February 1984 Administrative Law Judge Leonard N. Cohen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a motion to strike the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Atlas Glass & Mirror Company, Dale City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following as paragraph 2(c).

"(c) Resume making contributions to the pension program as it existed prior to the unilateral discontinuance of such contributions on 19 September 1983 for the employees in the above-described unit, make them whole for any losses or expenses they may have suffered as a result of this unilateral change, and pay into the appropriate fund all contributions it has failed to pay by reason of the unilateral change, in the manner described in 'The Remedy,' as modified by this decision."

[1] We grant the General Counsel's motion to strike the Respondent's exceptions to the extent that the exceptions attempt to introduce evidence that is neither in the record nor claimed to be newly discovered.

[2] We modify the remedy recommended by the judge to provide that the question of whether the Respondent must pay any additional amounts to the pension fund to satisfy our "make whole" remedy will be left to the compliance stage as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge. This case was heard before me on January 9, 1984, in Oklahoma City, Oklahoma. The complaint which was based on unfair labor practice charges filed on September 26, 1983,[1] issued on November 14 and alleges that Respondent Atlas Glass & Mirror Company violated Section 8(a)(5) and (1) by unilaterally repudiating a collective-bargaining agreement in effect between it and Glaziers Local Union #1776. Respondent timely filed an answer in which it denied the commission of any violation of the Act.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel filed a brief which has been carefully considered.

On the entire record of this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a sole proprietorship with an office and principal place of business in Del City, Oklahoma, where it is engaged in the construction industry as a glazing contractor. During the past 12 months, a representative period, Respondent in the course and conduct of its business operations, purchased and received at its Del City, Oklahoma facility products, goods and materials valued in excess of $50,000 directly from points outside the State of Oklahoma. Accordingly, Respondent admits and I find and conclude that Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Although Respondent did not admit that the Union was a labor organization within the meaning of Section 2(5) of the Act, it did not challenge the stipulated testimony of Business Manager George Hite that he negotiates on the Union's behalf collective-bargaining agreements with area employers and that the Union admits to membership employees engaged in the glazing craft and processes their grievances. Clearly, the Union meets the statutory definition and I, therefore, find and conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The facts are not in dispute. On July 29, 1981, Respondent by its owner Johnny Gwin and the Union by its business manager Hite entered into a collective-bargaining agreement covering Respondent's outside glaziers.[2] This agreement which has a term of July 30, 1981

[1] Unless otherwise indicated, all dates refer to 1983.

[2] During the term of the contract, Respondent employed four regular full-time journeymen glaziers; Junior Logan, Calvin Gwin, the son of owner Johnny Gwin, Allen Bohanon, the son-in-law of Johnny Gwin, and Harold Cox, the working foreman. Respondent also employed Brent Cox, Harold Cox's son, as a full-time apprentice glazier. On occasion over the last several years, Respondent has employed as many as eight

Continued

to August 12, 1984, provides, inter alia, for a wage scale, a union shop, a checkoff of union dues, and monthly employer payments to the Union's pension fund.

The first hint of a problem occurred in February when Gwin and Hite discussed the Union's plan to attempt to recover some of the work that the Union had lost over the years to nonunion employers. During this discussion, Gwin commented that he hoped that the Union's plan would be successful, for if it were not, Respondent might have to go nonunion.

In June, Gwin informed Foreman Harold Cox that Respondent was in a money bind and could not continue to meet its payroll. As a consequence, Gwin stated that Respondent was going to have to lay off everyone for 2 to 3 weeks. While Cox was never recalled, it appears that Respondent recalled its other employees within a few weeks of their initial layoff.

On Friday, September 16, Hite happened to visit Respondent's shop at Del City. During a brief discussion with Gwin, Hite was told that since the Union's recovery program had failed, he could no longer compete with nonunion shops and pay the type of wages called for by the collective-bargaining agreement. Gwin announced, therefore, that commencing the following Monday, September 19, he would open up as a nonunion operation. Hite suggested they take the matter before the Union's executive board in an effort to see if they could not satisfactorily resolve it. Gwin did not respond to Hite's suggestion.

On Monday, September 19, Hite again visited Respondent's shop and spoke to Gwin. Gwin informed Hite that he was henceforth operating as a nonunion company and then added that Hite had just missed seeing one of his employees who had picked up his tools and quit over this decision. Hite discussed the situation with Gwin for a few minutes longer but, when he was unable to get Gwin to change his mind, he then left the premises. Since that time Respondent has ceased making any payments to the Union as required by the collective-bargaining agreement and has operated without reference to any of its other terms and conditions.

In its amended answer, Respondent raises two items as affirmative defenses. First, Respondent asserts that the collective-bargaining agreement was in fact breached not by it but by the Union "by means of [the Union's] negligently and carelessly furnishing labor and workmen that were unskilled and unwilling to perform the duties by which they were represented that they would furnish by contract to perform glazing work. By reason thereof, Respondent has been damaged several thousand dollars in replacement, materials, rework jobs, loss of business reputation, and diminishing business relationship." Second, Respondent asserts that the current economic market permitted Respondent's competitors to pay less wages while at the same time providing a better quality and quantity of service, and that as a result thereof, Respondent could no longer continue in business operating under the terms of the collective-bargaining agreement.

Respondent called no witnesses nor offered any documentary evidence in support of these or any other defenses that it wished to assert before the Board. The evidence as developed through the questioning of the General Counsel's witnesses indicates, as to Respondent's first above-cited affirmative defense, that the Union did not refer or otherwise furnish any workmen to Respondent. While the collective-bargaining agreement neither contains provisions for an exclusive hiring hall or a referral system, the Union does provide as a service to both individuals and employers an informal referral service. On one unspecified occasion sometime during the life of the contract, Gwin called Hite and asked him for the names of glaziers who were then currently out of work. Hite supplied Gwin with the names of the only three individuals he was then aware were unemployed. Gwin subsequently hired two of the three for an indeterminate period of employment.

At no time during the entire term of the contract did Gwin ever complain to Hite about the quality or quantity of work performed by any employee of Respondent. Hite was told on one occasion by employee Junior Logan that Gwin was having some trouble with the work that some of the people were doing. However, Logan neither identified by name nor specified by job duties (inside/outside) who was causing these problems. Harold Cox, the outside working foreman until June of this year, testified that in late 1982 one employee had left a job in such bad shape that Cox had to go back to the jobsite and redo the work.[3] Cox further testified that, other than this situation, Gwin had only complained to him about the work of one other employee, that being Junior Logan. Cox stated that on several occasions Gwin indicated to him that he felt Logan was taking too long on certain jobs. Logan is still employed by Respondent.

With regard to Respondent's second above-mentioned affirmative defense, there is no showing on this record that paying the union wages as called for in the collective-bargaining agreement placed Respondent in a position where it could no longer compete with nonunion operations. Gwin's self-serving statements to Cox and Hite to this effect are simply not appropriate substitutes for provable facts.

Section 8(d) of the Act provides in pertinent part that where a collective-bargaining contract is in effect, no party shall terminate or modify it unless he or she offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications. Gwin's action in simply informing the Union on a Friday that it intended to open "non-union" on the following Monday hardly meets this standard. Even if Gwin's naked assertion that economic exigencies forced him to take drastic action to get out from under the suffocating provisions of the collective-bargaining agreement could be proved, it would not excuse Respondent's total and sudden repudiation of its

additional journeymen and/or apprentice glaziers on a temporary basis as required to perform the outside work on a particular jobsite.

The two full-time shop employees were not covered by this contract and are not part of the appropriate unit.

[3] The record does not disclose how this individual came to be hired by Respondent. His name was not one of the three supplied by the Union to Respondent.

collective-bargaining agreement.[4] By this conduct Respondent has unilaterally effectuated changes in the terms and conditions of employment by reducing wages and other fringe benefits, by failing to make deductions for union dues from employees' pay pursuant to the checkoff provisions of the collective-bargaining agreement and by its subsequent failure to tender such payments to the Union and by discontinuing Respondent's contributions to the employee pension program. Accordingly, I find that Respondent has since September 19, 1983, and at all times thereafter, failed and refused to bargain collectively and in good faith with the Union as the exclusive representative of its employees and that by such refusal Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.[5]

IV. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. Accordingly, having found that Respondent about September 19, 1983, unilaterally reduced wages and other fringe benefits, I shall recommend that it be ordered to restore these benefits as they existed prior to the unilateral changes and to make unit employees whole for any loss of pay they may have suffered as a result of the unilateral changes, with interest. Having found further that Respondent about September 19, 1983, unilaterally failed to make deductions for union dues from employees' wages pursuant to the checkoff provisions of the contract and subsequently failed to tender such payments to the Union, I shall recommend that Respondent be ordered to restore making such deductions and payments and that it further be ordered to make the Union whole for any loss of payments due to its unilateral action. Finally, having found that Respondent about September 19, 1983, unilaterally discontinued making contributions to the employee pension program, I shall recommend that it be ordered to restore making such payments and to make whole the unit employees for any losses or expenses they may have suffered as a result of the unilateral change and to pay into the appropriate fund all those contributions it has failed to pay as a result of the unilateral change, with interest. Backpay and interest thereon shall be computed in the manner prescribed by *Ogle Protection Service*, 183 NLRB 682 (1970), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All journeymen and apprentice glaziers employed by Respondent at its Del City, Oklahoma location, excluding all other employees, including guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(d) of the Act.
4. Since about July 29, 1981, the above-named labor organization has been, and is now, the recognized and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the act.
5. By refusing about September 19, 1983, to bargain collectively with the Union as the exclusive bargaining representative of the employees in the aforesaid unit by unilaterally reducing wages and fringe benefits, by failing to make deductions for union dues from employees' wages pursuant to the checkoff provisions of the contract and by failing to tender such payments to the Union, and by discontinuing its contributions to the employee pension program, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and Section 8(d) of the Act.
6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Atlas Glass & Mirror Company, Del City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with employees of Atlas Glass & Mirror Company as the exclusive representative of its employees in the unit described below by unilaterally reducing wages and other fringe benefits, by failing to make deductions for union dues from employees' wages pursuant to the checkoff provisions of the agreement and by failing to tender such payments to the Union, and by discontinuing its contributions to the employee pension program. The appropriate unit is all journeymen and apprentice glaziers employed by Respondent at its Del City, Oklahoma location, excluding all other employees, including guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

---

[4] *Bedford Farmers Cooperative*, 259 NLRB 1226, 1236–37 (1982).

[5] *Valley Mfg., Inc.*, 264 NLRB No. 174 (Sept. 27, 1982) (not reported in Board Volume).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action which is designed to effectuate the policies and purposes of the Act.

(a) Restore the wage rates and other fringe benefits as they existed prior to the unilateral changes on September 19, 1983, to the employees in the aforesaid unit and make them whole for any losses or expenses they may have suffered by reason of the unilateral changes in the manner described in "The Remedy."

(b) Restore making deductions for union dues from employees' wages pursuant to the checkoff provisions of the collective-bargaining agreement, forward such payments to the Union, and make the Union whole for any loss of payments in the manner described in "The Remedy."

(c) Restore making contributions to the pension program as it existed prior to the unilateral discontinuance of such contributions on September 19, 1983, for the employees in the aforesaid unit, make them whole for any losses or expenses they may have suffered as a result of this unilateral change, and pay into the appropriate fund all contributions it has failed to pay by reason of the unilateral change in the manner described in "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examining and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Del City, Oklahoma facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days of the date of this Order what steps Respondent has taken to comply.

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with Glaziers Local Union #1776 as the exclusive representative of the employees in the unit described below by unilaterally reducing wages and other fringe benefits, by failing to make deductions for union dues from employees' wages pursuant to the checkoff provisions of the collective-bargaining agreement, and by discontinuing contributions to the employee pension program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

We will restore the wage rate and other fringe benefits as they existed prior to our unilateral changes thereof and make our employees in the unit described below whole for any losses or expenses they may have suffered by reason of our unilateral changes, with interest.

WE WILL resume making deductions from employees' wages for union dues pursuant to the checkoff provisions of the collective-bargaining agreement, and WE WILL in the future tender such payments to the Union and WE WILL tender to the Union all payments we have failed to make.

WE WILL resume making contributions to the pension program as they existed prior to our discontinuance thereof and make our employees in the unit described below whole for any losses or expenses they may have suffered as a result of such discontinuance, with interest, and WE WILL pay into the appropriate fund all contributions we have failed to make. The appropriate unit is:

> All journeymen and apprentice glaziers employed by Respondent at its Del City, Oklahoma, location, excluding all other employees, including guards and supervisors as defined in the Act.

ATLAS GLASS & MIRROR COMPANY

International Brotherhood of Electrical Workers, Local Union No. 11, AFL–CIO (Anco Electrical Contractors, Inc.) *and* **John G. Kelley** *and* **Albert E. Kelley.** Cases 31–CB–4422–1 and 31–CB–4422–2

11 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

This case[1] raises the issue of whether a union violated Section 8(b)(1)(A) and (2) of the Act by attempting to cause the discharge of 11 employees hired after the commencement of an economic strike. The administrative law judge found that the Respondent violated those sections of the Act by attempting to cause the discharge of nine of these employees. Our review of the record and of relevant precedent leads us to conclude that the General Counsel has failed to meet its burden of proving that the Respondent unlawfully attempted to cause the discharge of any employee. We, accordingly, shall dismiss the complaint in its entirety.

According to the credited testimony,[2] the pertinent facts are as follows. From 12 June 1981 until 21 July 1981, the Respondent was involved in an economic strike against the Employer. In order to continue its operations, the Employer advertised and hired 11 employees before the end of July, including the Charging Parties, John Kelley and Albert Kelley, hired 31 July. The record does not provide the identity or date of hire of any of the other nine employees. In the meantime, on 21 July, the strike ended and all striking employees soon returned to work.

It is undisputed that the National Electrical Contractors Association (NECA), the employer-association of which the Employer had been a member since 1977,[3] and the Respondent executed a "Return-to-Work Agreement" bearing an "Approved" date of 21 July 1981. This agreement provides in pertinent part:

> Upon ratification of a new collective-bargaining agreement between I.B.E.W. Local Union No. 11 and Contractors represented by the Los Angeles Chapter, National Electrical Contractors Association, the following procedures shall govern the return to work of employees of the employer-contractor on the conclusion of the work stoppage.
>
> 1. Contractors shall first recall to employment those employees who were dispatched by Local 11 to that contractor, and were employed on the job on the date of work stoppage;
> 2. If such employees choose not to return, or are unavailable, or are not sufficient to meet the contractors' [sic] need, the contractor shall resort to the appropriate Local Union hiring hall to request additional employees in accord with the contractual dispatch rules;
> 3. Employees hired by contractors during the work stoppage may report to the appropriate Local Union hiring hall and may, if qualified under the regular procedures of the contractual dispatch procedure, register for dispatch from Local Union 11.

It is also undisputed that NECA and the Respondent entered a new collective-bargaining agreement which provides in pertinent part:

> Sec. 4.05(a). The Union shall maintain a register of applicants for employment . . . .
>
> Sec. 4.06. If the registration list is exhausted and the Local Union is unable to refer applicants for employment . . . the Employer shall be free to secure applicants without using the Referral Procedure but, such applicants, if hired, shall have the status of "temporary employees." . . .
>
> Sec. 4.07. The Employer shall notify the Business Manager promptly . . . of such "temporary employees" and shall replace such "temporary employees" as soon as registered applicants for employment are available under the Referral Procedure.

Beginning in mid-August and continuing until the end of December 1981, the Respondent attempted to cause the Employer to discharge the employees hired after the commencement of the strike, contending that because they were not referred by the hiring hall, they were temporary em-

[1] On 16 December 1983, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent and the Charging Parties filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] The Respondent and the Charging Parties have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] According to the uncontradicted testimony of the Employer's president Timothy Anderson, the Employer has a letter of assent with NECA by which it is bound to agreements negotiated on its behalf.

ployees and subject to discharge pursuant to the above provisions of the collective-bargaining agreement. (Pursuant to these demands, the Respondent also dispatched unsolicited referrals to the Employer's jobsites.) The Employer responded that these employees were not temporary within the meaning of the contract, but were instead permanent replacements hired during the strike and covered by the return-to-work agreement.

The judge properly found that the lawfulness of the Respondent's actions depends on whether the employees it sought to discharge are permanent replacements hired during the strike or employees hired after the strike at a time when the new collective-bargaining agreement was in effect. If the employees are permanent replacements, then the Respondent's attempt to discharge them is, for the reasons as stated by the judge, a violation of Section 8(b)(1)(A) and (2). Alternatively, if the employees were hired after the strike at a time when the collective-bargaining agreement was in effect, the Respondent's attempt to discharge them is a lawful exercise of its contractual right to replace temporary employees with employees referred through the Respondent's hiring hall.

Based on the credited testimony, the judge found that the strike ended 21 July. He further found that the collective-bargaining agreement was effective 22 July 1981.[4] He found, therefore, that John and Albert Kelley, who were hired 31 July, were hired after the strike had ended and at a time when the collective-bargaining agreement was in effect. He, accordingly, reasoned that they were temporary employees under the collective-bargaining agreement and thus lawfully subject to replacement under the hiring hall terms of the agreement. On this basis, he recommended dismissal of the allegations that the Respondent violated the Act by demanding that John and Albert Kelley be discharged and by dispatching referrals to the Employer's jobsites for this purpose.[5] We agree.

With respect to the nine other employees, however, the judge found that it is reasonable to assume that some if not all were hired before the strike ended on 21 July. He based this assumption on President Anderson's testimony that the Employer's operations had "virtually ceased" at the start of the strike on 12 June and that from that date forward it was compelled to hire employees to replace the strikers in order to maintain its business. Relying on this assumption, he concluded that the nine employees were permanent replacements for economic strikers and that, therefore, the Respondent could not lawfully demand their discharge as temporary employees under the hiring hall provisions of its collective-bargaining agreement. The judge, accordingly, concluded that the Respondent unlawfully attempted to cause the discharge of these employees, including by the dispatching of unsolicited referrals to the Employer's jobsites. We do not agree.

There is no evidence of the dates of hire of any of the nine employees. Anderson testified that the Employer began advertising positions after the strike began on 12 June and that the nine employees were hired by 31 July. There is no evidence that these employees were any different from the Kelleys, who were hired after the strike ended. The judge's assumption that these employees were hired while the strike was in progress is unsubstantiated conjecture. Consequently, his finding that the nine employees were not subject to a lawful demand for discharge under either the return-to-work agreement or the collective-bargaining agreement is also unsubstantiated conjecture and not properly a basis for a finding of a violation of the Act.

It is well settled that when a union attempts to cause the discharge of an employee it has the burden of proving that this action was necessary to the effective performance of its function of representing its constituency.[6] Here, the Respondent showed that it executed a valid "Return-to-Work Agreement" with the Association of which the Employer is a member on 21 July 1981 and no party to this proceeding challenges the fact that this agreement was legally binding on the parties signatory thereto. The Respondent also showed that it had a hiring hall arrangement in effect with the Employer on 22 July. By demonstrating that it was making the discharge demands pursuant to hiring hall provisions, the Respondent met its burden.[7] The General Counsel's burden is to substantiate that any of the employees whom the Respondent attempted to have discharged were hired at a time when the hiring hall provisions were not in effect or under conditions by which they were

[4] He noted there was no evidence that the collective-bargaining agreement was backdated or not signed on its effective date. The Charging Parties contend that the agreement was not in effect on the date they were hired. However, the record substantiates that the Respondent and the Employer were bound by a collective-bargaining agreement, with hiring hall provisions whose validity has not been challenged, with an effective date of 22 July 1981. This agreement, which by its own terms is effective as of 22 July 1981, was presented into evidence as a joint exhibit of the Respondent and the General Counsel. The Charging Parties did not object to its acceptance into the record. They did not then, nor do they now, offer any evidence to show that the agreement was backdated or not in effect on its stated effective date.

[5] No contention was made that the content or operation of the hiring hall provisions with regard to any of the 11 employees was unlawful.

[6] E.g., *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432 (1983).

[7] See, e.g., *Laborers Local 596 (Hood Contractors)*, 216 NLRB 778 (1975).

exempt. As noted above, the General Counsel presented no evidence of the dates of hire of any of the nine employees. He made no affirmative showing that any of these employees were hired before the strike ended. He, consequently, has failed to establish by a preponderance of evidence that the Respondent's attempt to discharge employees was unlawful. We, therefore, reverse the judge on this issue and shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of charges filed by John G. Kelley, an individual,[1] and Albert E. Kelley, an individual,[2] on October 22, 1981,[3] the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, Los Angeles, California, issued an order consolidating these cases, a consolidated complaint and notice of hearing on December 30, 1981, against the International Brotherhood of Electrical Workers, Local Union No. 11, AFL–CIO, the Respondent, alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, the Act. On February 10, 1982, the Respondent filed its answer denying the material allegations in the consolidated complaint.

A hearing was duly held before me in Los Angeles, California, on September 14, 1982. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. At the commencement of the hearing the Respondent moved "that the charges were not served on the charged parties until past 6 months from the date of the alleged conduct, and therefore, they are time-barred under Section 10(b)."[4] I reserved decision on the motion. The Respondent also moved "to strike paragraph 14 of the Complaint," for the reason that "The basis for the motion is that I do not believe the statute prohibits attempts at violations. It is a strict liability statute. It describes Section 8(a) and (b) specific unfair labor practices. It does not proscribe attempts." I denied this motion. At the conclusion of the General Counsel's case the Respondent moved to dismiss the consolidated complaint for failure of proof. I also denied this motion. At the close of the hearing the Respondent renewed all its previous motions made during the course of the hearing. I reserved decision thereon. Thereafter both the General Counsel and the Respondent filed briefs. For the reasons hereinafter set forth, I deny the Respondent's motion to dismiss the allegations in the consolidated complaint as being "time-barred" under Section 10(b) of the Act; its motion "to strike paragraph 14 of the complaint;"[5] and its motion to dismiss the consolidated complaint in its entirety for failure of proof. However, I grant the Respondent's motion to dismiss the unfair labor practices allegations in the consolidated complaint concerning John and Albert Kelley.

On the entire record and the briefs of the parties, and on my observations of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Anco Electrical Contractors, Inc., the Employer, at all times material herein has been, and is now, a corporation organized under and existing by virtue of the laws of the State of California, with an office and principal place of business located in Glendora, California, where it is engaged in the electrical construction of commercial, industrial, and institutional structures in the construction industry. In the course and conduct of its business operations the Employer annually sells goods or services valued in excess of $50,000 to customers or business enterprises within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard and, additionally, the Employer annually derives gross revenues in excess of $500,000. The consolidated complaint alleges, the Respondent admits, and I find that the Employer is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The consolidated complaint alleges, the Respondent admits, and I find that the Respondent, International Brotherhood of Electrical Workers, Local Union No. 11,

[1] Case 31–CB–4422–1.

[2] Case 31–CB–4422–2.

[3] The dates of the service of the charges on the Respondent are in dispute as set forth hereinafter.

[4] In response to this motion counsel for the General Counsel asserted that "while the charges were served at a later date, the Respondent furnished a witness to these—to supply evidence during the investigation of both these charges in November, 1981, subsequent to the filing of the charges and was certainly aware of the charges and certainly cannot argue that they were prejudiced by the late service, which General Counsel will contend was within the 10(b) period." John G. Kelley, representing himself at the hearing, and with regard to this motion, stated that he had mailed copies of the charges to the Respondent at the same time that he also, by mail, filed the charges with the Board. Additionally Kelley alleged that he had served a copy of the charges on Richard J. Davis Jr., counsel for the Respondent, at his office "prior to the expiration of the time limit." Davis' response to this was, "I am afraid not, your Honor."

[5] With regard to the Respondent's motion to strike par. 14 of the consolidated complaint, the Act specifically provides in Sec. 8(b)(2) that it is an unfair labor practice for a labor organization or its agents "to cause or *attempt to cause* an employer to discriminate against an employee in violation of subsection 8(a)(3). . . ." (Emphasis added.) The Board has held that a union's demand for the discharge of permanent replacements hired during an economic strike constitutes an "attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3)" and is a violation of Sec. 8(b)(2) and (1)(A) of the Act where such demand was without legal or contractual justification. See *Wismer & Becker, Contracting Engineers*, 228 NLRB 779 (1977), remanded 603 F.2d 1383 (9th Cir. 1979), Board's decision on remand 251 NLRB 687 (1980); *United Rubber Workers Local 457 (Kentile, Inc.)*, 147 NLRB 980 (1964).

AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Furthermore, the consolidated complaint alleges that, at all times material herein, the Respondent's business representatives Douglas R. Cooley and Don Skol have been, and are now, agents of the Respondent, acting on its behalf, within the meaning of "Section 2(11) of the Act." The Respondent denied this. The evidence herein shows that Cooley represented the Respondent and acted on its behalf in almost all of the Respondent's dealings with the Employer and the Charging Parties herein which gave rise to the allegations of unfair labor practices against it in the consolidated complaint. Moreover, Don Skol represented the Respondent in grievance hearings between it and the Employer. I therefore find that, at all times material herein, Cooley and Skol have been, and are now, agents of the Respondent, acting on its behalf within the meaning of Section 2(13) of the Act.

III. THE UNFAIR LABOR PRACTICES

The consolidated complaint alleges that the Respondent sent referrals to the Employer in an attempt to replace John Kelley and Albert Kelley and other permanent replacements hired by the Employer during the economic strike and, through its agents, requested or demanded that the Employer discharge John Kelley and Albert Kelley because they had been hired as permanent replacements for economic strikers following expiration of a previous collective-bargaining agreement between NECA and the Respondent and for reasons other than their failure or refusal to tender the periodic dues and initiation fees uniformly required by the Respondent as a condition of acquiring or retaining union membership. The consolidated complaint further alleges that, by these acts and conduct, the Respondent violated Section 8(b)(2) of the Act by attempting to cause the Employer to discriminate in regard to the hire or tenure, or terms or conditions of employment of employees in violation of Section 8(a)(3) of the Act; and violated Section 8(b)(1)(A) of the Act by restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. The Respondent denies these allegations and asserts that its actions in demanding replacement of the employees hired during and after the economic strike ended, and the sending of union referrals from its hiring hall to the Employer's jobsites to accomplish this, was a valid and lawful exercise of the hiring and referral clause in the collective-bargaining agreement between it and the Employer and therefore did not violate the Act.

A. *The Evidence*

1. The service of the charge

The consolidated complaint alleges that the charges in Cases 31–CB–4422–1 and 31–CB–4422–2 were served on the Respondent by certified mail about October 22, 1981. The Respondent denied these allegations in its answer. However, the affidavits of service of a copy of the charges in the formal papers in evidence show that copies of the charges were served by certified mail on October 26, 1981 (Case 31–CB–4422–1), and October 23, 1981 (Case 31–CB–4422–2). Moreover, there are no return receipts in evidence for such service by certified mail on the Respondent and both affidavits of service seem to be copies of the originals, since in lieu of the actual signatures of the persons executing these affidavits there appears typed-in signatures.[6]

A consolidated complaint was served on the Respondent by certified mail on December 30, 1981, and the Respondent's answer was served on February 8, 1982.[7] Subsequently, the Regional Director for Region 31 served second copies of the charges on the Respondent on March 3, 1982, and affidavits of the service and return receipts thereof are in evidence as part of the formal papers. At the hearing, counsel for the Respondent alleged that the Respondent "was served with the complaint and filed his answer to complaint approximately one month before it was served with the charges . . . March 8 and March 9, 1982." In response counsel for the General Counsel noted that the Respondent had "furnished a witness . . . to supply evidence in November, 1981, subsequent to the filing of the charges." The General Counsel offered no other evidence with regard to service of the charges in this matter and the Respondent did not call any witness or produce any evidence concerning this issue. In fact the Respondent chose not to call any witnesses at all on its own behalf in this proceeding.

2. The hiring of John and Albert Kelley

Timothy Anderson, president of the Employer, Anco Electrical Contractors, Inc., testified[8] that the Employer has been a member of the National Electrical Contractors Association, Los Angeles County Chapter, herein NECA, since 1977. NECA is an employer association which admits to membership employers in the building and construction industry, and which exists, in part, for the purpose of negotiating, executing, and administering multiemployer collective-bargaining agreements on behalf of its employer-members with the collective-bargaining representatives of their employees, including the Respondent Union. Anderson stated that employer-members of NECA are bound by the terms and conditions of a collective-bargaining agreement negotiated between NECA and the Respondent, where such an employer has executed a "letter of assent A" agreeing to this.[9] The

---

[6] Interestingly, an affidavit of second service of the charge in Case 31–CB–4422–2 is signed by the affiant "C. S. Cartwright" and by "Raquel Garcia" (Designated Agent), the same persons whose names appeared typed in on the initial affidavit of service of the charge, and the original typed date thereon, October 23, 1981, is crossed out and the date March 3, 1982, substituted. (See G.C. Exh. 1(e) and (f).) The Respondent raised no objection to the receipt in evidence of these documents as part of the formal papers herein. Additionally it should be noted that internal office code letter designations of the various types of charges against labor organizations and/or employers filed with the Board appear on these affidavits, "CB–CC–CE–CG–CP," which might indicate that various types of charges were also filed by or against this Respondent and/or this Employer in other cases.

[7] See Sec. 102.113(a) of the Board's Rules and Regulations.

[8] Anderson was subpoenaed as a witness for the General Counsel.

[9] Also see Jt. Exh. 1.

evidence shows that about June 12, 1981[10] until sometime in the latter part of July 1981,[11] the Respondent engaged in an economic strike against the employer-members of NECA including Anco Electrical Contractors, Inc., the Employer herein. Anderson stated that his employees, who were members of the Respondent, participated in the strike and, as a result thereof, the Employer virtually ceased its operations and in order to continue in business he proceeded to hire permanent replacements for the striking employees through advertisements in newspapers. Anderson added that from June 12, 1981, through July 31, 1981, the Employer hired 11 employees including John and Albert Kelley.[12]

Anderson testified that when he interviewed and hired the 11 employee replacements, it was his understanding that the strike was still in progress. He continued,

> I told them that there was a strike and that the strike would obviously be settled at some time in the future and that when the strike was settled that we would retain them as employees, and when we signed the new agreement, that we would make sure that the Union accepted them as members at some time in the future. . . . I told them that it may be a very long process, but in the end, that they would be accepted into the Union as members, if they would just abide by the rules and regulations that we all would have to live by under the new agreement.

Anderson added that he also told these employees that after the strike ended they would be required to become union members in order to continue working for the Employer "because we would again be signatory to the agreement. . . . That was one of the stipulations when they were hired."

John Kelley[13] testified that on July 20, 1981, he telephoned the Employer in response to its advertisement in the Los Angeles Times for electricians and was advised that the Employer was seeking "permanent replacements for employees currently engaged in a strike." The next day, July 21, 1981, Kelley and his brother Albert, also a journeyman electrician, visited the Employer's premises to be interviewed for possible employment by Tim Anderson, the Employer's president. Kelley related that Anderson advised them that, if hired, they would receive "lower than Union scale" until they could be evaluated as qualified journeyman electricians after which their pay would be increased to union scale. He stated that Anderson told them, in response to Kelley's question regarding their continued employment after the strike ended, that,

> [T]hey were looking for permanent replacements, and that they were not even sure if they were going to sign an agreement with the Union even if the other employers did sign one, and that we would be considered permanent employees and not subject to replacement.[14]

Kelley continued that they were not actually hired by Anderson that day but that on July 30, 1981, they "received word from Anco" by telephone that the Employer was interested in employing them. Kelley added that he called Anderson the next day, July 31, 1981, whereupon Anderson hired both him and his brother Albert Kelley and they commenced work on August 4, 1981, at the Employer's Northrop Aviation jobsite in Hawthorne, California. Kelley recounted that when Anderson hired them on July 31, 1981, and since he "understood that the strike was over and Local 11 electricians had gone back to work," he again asked Anderson, how this would affect their status as employees and Anderson responded, "[I]t would not, that they had not signed an agreement with the Local, and he did not even know if he was going to sign such an agreement."

The testimony of Albert Kelley, concerning what Anderson had told the Kelleys when they were hired, was similar to that given by his brother John Kelley, above. Albert Kelley stated that during their conversation on July 21, 1981, Anderson had told them that,

> [I]f we were hired, we would be permanent employees for Anco. . . . My brother asked about the strike and everything, if we would be replaced by union members. And he said, no, if he hires us, he is hiring us as permanent employees. . . . Well, he said that they had no agreement with them, that they were on strike. There was no agreement with Local 11.

3. The economic strike ends

John Kelley testified that "It was my understanding that the strike ended in July, sometime shortly after the 21st of July, but I am not sure of the exact date."[15] An-

[10] It appears that the previous collective-bargaining agreement between NECA and the Respondent had expired.

[11] The record evidences some witness confusion as to just exactly when the strike ended. This will be discussed in detail hereinafter.

[12] Anderson maintained throughout his testimony that he had hired John and Albert Kelley prior to the end of the strike and at a time when he believed the Employer was not bound by any collective-bargaining agreement in force between it and the Respondent. Moreover, Anderson testified that when he had interviewed the prospective employees during the strike period and found them qualified, that this, in his own mind, constituted a "commitment" and it was his understanding that he had in fact hired such employees as of the interview date although he may have notified them of such hire at a later date.

[13] Kelley is a journeyman electrician and he testified that, although he had previously been a member of other locals of the International Brotherhood of Electrical Workers (IBEW), at the time of the hearing he was not a member of the Respondent Union local. Also see *Electrical Workers IBEW Local 441*, 221 NLRB 214 (1975).

[14] On cross-examination and in an affidavit given to a Board agent during the investigatory stage of these proceedings, Kelley stated that Anderson had also told them that "anyone referred to Anco during any period when Anco is not a signatory to a collective bargaining agreement with the IBEW would not be replaced. . . . [T]he Company would not be obligated to replace us because we were referred during the time when Anco was not signatory to any collective bargaining agreement with the Union."

[15] On cross-examination, Kelley testified as follows:

> Q. Do you know the date of the conclusion of the strike?
>
> A. I believe the strike—the IBEW workers went back to work sometime the last part of July, but the exact date I do not know.
>
> Q. Does the date July 21, 1981, refresh your recollection?
>
> A. I recall July 21st.

Kelley also testified, "I had been listening to news service with respect to the strike at that time, and I had not—that is why I knew on July 31st that the Union had gone back to work because I heard it over the news."

derson testified that the strike ended "approximately the last day of July or first day of August, somewhere in that area." Anderson stated that the striking employees returned to work on a Thursday, but was unsure whether the date was July 23 or July 30, 1981, both these dates falling on Thursday of their respective weeks.

The 1981–1983 collective-bargaining agreement signed by NECA and the Respondent, which ended the strike, has an effective date thereon of July 22, 1981.[16] While Anderson was unsure as to the exact date this agreement was signed, he testified, "It would have been the day before the strike ended, I believe . . . we were informed there was an agreement reached and that we could go back to work." Concerning this, John Kelley testified as follows:

> Q. You now know, do you not, that a collective-bargaining agreement was signed effective July 22, 1981?
>
> A. I do not know what you mean by "signed effective July [22], 1981." I am not sure if that means it was signed on July [22] or it was signed at some subsequent date and backdated to July [22]. It is my understanding that that is the case.[17]

Moreover, while Kelley at first testified that he had heard rumors to the effect that the Union's membership had ratified the collective-bargaining agreement on July 31, 1981, "but that the contractors had not signed it . . . into effect," he did admit uncertainty as to the actual date the agreement was ratified or when he had heard the rumor of its ratification.

The collective-bargaining agreement provides in pertinent part,

> Sec. 4.05(a). The Union shall maintain a register of applicants for employment . . . .
>
> Sec. 4.06. If the registration list is exhausted and the Local Union is unable to refer applicants for employment . . . the Employer shall be free to secure applicants without using the Referral Procedure but, such applicants, if hired, shall have the status of "temporary employees.". . .
>
> Sec. 4.07. The Employer shall notify the Business Manager promptly . . . of such "temporary employees" and shall replace such "temporary employees" as soon as registered applicants for employment are available under the Referral Procedure.

Additionally, NECA and the Respondent executed a "Return-To-Work Agreement," bearing an "Approved" date of July 21, 1981, which states:

> Upon ratification of a new collective-bargaining agreement between I.B.E.W. Local Union No. 11 and Contractors represented by the Los Angeles Chapter, National Electrical Contractors Association, the following procedures shall govern the return to work of employees of the employer-contractor on the conclusion of the work stoppage.
>
> 1. Contractors shall first recall to employment those employees who were dispatched by Local 11 to that contractor, and were employed on the job on the date of the work stoppage.
> 2. If such employees choose not to return, or are unavailable, or are not sufficient to meet the contractors' need, the contractor shall resort to the appropriate Local Union hiring hall to request additional employees in accord with the contractual dispatch rules.
> 3. Employees hired by contractors during the work stoppage may report to the appropriate Local Union hiring hall and may, if qualified under the regular procedures of the contractual dispatch procedure, register for dispatch from Local Union 11.[18]

4. What occurred thereafter

The evidence herein shows that John and Albert Kelley were employed by the Employer on its Northrop Aviation jobsite from August 4 through 6, 1981, and then were transferred to its Biltmore Hotel jobsite in downtown Los Angeles, California, where they worked from August 7 until August 31, 1981. John and Albert Kelley were terminated by the Employer on September 9, 1981, because of a "Reduction in Force."[19]

Anderson testified that sometime in mid-August, August 15, 16, or 17, 1981, the Respondent's business representative Douglas Cooley telephoned him and advised that the Employer was "signatory" to the collective-bargaining agreement between NECA and the Respondent and would therefore "have to comply with Section 4.07 in the agreement." He related that Cooley said that the employees who had been hired during the strike period "were temporary employees and that they would fall under the conditions of Section 4.07."[20] Anderson stated,

---

[16] Jt. Exh. 1.

[17] While Kelley admitted that he did not have "any evidence that the effective date indicated on [the collective-bargaining agreement, July 22, 1981] is not the date of signature" he testified in explanation of his above testimony,

> I have experience with other Local Unions of the IBEW. I have been a member of the Local Union. And I am aware that contracts are often continued to be negotiated after a strike is over, and that sometimes several weeks or several months pass before the contract is finally signed and ratified by both parties, and whenever that happens, it in every case occurs that the contract itself is dated as for the effective date at the end of the strike or at the end of the time the past agreement lapsed . . . . There is a further basis . . . .
>
> When I spoke to Mr. Anderson on the 31st, I asked him about the fact that since the strike—since I understood that the strike was over and Local 11 electricians had gone back to work, I asked him if that would—how that would affect our status as employees. And he said that it would not, that they had not signed an agreement with the local, and he did not even know if he was going to sign such an agreement.

[18] R. Exh. D. Anderson testified that he was unsure as to the date this agreement was actually signed.

[19] The General Counsel *does not* allege that the actual termination of John and Albert Kelley by the Employer constituted an unfair labor practice in violation of the Act on the part of either the Employer or the Respondent.

[20] Anderson testified that Cooley had "[A]dvised me to abide by Section 4.07, which was replace the temporary employees with applicants for employment which were available under the referral procedure, as it states here."

> To the best of my knowledge of recollection, I stated something to the effect that these people were hired as permanent replacement help and that to the best of my knowledge, there was an agreement between the contractor's association and Local 11, that these people would be taken into the Union provided they follow all the criteria that was set forth for them to do so, and that he should probably talk with his Business Manager, and I would talk to my representative from NECA and find out how we should approach this, because they were not going to be replaced.

Anderson continued that thereafter, in August and September 1981, he received several calls from Cooley "regarding this particular matter," with Cooley insisting that the Employer abide by Section 4.07 of the agreement and replace the "temporary employees" with referrals dispatched from the Union's hiring hall, and Anderson maintaining that the so-called temporary employees were permanent replacements for striking employees and the Employer would not replace them.[21] He stated that the Respondent continued to seek the replacement of employees, hired during the period of the economic strike, with referrals from the Union's hiring hall for several months, until the end of December 1981.[22] Anderson testified that "within a week" after the strike ended and the striking employees returned to work, he requested referrals from the Respondent because "there was a considerable amount of work and we had to catch up for the month and a half that we had lost." He related that the Respondent could fill only "a very small portion" of the Employer's requests for additional employees. Anderson added that the Respondent continued to refer people from its hiring hall to the Employer's jobsites "periodically on and off" until sometime in December 1981, apparently in an attempt to replace the employees hired during the strike.[23] He recounted that, during this period, the Respondent also dispatched its business representatives to the Employer's various jobsites to find out the status of employees working there.

John Kelley testified that on August 13, 1981, after he had been advised by Anderson that the Respondent was "pressuring" the Employer to replace him on the jobsite with union-referred employees, and Anderson had suggested that they "clear through the Hiring Hall," he and his brother, Albert Kelley, went to the "Union Hiring Hall" at approximately 3 p.m. that day. Kelley stated that he spoke to Douglas Cooley, a union business agent, telling Cooley that they currently were employed by the Employer at its Biltmore Hotel jobsite and were there at the hiring hall to pay "any applicable union security fees." He related that Cooley said that the Respondent would "not have any dealings" with the Kelleys, or "recognize" their employment until they brought letters from their Employer evidencing their hire. According to Kelley, Cooley told them that thereafter, if qualified, they would be required to register as "out of work" and be dispatched to a job whereupon they would then be required to pay the hiring hall fees.[24] Kelley recounted that Cooley explained that by "registering on the out-of-work book they would in effect be terminating their employment with Anco Electrical Contractors, Inc., and would then be eligible for dispatch to other jobs, but up until that time they would be subject to replacement by union-referred workers." Kelley continued that after he told Cooley that he would not sign the "out-of-work book," and that he did not care whether or not the Respondent "recognized" their employment and accepted the proffered fees, Cooley became "belligerent" and threatened to cause them "more trouble than we ever knew."

The testimony of Albert Kelley regarding what had transpired at the union hiring hall on August 13, 1981, was similar in most respects to that given by his brother, John Kelley, as set forth above. He stated that Cooley had told his brother that the Respondent would not "recognize" them nor accept any payments unless they obtained a letter from the Employer stating that "[w]e were temporary employees of Anco."[25] Kelley related that, after his brother had finished speaking to Cooley, he told Cooley that he was there for the very same reason, to pay the security fees, and that Cooley responded, in substance, that what Cooley had told his brother, John, previously also applied to him as well. Kelley added that they then left the hiring hall. John Kelley testified that he telephoned Anderson later that day to apprise him of what had happened at the union hiring hall and that Anderson said, "I should not worry about it, that he would deal with the Union and that I should just go back to work and then not worry about it any further."

Anderson testified that after the strike had settled he wrote letters to the Respondent indicating that John and Albert Kelley had been hired by Anco Electrical Contractors as "temporary employees."[26] Anderson stated that he characterized the Kelleys as "temporary employees" because, "It is what we were told to do by both the Union and our association NECA. In other words, we

[21] Anderson testified that, during a telephone conversation he had with Cooley in mid-September 1981, he asked Cooley for a list of the names of the employees the Respondent wanted replaced and the reasons for such replacements signed by the Respondent's business manager, but that this had never been forthcoming.

[22] Although unsure, Anderson believed that the Respondent had sent approximately 23–30 referrals to the Employer's various jobsites during this period. Moreover, John Kelley testified that about August 15 or 16, 1981, he observed that the Employer had hired four new employees at least three of whom, he was informed, had been referred by the Respondent through its hiring hall to the Biltmore Hotel jobsite.

[23] There is evidence in the record of at least two grievances filed by the Respondent against the Employer for the latter's failure to discharge an employee hired during the strike and to hire a referral to the jobsite, albeit these "temporary employees," as defined by the Respondent, were working on the construction project.

[24] In his affidavit, given to a Board agent, Kelley also stated,

> When we offered to pay any union security fees that might be due, Mr. Cooley refused to accept our offer and said that the Union would not deal with us in any way until I had received a letter from Anco informing them that we had been hired as temporary employees. He went on to say that we would be subject to replacement by Union-referred personnel.

[25] However, on cross-examination Kelley was unsure as to whether Cooley told them that they needed "a letter" from the Employer, or "a letter stating that they were temporary employees."

[26] These letters are dated August 17, 1981. See G.C. Exhs. 2 and 4.

had to follow a particular format to bring these people into the Union . . . per the agreement stating how we were to go about bringing these permanent replacement help into the Union, so that we may keep them as a Union employee." He added that the letters, as worded, were part of the format he was instructed and required to follow "by NECA and the IBEW."

John Kelley testified that on August 31, 1981, he, his brother Albert Kelley, and two other employees[27] of the Employer appeared at the union hiring hall "to offer to pay union security fees" to the Union in order to cover themselves concerning their employment at Anco Electrical.[28] Kelley related that he spoke to someone behind a "teller's window" who was not Cooley, advising him that they were there to pay the union security fees. Kelley stated that he was asked if a letter had been sent from the Employer to the Respondent to which Kelley replied that he had been informed by the Employer that this had been done. Kelley added, "As the conversation progressed, I had refused to sign an application [for formal] union membership. And I had also refused to sign an authorization for dues check-off. And the man told me that if I did not sign those documents, that he would not clear me through the Hall."

Kelley continued that Cooley now appeared on the scene and entered the conversation advising Kelley that the Respondent had received the required letters from the Employer and agreeing to allow Kelley "to pay the Hiring Hall fees and to receive a receipt without signing the dues check-off or the membership application form."[29] Kelley testified that when he discovered that the "dues receipt indicated that I was a temporary employee, I immediately pointed out to Mr. Cooley that I was not a temporary employee, but Anco had hired me as a [permanent] replacement." He stated that Cooley then brought out the letter from the Employer and exhibited it to Kelley. This letter dated August 17, 1981, characterizes Kelley as a "temporary employee." Kelley related that after his brother Albert also paid the hiring hall fees and was given a receipt therefor, he advised Cooley that the other two employees were there to also pay "any fees that the Union required and to clear through the Hiring Hall." Kelley continued that Cooley asked these employees if they had "a letter from the Employer" and when they responded that they did not, he showed them a copy of the "back-to-work agreement" and explained,

> [T]he way the back-to-work agreement would affect them would be that they would have to bring in a letter from the Employer, that after they brought the letter in, they would then be permitted to come in and register as out of work on the union's referral list if they were qualified to register. And that would mean that . . . their job at Anco Electric would be terminated and that they would then be dispatched by the Union when their turn came up to a job . . . and then at that time they would be eligible for . . . union fringe benefits and union pay scale and all the benefits of . . . the collective bargaining agreement.

Albert Kelley testified that his brother John had told him that Anderson had now, for a second time, requested that they "try to get cleared again with the Union," and therefore they went to the union hiring hall on August 31, 1981, to accomplish this, accompanied by two other employees. The rest of his testimony concerning what happened at the union hiring hall on August 31 is similar to that given by John Kelley as recounted above.

B. *Analysis and Conclusions*

1. The 10(b) period

Section 10(b) of the Act provides "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

Section 102.14 of the Board's Rules and Regulations provides:

> Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The regional director will, as a matter of course, cause a copy of such charge to be served on the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.[30]

Section 102.111 of the Board's Rules and Regulations provides:

> Charges . . . may be served personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same.[31]

[27] These employees were John Davis and Greg (last name unknown).

[28] However, on cross-examination Kelley also testified that he had advised these employees that they would be eligible for benefits under the collective-bargaining agreement and therefore they should all go to the union hiring hall to offer to pay the union security fees, at which time Kelley would speak on their behalf. A somewhat similar statement is also contained in Kelley's Board affidavit. Kelley also testified that he assumed that a collective-bargaining agreement had been signed between NECA and the Respondent prior to August 31, 1981, because the strike had ended and Anderson "was suggesting on two separate occasions that I clear through the Hiring Hall."

[29] See G.C. Exh. 3 (Receipt for Hiring Hall Operating Expenses).

[30] Also see Sec. 101.4 of the Board's Rules and Regulations.

[31] Sec. 102.113(a) of the Board's Rules and Regulations, provides: "The date of service shall be the day when the matter served is deposited in the United States mail or is delivered in person, as the case may be." Also see *Laborers Local 264 (D & G Construction Co.)*, 216 NLRB 40 (1975); *Dow Chemical Co.*, 215 NLRB 910 (1974).

Section 102.113(b) of the Board's Rules and Regulations provides:

> The person or party serving the papers or process on other parties in conformance with sections 102.111 and 102.112 shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in section 102.112 shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

Moreover, Section 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense and, if not timely raised, is waived.[32]

The consolidated complaint alleges that the charges in Cases 31–CB–4422–1 and 31–CB–4422–2 were served on the Respondent by certified mail about October 22, 1981. The Respondent denied this in its answer. The burden of proving the allegations in a complaint is on the General Counsel including the above allegation regarding service. In support thereof the General Counsel offered affidavits of service by Board agents certifying that they had served the Respondent with copies of the charges in the above cases on October 26 and 23, 1981, respectively, by "postpaid certified mail." However, there was no return receipt for the charges and the signatures on both affidavits of service as well as the notary public's signature thereon were typed in, rather than being the actual written signatures. While there is no explanation therefor in the record, I find and conclude that these affidavits are nonetheless sufficient in themselves to sustain the finding that the General Counsel has met such burden of proof.[33]

The affidavits of service are sworn to and notarized, and there is no evidence in the record which validly disputes their authenticity.[34] Further, the above finding and conclusion receives additional support from the fact that the Respondent cooperated in the investigation of these charges shortly after they were filed with the Board, and from the fact that aside from the remarks made by counsel for the Respondent in connection with his opening motion for dismissal of the consolidated complaint on the grounds that the Respondent's "alleged conduct . . . [is] time-barred under Section 10(b)," and statements in the Respondent's brief that timely service of the charges was not made, the Respondent offered no evidence to support this. No officer, official, representative, or agent of the Respondent was called as a witness to testify under oath that the Respondent had failed to receive a copy of the charges filed in this matter until after the complaint was issued, and the second copies of the charges were served on it in March 1982.

Moreover, since Section 10(b) of the Act is a statute of limitations and an affirmative defense which must be pleaded, as was in effect done so herein by the Respondent, the burden of proving such an affirmative defense rests squarely on the Respondent. As stated before, the Respondent failed to offer any evidence whatsoever on its behalf to support and sustain its burden of showing that Section 10(b) of the Act bars consideration of the charges herein alleging unlawful conduct on its part in violation of Section 8(b)(1)(A) and (2) of the Act.

In view of all of the above, I find and conclude that timely service of a copy of the charges filed herein was served within the meaning of Section 10(b) of the Act and the Board's Rules and Regulations and, therefore, I deny the Respondent's motion to dismiss the consolidated complaint as being "time-barred by Section 10(b) of the Act."[35]

2. The violations of Section 8(b)(1)(A) and (2) of the Act

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to "restrain or coerce" employees in the exercise of the rights guaranteed them in Section 7 of the Act, "*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."[36] Section 7 of the Act protects the rights of employees to engage in union or other concerted activities or to refrain from such activities. The rights protected by Section 7, however, are limited by the principle of exclusive representation set forth in Section 9(a) of the Act.[37] In view of the restraints im-

---

[32] *Federal Management Co.*, 264 NLRB 107 (1982); *McKesson Drug Co.*, 257 NLRB 468 fn. 1 (1981); *Vitronic Division of Penn Corp.*, 239 NLRB 45 (1978).

[33] Albeit Secs. 102.111 and 102.112 specifically provide that "the return post office receipt shall be proof of service" when service is made by certified mail, it does not specifically exclude other types of proof of service, such as an affidavit of service.

[34] The fact that no post office receipts for certified mail service of the charges were produced at the hearing might well give rise to various inferences both in favor of and against the respective positions of the parties herein; i.e., either that service was never effectuated, or that service was made and the receipts were lost or misplaced in other files since the evidence appears to indicate that there were various charges filed in various types of cases affecting this Respondent. (See the case code designations on G.C. Exhs. 1 (b, c, e, and f).) This might also account for the typed-in signatures on the affidavits of service since additional copies of the notice of filing of the charges and the charges themselves may have been required for placement in the other case files. (See G.C. Exh. 1(f) with the October 23, 1981 date thereon having been crossed out and a new date of March 3, 1982, inserted therein.) Be that as it may, I am convinced that the affidavits of service of the charges dated October 26 and 23, 1981, respectively, are valid and authentic and constitute proper and sufficient proof of service as required by the Board's Rules and Regulations.

[35] See *General Marine Transport Corp.*, 238 NLRB 1372 (1978), enf. denied 619 F.2d 180 (2d Cir. 1980). Moreover, whether or not John Kelley is found to be a credible witness, as will be determined later, and particularly regarding his unsworn and unsupported assertion that he mailed a copy of his charge to the Respondent, such a finding would have no bearing one way or the other on my above finding and conclusion concerning Sec. 10(b) of the Act.

[36] The purpose of and policy behind Sec. 8(b)(1)(A), as set forth in Sec. 10(b) of the Act, is "to protect the rights of individual employees in their relations with labor organizations."

[37] Sec. 9(a) of the Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the em-

Continued

posed on individual employee rights by the principle of exclusive representation, the courts and the Board have imposed on labor organizations a reciprocal obligation of the Act to fully and fairly represent all of the employees.[38] As the United States Supreme Court stated in *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967):

> It is now well established that, as the exclusive bargaining representative of the employees . . . the Union [has] a statutory duty fairly to represent all of those employees . . . [and that this duty] includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.
>
> . . . .
>
> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.[39]

A labor organization which fails to live up to this obligation unjustifiably restrains employees in the exercise of their Section 7 rights and thereby violates Section 8(b)(1)(A) of the Act. The duty of fair representation gives employees a correlative right under Section 7 to be represented without arbitrary, irrelevant, or invidious discrimination by their exclusive representative.[40] In its landmark decision in *Miranda Fuel Co.*, 140 NLRB 181 (1962), the Board held at 185:

> Viewing these mentioned obligations of a statutory representative in the context of the "right" guaranteed employees by Section 7 of the Act "to bargain collectively through representatives of their own choosing," we are of the opinion that Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.[41]

"Irrelevant considerations" include nonmembership in the union.[42]

A labor organization's arbitrary conduct alone may suffice to establish a violation of the duty of fair representation.[43] Without any hostile motive of discrimination and in complete good faith, a labor organization may pursue a course of action that is so unreasonable and arbitrary as to constitute a violation of its duty of fair representation. However, in evaluating whether such conduct is so arbitrary as to breach the duty of fair representation, so long as a labor organization exercises its discretion in good faith and with honesty of purpose, a "wide range of reasonableness" must be allowed.[44] On the other hand, a labor organization may not impair individual employee interests on the basis of personal preferences.[45]

Section 8(a)(3) of the Act prohibits an employer from discriminating against its employees "in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(b)(2) of the Act makes it unlawful for any labor organization "to cause or attempt to cause an employer to discriminate against any employee in violation of Section 8(a)(3)." The Board and the courts have held that when a labor organization causes or attempts to cause an employer to discriminate against employees on an irrational or arbitrary ground, this conduct constitutes unlawful encouragement of union activity within the meaning of Sections 8(b)(2) and 8(a)(3) of the Act.[46] Moreover, this is true regardless of whether or not that attempt is successful.[47] The foreseeable intimidating effect on the workers is examined; specific evidence of an intent to encourage union membership is not essential.[48] However, the Board has also consistently held that a labor organization possessed of a lawful exclusive hiring hall agreement does not violate Section 8(b)(2) by causing or attempting to cause the discharge of an employee who is on the job without having complied with the contractual hiring hall procedures.[49] As the Board stated in *Operating Engineers Local 542 (Ralph A. Marino, General Contractor)*, 151 NLRB 497, 500 (1965):

> As we construe the hiring and referral clause to require the Employer to utilize the union referral system in securing employees for the work in that area, the Union could, without violating the Act, properly seek the discharge of the employees in

---

ployees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61–70 (1975); *NLRB v. Tanner Motor Livery*, 419 F.2d 216, 218–221 (9th Cir. 1969).

[38] *NLRB v. American Postal Workers (U.S. Postal Service)*, 618 F.2d 1249 (8th Cir. 1980); *Teamsters Local 315 (Rhodes & Jamieson)*, 217 NLRB 616, 619 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976).

[39] Also see *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *H. H. Robertson Co.*, 263 NLRB 1344 (1982).

[40] *Vaca v. Sipes*, supra, 386 U.S. at 177–178, 181–183; *Kling v. NLRB*, 503 F.2d 1044, 1046 (9th Cir. 1975).

[41] *U.S. Postal Service*, 240 NLRB 1198 (1979), enfd. in pertinent part 618 F.2d 1249 (8th Cir. 1980); *Laborers Local 300 (Memorial Park Development)*, 235 NLRB 334 (1978).

[42] *Hughes Tool Co.*, 104 NLRB 318 (1953).

[43] *NLRB v. American Postal Workers (U.S. Postal Service)*, 618 F.2d (8th Cir. 1980); *Griffin v. Auto Workers*, 469 F.2d 181, 183 (4th Cir. 1972).

[44] *Ford Motor Co. v. Huffman*, supra at 338 (1953); *American Postal Workers*, supra.

[45] Mere negligence, poor judgment, or ineptitude is insufficient to establish a breach of the duty of fair representation. See cases cited in fn. 44, herein.

[46] *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 799 (7th Cir. 1976), on remand 228 NLRB 889, 891–893 (1977); *Kling v. NLRB*, supra, 503 F.2d at 1046; *American Postal Workers*, supra.

[47] *American Postal Workers*, supra.

[48] *Radio Officers v. NLRB*, 347 U.S. 17, 52 (1954).

[49] *Laborers Local 300 (Memorial Park Development)*, 235 NLRB 334 (1978); *Laborers Local 1140 (Peter Kiewit Sons)*, 204 NLRB 151 (1973).

question who had bypassed the Union's referral system.

Moreover, in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1937), the United States Supreme Court held:

> it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

As the Board stated in *Bio-Science Laboratories*, 209 NLRB 796, 797 (1974),[50]

> Subsequent cases[5] have not altered the *Mackay Radio* rule that an employer is under no obligation to discharge or lay off permanent replacements at the termination of an economic strike. The decisions in *Fleetwood, Laidlaw*, and *Brooks Research* all relate to rights of economic strikers to job openings occurring when permanent replacements quit their jobs subsequent to the termination of a strike.

[5] *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *The Laidlaw Corporation*, 171 NLRB 1366, enfd. 414 F.2d 99 (C.A. 7); *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634.

While the Board has held that, under *Laidlaw*,[51] an employer is under an obligation to place permanently replaced economic strikers on a preferential hiring list, it has also held that a union's concern about getting all strikers back to work in preference to strike replacements is "[c]learly a legitimate bargaining demand,"[52] and therefore the *Laidlaw* reinstatement rights of economic strikers may be cut off by an agreement between the union and the employer reached in the give-and-take of collective bargaining.[53] And a union may lawfully seek the reinstatement of economic strikers and the layoff of strike replacements pursuant to a nondiscriminatory system of layoff and recall without violating Section 8(b)(1)(A) and (2) of the Act. However, it is well established that a union may not discriminate against employees who exercise their Section 7 right not to join a strike.[54]

The Respondent asserts in its brief, "Even if General Counsel could prove his best case, that 'case' has consistently been held not to constitute a violation of the Act by the Board's Advice Division."[55] I do not agree with the Respondent's conclusion nor its analysis of the law as applicable to the facts of this case. In truth, the Advice Memorandum which the Respondent asserts "controls here" actually contains within it the requirement of a ruling adverse to the Respondent. While this will be gone into in more detail subsequently, briefly as stated in *Steelworkers Local 8560 (Spartek, Inc.)*, 103 LRRM 1238, 1239 (1979):

> In the instant case, the Employer alleges that the Union initially sought to have all strike replacements fired, even when the Employer was offering jobs for all employees. . . . Assuming, arguendo, that the Union initially proposed that all strike replacements be terminated, the Union clearly has abandoned this proposal and, instead is now requesting a nondiscriminatory system of layoff and recall pursuant to seniority. Given these changed circumstances, it was concluded that it would not effectuate the purposes of the Act to attempt to establish a previous, technical violation of the Act, especially since none of the strike replacements have been terminated.

However, as shown by the evidence in the instant case, the Respondent persisted in demanding that all the striker replacements be fired even though the Employer had reinstated all the striking employees who desired to return to their jobs and it never abandoned this demand, continuing to send referrals to the Employer to replace these employees for several months after the end of the strike and the reinstatement of the striking employees. This constituted more than a "previous technical violation of the Act."

The evidence shows herein that the employees of the Employer, Anco Electrical Contractors, Inc., who were members of the Respondent Union, engaged in an economic strike called by the Respondent at a time when there was no collective-bargaining agreement in force and effect between the Respondent and the Employer. The evidence further shows that the strike commenced on June 12, 1981, and, in order to continue its business operations, the Employer commenced hiring new employees to replace its striking employees. Timothy Anderson, the Employer's president, testified that the Employer hired 11 employees as "permanent replacements," including John and Albert Kelley, during the course of the strike.

While the record is confusing and somewhat unclear as to the exact date the economic strike ended and the striking employees returned to work, with regard to John and Albert Kelley the evidence does indicate that they were actually hired subsequent to these events. John Kelley testified, "It is my understanding that the strike had ended in July, sometime shortly after the 21st of July, but I am not sure of the exact date." Kelley also testified as follows:

> A. I believe the strike—the IBEW workers went back to work sometime the last part of July, but the exact date I do not know.

[50] Also see *Bancroft Cap Co.*, 245 NLRB 547 (1979).
[51] *Laidlaw Corp.*, 171 NLRB 1366 (1968).
[52] *Portland Stereotypers Union 48 (Journal Publishing Co.)*, 137 NLRB 782 (1962).
[53] *United Aircraft Corp.*, 192 NLRB 382 (1971).
[54] See, e.g., *Rubber Workers Local 457 (Kentile, Inc.)*, 147 NLRB 980 (1964).
[55] *Strick Corp.; UAW and its Local 644*, 95 LRRM 1526 (1977); and "controlling here," *Steelworkers Local 8560 (Spartek, Inc.)*, 103 LRRM 1238 (1979).

> Q. Does the date July 21, 1981, refresh your recollection?
>
> A. I recall July 21st.

Moreover, Kelley related that when he was hired by Anderson on July 31, 1981, he had inquired what his status as an employee would be since he "understood" that the strike had already ended and the striking employees had returned to work by then.

While Anderson testified, "I believe [the strike] ended approximately last day of July or first day of August, somewhere in that area," he also stated that the striking employees had returned to work on a Thursday which, according to the evidence herein and the use of a 1981 calendar, could only have occurred on July 23 or 30, 1981. Furthermore, the 1981—1983 collective-bargaining agreement between NECA and the Respondent provides for an effective date of July 22, 1981, and Anderson testified that although unsure as to the exact date of the signing of this agreement, "It would have been the day before the strike ended." Additionally, NECA and the Respondent executed a "Return-to-Work Agreement" which is dated July 21, 1981.

Considering the issue of credibility at this time, the Respondent in its brief asserts that John Kelley "lied," "fabricated statements," and engaged in "clear perjury" and thereby "contemptuous" conduct at the hearing which requires the discrediting of his testimony as a whole, and consideration of "referral of this case to the United States Attorney for review of Kelley's testimony." The Respondent also maintains that the testimony of Albert Kelley must be disbelieved because he merely "ventriloquized" the testimony of his brother John Kelley. I disagree with the Respondent on both counts.

In reviewing the testimony of John Kelley and the particular segments thereof which the Respondent points to as illustrative of Kelley's "lies," "fabrications," and "clear perjury," I find that as to most of these instances the Respondent has drawn unwarranted inferences in support of its position, reflecting on almost out-of-context consideration by the Respondent of Kelley's statements; while in other instances the Respondent has drawn inferences from answers given by Kelley, favorable to its own position herein, although various other inferences, not supporting its contentions, could also reasonably be applicable. For example, as the Respondent sets forth in its brief:

> At page 83 of the Transcript. Kelley questions if the new Agreement was signed on July 21 or it was signed at some subsequent date and backdated to July 21st. "*It is my understanding that that is the case.*" (Emphasis ours.) The Administrative Law Judge noted this at page 84, lines 17–19, 22–25, despite Counsel for the General Counsel's efforts to divert the Court's attention. Following the Court's intervention, Kelley realized his error and answered that in fact he had no evidence. When the Court asked, at lines 10–11 of page 86 of the Transcript "*What was the basis for your answer before?*" Kelley quite simply lied, saying at page 87, line 1. "But I did not indicate that I did." (Emphasis ours.) Kelley's initial admission is accurate and his clear perjury, in direct response to the Administrative Law Judge, is contemptuous.

However, consider the actual testimony as given in its full context. On recross-examination by counsel for the Respondent, the following testimony appears in the record:

> Q. You now know, do you not, that a collective bargaining agreement was signed effective July 22, 1981?
>
> A. I do not know what you mean by "signed effective July [22], 1981." I am not sure if that means it was signed on July [22]. It is my understanding that that is the case.
>
> Q. Did you testify on cross that the date July 21, 1981 refreshed your recollection as to the date the back-to-work agreement was signed?
>
> A. No, I did not.[56]
>
> Q. Do you have any evidence whatsoever that the date on page 50 of Joint Exhibit 1 is not the accurate date?

At this point in the record, counsel for the General Counsel raised an objection to this line of questioning regarding the collective-bargaining agreement on the grounds that Kelley was not a party to the agreement or the negotiations thereon and would therefore have no knowledge thereof. After referring counsel for the General Counsel to Kelley's previous answer, that it was his understanding that the collective-bargaining agreement had been backdated, I overruled the objection. How this can be characterized as "Counsel for the General Counsel's efforts to divert the Court's attention" is beyond my understanding.

Kelley's testimony continues:

> Q. Do you have any evidence that the effective date indicated on page 50 of Joint Exhibit 1 is not the date of signature?
>
> A. No, I do not.
>
> JUDGE KLEIMAN: What was the basis for your answer before?
>
> THE WITNESS: I have experience with other Local Unions of the IBEW. I have been a member of the Local Union. And I am aware that contracts are often continued to be negotiated after a strike is over, and that sometimes several weeks or several months pass before the contract is finally signed and ratified by both parties, and whenever that happens, it in every case occurs that the contract itself is dated as for the effective date at the end of the strike or at the end of the time the past agreement lapsed.
>
> JUDGE KLEIMAN: So it may have been signed subsequent—

[56] As to this, Kelley's answer is accurate since the question directed to him on cross-examination referred to the date the strike ended, and not to the date the "back-to-work agreement" was signed.

THE WITNESS: Although it may have been signed subsequently.

JUDGE KLEIMAN: Do you have—

THE WITNESS: I have no evidence that it took place in this case. But I did not indicate that I did.

JUDGE KLEIMAN: I am just trying to determine the basis of your reason. It is conjecture—

THE WITNESS: There is a further basis . . . . When I spoke to Mr. Anderson on the 31st, I asked him about the fact that since the strike—since I understood that the strike was over and Local 11 electricians had gone back to work, I asked him if that would—how that would affect our status as employees. And he said that it would not, that they had not signed an agreement with the Local, and he did not even know if he was going to sign such an agreement.

When the above testimony is considered as a whole, it certainly cannot be said that Kelley "quite simply lied" or committed perjury. Kelley testified that it was his understanding that the collective-bargaining agreement had been backdated and he explained the basis for his "understanding" which did not appear to me to be incredible or unbelievable. Also, Kelley never stated in his testimony that he had actual evidence of the backdating of the agreement and therefore his testimony that he had not said that he did was true and not a lie.

Additionally, the Respondent in its brief alleges fabrication by Albert Kelley in his testimony concerning whether or not Cooley had requested a letter from the Employer stating that the Kelley's were employed as "temporary employees." At first Albert Kelley testified that Cooley had said that he wanted a letter "that said we were temporary employees of Anco." On cross-examination however Kelley was less sure of this testifying, "A letter of temporary employee—I do not—not sure if he said temporary completely, you know, but it was—he said you had to have a letter." The following testimony was given soon thereafter:

Q. I am trying to focus your attention on whether or not "temporary" was mentioned on the 13th of August. Did you or did your brother, John, raise any objection to Mr. Cooley's statement at that time?

A. It must have been "temporary employee" because there was some objection raised.

Q. What was the objection?

A. That we were not temporary employees.

Q. And who said that?

A. John.

Q. And when did he say that?

A. The 13th.

Q. The 13th?

A. Yes.

Q. Or the 31st?

A. Well, he said the 31st also.

Q. When did he first say it?

A. I am really not sure. I cannot—I think he said it on the 13th. I know he said it on the 31st. But I am not—I am not positive. I cannot give you a—

JUDGE KLEIMAN: Again, did Mr. Cooley use the words, "temporary employee," or did he just ask for a letter? Which, if you can recall? Or can you not remember?

THE WITNESS: I cannot recall that well right now. I cannot recall. I mean, I would not want to bet my life on it.

JUDGE KLEIMAN: Well, to the best of your recollection with regard to your reporting about a letter?

THE WITNESS: That we had to have a letter is—.

JUDGE KLEIMAN: So that he did not mention "temporary employee?"

THE WITNESS: Right, I am not sure about that. I cannot be positive about it.[57]

I do not consider the above to reflect that Albert Kelley sought to "fabricate" evidence. It appeared to me that Kelley desired to testify as to what had actually occurred as truthfully and as accurately as his memory could recollect.

Additionally, the events which occasioned the witness' testimony at the hearing had occurred more than a year previously and it is not surprising that there was some uncertainty and failure of recollected exactness as to dates and statements made during the course thereof.[58] And the Respondent offered no evidence itself to clarify or shed light on any of the occurrences, although it could well be supposed that, as to some of these events, the Respondent was in a better position to present evidence thereon and to clarify and complete the record than any of the other parties. This is not to say that the Respondent was obligated to assist the General Counsel in sustaining his burden of proof as to the allegations in the consolidated complaint, but the Respondent did have the responsibility of supporting its positions taken in this proceeding especially if the General Counsel has established a prima facie case.

As to Anderson's testimony, while he was unsure as to the exact dates of some of the events which occurred herein, i.e., the dates that the strike ended and the strikers returned to work, yet his testimony for the most part remains uncontradicted. Anderson was subpoenaed as a witness for the General Counsel, he did not volunteer to

[57] At this juncture in Albert Kelley's testimony, his brother John Kelley requested permission to ask a question. I denied the request explaining that, if I allowed him to do so, it would constitute improper procedure on my part. The Respondent asserts in its brief, "Respondent hopes that the Administrative Law Judge recalls that when John Kelley sought to intervene to save his brother's 'testimony,' he had to be denied." However, John Kelley appeared at the hearing on his own behalf, as a layman without formal legal training, and his request to ask a question at this point is reasonably subject to other interpretations besides that of "saving his brother's testimony." For example, it is not unusual for witnesses present at the hearing, and before they are called to the stand, to volunteer remarks or answers or ask a question out loud during the course of another witness' testimony, in a burst of enthusiasm to tell their own story or to provide an accurate and complete record of what occurred, being unable to control themselves or not realizing that this is improper. Besides, there is absolutely no evidence in the record to support the Respondent's contention that John Kelley had acted as he had in order to "save his brother's testimony."

[58] It is not unusual for witnesses, who may be generally believed, to give testimony that in part may be unclear or somewhat inconsistent because of the passage of time requiring the remembrance of things long past. See *Photo Drive Up*, 267 NLRB 329 (1983).

appear, and I perceive no actual reason or ulterior motive for him not to have told the truth under oath since no allegations of unfair labor practices were made herein against the Employer or are contained in the consolidated complaint.

On all the above considerations, and having also based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole,[59] I credit the testimony of John and Albert Kelley and Timothy Anderson, except where it is unclear, or exhibits doubt or a failure of recollection.[60]

In applying the legal principles enunciated by the above court and Board cases to the facts in the instant case it should first be noted that, at the conclusion of the economic strike, the Employer reinstated all the striking employees who wanted to return to work and the Respondent has not contended that the employees hired as permanent replacements during the strike deprived the returning strikers of their jobs. Moreover, since Anderson testified uncontradictedly that the Employer hired 11 electrician employees from June 12, 1981, when the economic strike began and until July 31, 1981, when it was over, it is a reasonable assumption, without evidence having been introduced to the contrary, that some, if not all, 9 of the remaining employees, excepting the Kelleys, were hired during the course of the strike and before it ended in late July 1983.[61] Therefore, there was no legal basis for the Respondent's demand that the Employer discharge all the permanent employees hired during the strike as replacements for the striking employees and hire, in their stead, referrals from the Respondent's hiring hall.[62]

Nor was there a contractual justification for the Respondent's repeated demands to discharge these permanently hired striker replacements. The "Return-To-Work Agreement" specifically provides that employees hired during the economic strike "may report to the appropriate Local Union hiring hall and may, if qualified under the regular procedures of the contractual dispatch procedure, register for dispatch from Local Union 11." There is no requirement for their discharge and use of the discretional "may" also does not require them to register for dispatch from the Respondent's hiring hall to maintain their jobs with the Employer. Thus the demand by the Respondent for the discharge of the permanent striker replacement employees on the grounds that they were actually "temporary employees," subject to replacement by referrals from the Respondent, has no contractual justification therefor.

In view of the above, and inasmuch as there was neither legal nor contractual justification for the Respondent's demands, from mid-August through December 1981, that the employees who had been hired during the economic strike as permanent replacements for striking employees be replaced by union referrals, the Respondent thereby restrained employees in violation of Section 8(b)(1)(A) of the Act, and attempted to cause the Employer to discriminate against employees, i.e., to encourage membership in the Respondent Union, in violation of Section 8(b)(2) of the Act.[63] Moreover, the Respondent's dispatch of referrals in mid-August through December 1981, in an attempt to replace these permanent employees, likewise lacked legal or contractual justification and thereby also violated Section 8(b)(2) and (1)(A) of the Act.[64]

With regard to John and Albert Kelley, the Charging Parties herein, the evidence shows that they were actually hired after the strike ended and the striking employees had returned to work. While Anderson insisted that they were hired prior to the end of the strike, John Kelley's own testimony contradicts this as noted above. Besides, Anderson admitted to a lack of sureness and recall as to the pertinent dates of events which transpired and, although I generally credit his testimony, I cannot accept or rely on his recollection as to this. The 1981–1983 collective-bargaining agreement has an effective date of July 22, 1981.[65] The "Return-to-Work Agreement" is dated July 21, 1981.[66] The Kelleys were hired on July 31, 1981. Thus I must conclude that the bargaining agreement was in effect prior to the Kelleys being hired. This being so, the Kelleys were "temporary employees" as provided for in sections 4.06 and 4.07 of the collective-bargaining agreement, and subject to replacement thereunder "as soon as registered applicants for employment are available under the Referral Procedure."[67]

---

[59] *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976). Also see *Cas Walker's Cash*, 249 NLRB 316 (1980).

[60] As Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950),

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

[61] Anderson's testimony, that the Employer's operations had "virtually ceased" when the strike began on June 12, 1981, because its employees joined the economic strike and that the Employer was compelled to seek and hire employees to replace the strikers in order to maintain its business, would support this assumption.

[62] *NLRB v. Mackay Radio & Telegraph Co.*, supra; *Bio-Science Laboratories*, supra, 209 NLRB 796 (1974).

[63] *Wismer & Becker, Contracting Engineers*, supra, 228 NLRB 779 (1977); *Bio-Science Laboratories*, supra; *Rubber Workers Local 457 (Kentile, Inc.)*, supra.

[64] Should the Respondent assert that the issue of the employees hired as permanent replacements for the striking employees during the strike was not fully tried or considered by it, because the thrust of the General Counsel's case was directed towards the allegations in the consolidated complaint regarding Charging Parties John and Albert Kelley, I note that the consolidated complaint specifically refers to the Kelleys and "other permanent replacements hired by the Employer during the economic strike," and in the testimony given by the General Counsel's witnesses, the facts and circumstances testified to were sufficient to establish a prima facie case of violations of the Act as to these employees. The Respondent totally ignored its obligation thereafter to prove that its actions herein were justified and not violative of the Act. The Respondent called no witnesses and, except for its introduction of the two agreements referred to above, the bargaining agreement as a joint exhibit, and the "Return-to-Work Agreement" as its own exhibit, it offered no other evidence on its own behalf.

[65] No evidence was offered to show that this agreement has been backdated or was not signed on its effective date July 22, 1981.

[66] There is no evidence in the record as to when this agreement was ratified by the Respondent's membership, as required by its terms.

[67] While Anderson testified that in and around this time the Respondent was unable to fill all the requests by the Employer for electrician referrals from its hiring hall, this would not affect the above.

Therefore, when the Respondent demanded that John and Albert Kelley be replaced by referrals from its hiring hall and actually sent union referrals to the Employer's jobsites to accomplish this end, it did not violate the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Employer described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

In light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), I conclude that a broad remedial order is inappropriate since it has not been shown that the Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental right. Accordingly, I recommend the use of the narrow injunctive language "in any like or related manner" in the recommended Order.

CONCLUSIONS OF LAW

1. Anco Electrical Contractors, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, International Brotherhood of Electrical Workers, Local Union No. 11, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By demanding that the Employer discharge or otherwise discriminate against its employees, and by dispatching union referrals to accomplish this purpose, the Respondent has attempted to cause the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act, and thereby has violated Section 8(b)(2) of the Act.

4. By restraining and coercing employees of the Employer in the exercise of rights guaranteed in Section 7 of the Act, the Respondent Union has violated Section 8(b)(1)(A) of the Act.

5. The Respondent has committed no unfair labor practices in connection with employees John and Albert Kelley.

6. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order is omitted from publication.]

Glass, Pottery, Plastic and Allied Workers, Local Union No. 185, affiliated with Glass, Pottery, Plastic and Allied Workers, AFL–CIO–CLC (Liberty Glass Company) ***and*** **Steven L. Andrew, Attorney**

Glass, Pottery, Plastic and Allied Workers, Local Union No. 128, affiliated with Glass, Pottery, Plastic and Allied Workers, AFL–CIO–CLC (Liberty Glass Company) ***and*** **Stephen L. Andrew, Attorney.** Cases 16–CB–2164–1, 16–CB–2172, 16–CB–2181, 16–CB–2164–2, and 16–CB–2177

12 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 6 October 1983 Administrative Law Judge William A. Gershuny issued the attached decision. The Respondents and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and, for the reason stated below, has decided to affirm the judge's rulings, findings, and conclusions of law, but not to adopt his recommended Order.

Recently, in *Machinists Lodge 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), the Board overruled the plurality decision in *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982),[1] which had found that a 30-day restriction on a union member's right to resign was reasonable, and held, instead, in accord with the views expressed by Member Hunter and former Chairman Van de Water in their concurring opinion in *Dalmo Victor*, that a union may not lawfully restrict the right of its members to resign or otherwise refrain from protected Section 7 activities for any period of time. Applying the *Neufeld Porsche-Audi* standard to the instant case, we conclude that article 26, section 10, of the Respondents' constitution is unlawful as it imposes a restriction on a member's right to resign by prohibiting resignations during a strike. For this reason, we find, as did the judge, that the fines imposed on those members who tendered their resignations from the Respondents and returned to work during the strike violated Section 8(b)(1)(A) of the Act.[2]

We also agree with the General Counsel that the Respondents further violated Section 8(b)(1)(A) by threatening those employees who resigned with fines, suspensions, expulsions, and the filing of intraunion charges and by threatening to fine and blackball employee Dennis Houser after he tendered his resignation from the Union and to have his operator's card stricken if he returned to work during the strike. While the threats to Houser were clearly unlawful as they occurred after he had resigned from the Union, we note that the threats to blackball Houser and to have his operator's card stricken would have been unlawful even if he had been a member when the threats were made because the threats, if implemented, would adversely affect Houser's employment relationship.

REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order them to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act, including refunding to those persons named in paragraph 2(b) of our Order any money they may have paid as a result of the fines imposed against them, with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

In addition, we shall order the Respondent to cease and desist from maintaining the restriction on resignations found invalid and to expunge the provision from its governing documents. *Engineers & Scientists Guild (Lockheed-California)*, 268 NLRB 311 (1983). In so doing, we note that we are not ordering that the parent International, which is not a party to this proceeding, expunge the offending provision from its constitution. Rather, we are only ordering the Respondents to expunge the provision from their governing documents, including such documents of the International that the Respondents may have incorporated by reference and adopted as their own.[3]

[1] The plurality decision expressed the views of Member Zimmerman and former Member Fanning.

[2] Member Zimmerman agrees with the result reached by his colleagues here, but does so for the reasons stated in the *Dalmo Victor* plurality decision to which he continues to adhere. See his dissenting opinion in *Neufeld Porsche-Audi*.

[3] While the complaint in this case specifically alleges the maintenance of the provision as being unlawful, the absence of such an allegation would have no bearing on the exercise by this Board of its discretion to fashion appropriate remedies for the violations found.

Member Dennis joins her colleagues in ordering the Respondents to cease and desist from maintaining the restriction on resignations because the complaint alleges unlawful maintenance of the constitutional provision and the record supports that allegation. Compare *Machinists Lodge 1414 (Neufeld Porsche-Audi)*, above at fn. 22, in which the complaint contained no such allegation. As in *Neufeld Porsche-Audi*, however, Member Dennis considers it impracticable to order the Respondent Local Unions to "expunge" a provision appearing in the constitution of the parent

Continued

ORDER

The National Labor Relations Board orders that the Respondents, Glass, Pottery, Plastic and Allied Workers, Local Union No. 185, affiliated with Glass, Pottery, Plastic and Allied Workers, AFL–CIO–CLC and Glass, Pottery, Plastic and Allied Workers, Local Union No. 128, affiliated with Glass, Pottery, Plastic and Allied Workers, AFL–CIO–CLC, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in their governing documents article 26, section 10, of the constitution of the International Union, which reads as follows:

> No member may resign from his local union of the International Union during a strike. All attempted resignations shall become effective thirty (30) days from the last day of the strike.

(b) Restraining or coercing employees who have resigned from, and are no longer members of the Respondents in the exercise of the rights guaranteed them by Section 7 of the Act by imposing court-collectible fines on the employees because of their postresignation conduct in working at Liberty Glass Company during the strike that began about 1 April 1983.

(c) Threatening employees who have resigned from the Respondents with fines, suspensions, expulsions, or the filing of intraunion charges and threatening them with being blackballed or having their operators' card stricken if they return to work during a strike.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from their governing documents article 26, section 10, of the International Union's constitution as described above.

(b) Rescind the fines levied against the following persons because of their postresignation work for Liberty Glass Company during the strike that began about 1 April 1983 and refund to them any money they may have paid as a result of the fines, with interest:

Local Union 128	*Local Union 185*
Earl Hankes	Wandra J. Martin
Bobby Hurt Jr.	Ramona Faye Hurt
Dennis Houser	Jackie Peek
James Norman Cook	Ina Rice
Roy Matney	Mary Edwards
Edwin McKean	Leon Ashlock
Vernie Dodson	Jerry Shipman

(c) Post at their business offices and meeting halls copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director forthwith signed copies of the notice for posting by Liberty Glass Company, if the Company is willing.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

International, which is not a party to this proceeding. Instead, Member Dennis would order the Respondents to notify their members in writing that they will not enforce the restriction on resignations.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our governing documents article 26, section 10, of the constitution of the International Union, which reads as follows:

> No member may resign from his local union of the International Union during a strike. All attempted resignations shall become effective thirty (30) days from the last day of the strike.

WE WILL NOT restrain or coerce employees who have resigned from, and are no longer members of, our organizations in the exercise of the rights guaranteed them by Section 7 of the Act by imposing court—collectible fines on them because of their postresignation conduct in working at Liberty Glass Company during the strike that began about 1 April 1983.

WE WILL NOT threaten employees who have resigned from our organizations with fines, suspen-

sions, expulsion, or the filing of intraunion charges nor will we threaten to blackball employees or have their operators cards stricken for returning to work during a strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL expunge from our governing documents article 26, section 10, of the International Union's constitution as described above.

WE WILL rescind the fines levied against the following persons because of their postresignation work for Liberty Glass Company during the strike that began about 1 April 1983 and refund to them any money they may have paid as a result of the fines, plus interest:

Local Union 128	*Local Union 185*
Earl Hankes	Wandra J. Martin
Bobby Hurt Jr.	Ramona Faye Hurt
Dennis Houser	Jackie Peek
James Norman Cook	Ina Rice
Roy Matney	Mary Edwards
Edwin McKean	Leon Ashlock
Vernie Dodson	Jerry Shipman

GLASS, POTTERY, PLASTIC AND ALLIED WORKERS, LOCAL UNION NO. 185, AFFILIATED WITH GLASS, POTTERY, PLASTIC AND ALLIED WORKERS, AFL–CIO–CLC

GLASS, POTTERY, PLASTIC AND ALLIED WORKERS, LOCAL UNION NO. 128, AFFILIATED WITH GLASS, POTTERY, PLASTIC AND ALLIED WORKERS, AFL–CIO–CLC

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was conducted in Tulsa, Oklahoma, on August 2, 1983, on consolidated complaints alleging violations of Section 8(b)(1)(A) based on Respondents' enforcement of a provision of the International Union's constitution which prohibits resignation from membership in local unions during a strike.

On the entire record, including my observation of witness demeanor, I hereby make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION AND LABOR ORGANIZATION

The complaints allege, the answers, as amended, admit, and I find that Liberty Glass Co. is an employer subject to the Act and that Respondents are labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

The relevant facts are undisputed.

For some time prior to 1983, Local Unions 128 and 185 have been the bargaining representatives of employees at Liberty Glass' Sapulpa, Oklahoma plant. Labor agreements covering these employees have made union membership a condition of employment. At the time of hiring, Liberty Glass routinely obtained employee signatures on union membership applications and dues-checkoff authorizations which, by their terms, obligated employees to abide by all union rules and laws.

At all relevant times, the constitution of the International Union provided, in article 26, section 6, that members crossing a picket line during an authorized strike might be fined, suspended, or expelled from membership and, in article 26, section 10, that

> No member may resign from his local union of the International Union during a strike. All attempted resignations shall become effective thirty (30) days from the last day of the strike.

All members were informed of the existence of such provisions upon their adoption in 1981; copies of the constitution were posted and made available to all members; and members were reminded of the provisions at union meetings conducted on March 30, 1983.

At the March 30 meetings, the membership of each local union unanimously voted to reject the Company's final contract proposal and to engage in a strike. That strike commenced on April 1 and was still continuing at the time of the hearing in this case, August 2.

During that strike, 14 members in good standing submitted their resignations in writing to their local union:

Local Union 128	*Local Union 185*
*Earl Hankes	Wandra J. Martin
**Bobby Hurt, Jr.	*Ramona Faye Hurt
*Dennis Houser	*Jackie Peek
*James Norman Cook	Ina Rice
*Roy Matney	*Mary Edwards
*Edwin McKean	*Leon Ashlock
*/**Vernie Dodson	*Jerry Shipman

* Participated in picketing
** On layoff on March 30

Thereafter, each crossed the picket line and returned to work; was informed by the local union that, under article 26, section 10 of the constitution the resignation would not become effective until 30 days from the last day of the strike; was charged by the local union with a violation of article 26, section 6, which prohibits a member from crossing a picket line; was found guilty following a hearing and fined $600 and $25 per day if a member of Local Union 185 and $1000 and $25 per day if a member of Local Union 128. At the hearing all parties, through counsel, stipulated that there are no issues in these cases as to the timeliness or regularity of either the employee resignations or the actions of the local unions in response to the resignations.

Prior to the strike, all members were covered under a union life insurance program, the premium for which was $1 per month deducted from regular union dues. All members, *including* the 14 who are the subject of this proceeding, continue to be covered under the program after commencement of the strike, with the International Union paying all such premiums. There is no evidence that any of the 14 members have received any benefit payments under such program since April 1, 1983.

On or shortly after April 10, when he sent his initial resignation telegram, and again on or shortly after April 16, when he sent a second resignation telegram, member Houser was visited at his home by local union officials who first inquired whether he intended to return to work and then informed him that he would be fined and blackballed by the Union if he did so during pendency of the strike.

In *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982), a divided Board struck down as an unlawful restriction of a member's right, under Section 7 of the Act, to refrain from union or other concerted activity, a union rule prohibiting resignations during the entire course of a strike or within 14 days preceding its commencement. Members Fanning and Zimmerman, balancing the statutory right of the members and that the union under the proviso to Section 8(b)(1)(A), were of the opinion that 30 days was a reasonable restriction on such right of resignation, while Chairman Van de Water and Member Hunter were of the opinion that the statutory right of a member was paramount and that any delay in the effective date of a resignation was unlawful.

Under either view, the provision here is unlawful, for it restricts the effective date of any resignation to the duration of an authorized strike (however long) plus 30 days. Nor are there present here any extraordinary circumstances which would compel a reexamination of *Dalmo Victor*, even if I had authority to do so. Participation in a unanimous strike vote or in picketing, both considered by the Board in *Dalmo Victor*, are commonplace occurrences. And the action of the International Union in paying insurance premiums of its members puts it in the position of a volunteer and, in any event, is an irrelevant consideration in the issue of whether the constitutional limitation on resignations conflicts with the Act.

[Recommended Order omitted from publication.]

Heck's, Inc. *and* Teamsters, Chauffeurs & Helpers Local Union No. 175, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Food Store Employees Union, Local 347, United Food and Commercial Workers International Union, AFL–CIO–CLC. Cases 9–CA–20275, 9–CA–20375, and 9–CA–20437

12 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 21 May 1984 Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Heck's, Inc., Nitro and Cross Lanes, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

MARION C. LADWIG, Administrative Law Judge. These cases were tried at Charleston, West Virginia, February 14, 1984.[1] The Teamsters Local 175 charge was filed October 21 and the UFCW Local 347 charges were filed November 21 and December 7, complaints were issued December 5 and January 5, orders consolidating the cases were issued January 11 and 17, and consolidated amended complaints were issued January 17 and 19.

The Teamsters and UFCW were engaged in organizing campaigns among warehousemen and secretaries at the Company's warehouse and offices at Nitro, and the UFCW among store employees at Cross Lanes, West Virginia. The primary issues are whether the Company, the Respondent, (a) coercively interrogated an employee and discharged her because of her union activity, (b) maintained an invalid no-distribution rule, (c) engaged in unlawful surveillance, (d) coerced employees by stating in a letter that "Heck's has an absolute right to see the union cards" they sign, and (e) engaged in other coercive conduct, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Company, and the Teamsters, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a West Virginia corporation, operates retail stores at various locations including Cross Lanes, West Virginia, annually deriving over $500,000 in gross revenue and receiving at its Nitro, West Virginia warehouse goods valued over $50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Teamsters Local 175 and UFCW Local 347 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Interrogation and Discharge of UFCW Member*

1. Her reemployment

Since April 1982, Roxanne Jividen has been a UFCW member with a regular part-time job at Kroger's Cross Lanes store. She works 15 to 20 hours a week, usually in the early morning from 5 to 10 a.m. or 4 to 9 a.m. (Tr. 48.)

She had previously worked twice as a cashier at the Company's nonunion Cross Lanes store (about a mile from the Kroger store), for 7 months in 1981 and during the 1982 Christmas season. Store Manager David Romeo, who hired her each of those times, was aware that she was working at the unionized Kroger store because he recommended her for the job (Tr. 9).

On September 1, Manager Romeo again hired her to work as a cashier during the 1983 Christmas season, after having seen her at the store and asked if she was interested in coming to work (Tr. 38). He admittedly hired her "out of her working ability" (Tr. 22). He asked her if she wanted to work mornings or evenings. She requested straight evenings, but told him that her schedule at Kroger's could be worked around any given week, and he said "Fine." (Tr. 39.) (Jividen's Kroger supervisor had assured her that any rescheduling that was needed for her second job could be done.) Romeo admitted at the trial that he told her she was being hired primarily for the night shift and that she "probably did" tell him

[1] All dates are from September 1983 until April 1984 unless otherwise stated.

"that if scheduling problems arose, she had some flexibility at Kroger" (Tr. 16).

From September 1 to October 27, when Manager Romeo summarily discharged Jividen purportedly for "scheduling reasons," he admittedly had no discussions with her about any possible scheduling conflicts between her two part-time jobs (Tr. 13–14). The only conflict that had arisen was on one of the first three Sundays in September (Tr. 12), when Kroger assigned her to work until 1 p.m., the same time the company had scheduled her to begin working that day. There was no need for her to ask her Kroger supervisor for permission to leave work a few minutes early because the day before she asked Assistant Manager Asaad Karam if she could be 15 minutes late and she said, "Sure, no problem." (Tr. 41, 50–51.) She clocked in at 1:15 p.m., as rescheduled. She never made any other requests to have her schedule changed (Tr. 47). Except for one time when she came in 30 minutes early at his request, Romeo never told her he wanted to schedule her for longer or different hours (Tr. 27, 47). She was working about 28 hours a week (Tr. 52).

2. The interrogation

Although Manager Romeo was aware that Jividen was a member of UFCW when he rehired her September 1 (Tr. 16), he admittedly was not aware of any UFCW organizing at the store at the time (Tr. 28).

On September 20, the day after UFCW began handbilling at the store, Assistant Manager Karam held meetings to explain the Company's opposition to a union. In the meeting that Jividen attended (as she credibly testified), Karam stated that there had never been and never would be a union at that store (Tr. 42). It is undisputed, however, that Karam also stated in the meeting that the Company "will use legal ways not to unionize the store" (Tr. 74).

At this September 20 meeting (about 5 weeks before Jividen's sudden discharge without any warning), Assistant Manager Karam singled her out, requiring her to take a stand on UFCW, which he was vigorously opposing in the meeting. As credibly testified by Jividen (who impressed me as an honest, forthright witness by her demeanor on the stand), "Mr. Karam asked me, 'Roxanne, what do you think of Kroger's union?' And I said, 'I'm very satisfied with it'" (Tr. 43). As credibly recalled by sporting goods clerk Richard Corey (who attended the same meeting), Jividen also added that "She thought the benefits were good" (Tr. 30). I discredit Karam's denial that he asked Jividen how she liked Kroger's union (Tr. 76). (He appeared on the stand to be less than candid.)

Assistant Manager Karam was clearly acting as the Company's spokesman when calling the meeting of employees and explaining the Company's strong opposition to a union at the store. By asking Jividen what she thought of Kroger's union (her own union, which represented her at the neighboring Kroger store), he was obviously seeking information on which the Company could take action against her. He expressed no legitimate purpose for asking the question and expressed no assurances to her against reprisal. He was forcing her, in front of the other assembled employees, to either join him in opposing UFCW to retain the Company's goodwill, or risk taking a stand against the Company's position. She took the risk and answered truthfully that she was pleased with UFCW and the union benefits. About 5 weeks later, she was summarily discharged.

Although Karam's statement in the meeting about the Company using "legal ways" to keep out a union may have tended to lessen the impact of his warning that there would never be a union in that store, I find that it would not overcome the tendency of his interrogation of Jividen to instill fear of reprisal, discouraging support of UFCW's organizing drive at the store. Under all the circumstances, including her summary discharge, I find that the interrogation reasonably tended to coerce the employees in the exercise of their Section 7 rights.

3. Her discharge

On October 20, Store Manger Romeo called another employee meeting and told the employees not to be misled by grocery store employees—that a grocery store employee might be making $8 an hour, but "we are a completely different business" (Tr. 16–17). He testified that he was not referring to any one individual, although he acknowledged that Jividen was the only store employee who also worked at an organized grocery store and that he decided to discharge her "right after that."

About 9:25 p.m., October 27, Romeo called employee Corey to relieve Jividen at the cashier's box and service desk, invited her to his office, took out some graphs, and commented that "Heck's is changing" and that "it costs so much to . . . train an employee" (Tr. 44). As Jividen credibly testified,

> A. . . . the graph showed how much it would cost to train an employee. And he said, "Due to this and your inflexibility in working hours, I'm going to have to terminate you."
>
> Q. Did you say anything?
>
> A. I was flabbergasted. I . . . said, "Mr. Romeo, I know this doesn't have to do with the inflexibility of my working hours. It has to do with the union."
>
> Q. And what did he say?
>
> A. He didn't say yes or no. He just said, "I'm sorry, this is the reason for your termination."

(Tr. 45.) Employee Corey overheard Jividen asking if it was because she was in the union, but could not hear Romeo's response (Tr. 31). Romeo claimed that he told her that was not the reason (Tr. 23).

About 2 days later, on Saturday, October 29, employee Corey talked to Department Head Colleen Fisher about Jividen's discharge (Tr. 32, 35). (Although Fisher was the immediate supervisor over the service desk where Jividen worked, Fisher admittedly was not aware at the time that the store manager was discharging Jividen (Tr. 70–71).) Corey had heard in the store that Jividen was fired because of inflexibility in scheduling and told Fisher he thought this was the reason. As Corey (a credible witness) testified, Fisher said, "No, that she was running her mouth about the union." (I discredit Fisher's denial that she made this statement.)

The supervisor's statement that Jividen was not discharged because of inflexibility in her working hours but because she engaged in union activity was clearly coercive. I therefore find that the statement violated Section 8(a)(1).

4. The Company's defenses

Store Manager Romeo testified that Jividen "was terminated on scheduling reasons" (Tr. 12). He explained that under new programs that went into effect since Chairman Isaacs became the chief executive officer early in 1983, the goal was to work with few employees and "save on training costs," and "it was of upmost importance that we had flexibility" in scheduling the employees' (Tr. 11, 19–20). The number of employees hired for the 1983 Christmas season was "somewhere around" 38 or 39, as compared to "Last year [when] I think we had as many as 45" (Tr. 21).

He testified that Jividen had come in 15 minutes late on a Sunday (sometime before September 25), that "She mentioned that she had commitments at Kroger's," and that this "started the mind thinking" (Tr. 12). "I started thinking then that . . . later on down the road as we got into the Christmas season, our store would probably change—and they did change, November 6 [10 days after her discharge] we started opening at 12 noon on Sunday" (working from 12 to 6 p.m. instead of 1 to 7 p.m.) (Tr. 12). He further claimed that "It seemed to me that Kroger's was going to be her primary source of work," and "I felt that Kroger's was her main job and that she would as far as flexibility goes with my work schedule, that she would be following Kroger's schedule rather than Heck's" (Tr. 14). When asked by company counsel if Jividen did "give Heck's priority over her other job," Romeo answered (Tr. 22)

> A. I would say no.
>
> Q. All right, can you be specific on that?
>
> A. The only way that I could be specific was . . . the day that she said she would be late due to Kroger. That would basically be it.

(He did not impress me as being a candid witness.)

In its brief, the Company contends that "Mr. Romeo testified that he had difficulty scheduling her around her schedule at Kroger [evidently referring to the one Sunday in September]. Ms. Jividen herself admitted that Kroger was her primary employer [referring to her year-round employment, working part time 15 or 20 hours a week]. Thus, one must conclude that when a scheduling conflict occurred it would be resolved in favor of Kroger." The Company also argues that she "had a permanent employment with Kroger some five minutes away," that this "was her primary employer," and that "one would presume" that her secondary employment at Heck's "would have to take a back seat to her employment at Kroger. When it appeared obvious to the manager, David Romeo, that Ms. Jividen's schedule at Kroger was such that she would not be able to fit in with the flexibility required of Christmas help with Heck's—she was terminated."

I find that these are frivoulous defenses. There was no conflict between her usual early morning schedule at Kroger and her night schedule at Heck's. Her supervisor at Kroger had assured her that any rescheduling that was needed for her second job at Heck's could be done, and it is undisputed that she told Romeo when he hired her that her schedule at Kroger's could be worked around any given week. (Romeo admitted that she probably did tell him that if scheduling problems arose, she had some flexibility at Kroger.) The only conflict that ever arose was shortly after she was hired, when she was scheduled to work on both jobs on a Sunday, getting off at 1 p.m. at Kroger and starting at 1 p.m. at Heck's. Assistant Manager Karam rescheduled her to start at 1:15, telling her "no problem." She readily agreed the one time Romeo asked her to come in 30 minutes early.

Store Manager Romeo admitted that he never had any complaints from other employees about Jividen's work schedule (Tr. 16), and that he never discussed possible scheduling conflicts with her before he decided to terminate her (Tr. 13–14). Although he testified that he had anticipated a scheduling change during the Christmas season, and one did occur (10 days after he discharge Jividen), that involved only a change in the Sunday working hours from 1–7 to 12–6. Her flexible Kroger schedule could have accommodated that change, even if she were scheduled to work another Sunday on both jobs.

He had sought her out to see if she would work again for him, and he had hired her because of her working ability. Undoubtedly if any difficulty in scheduling her had arisen or was anticipated, he would have discussed the problem with her.

There was obviously no scheduling problem. The only other reason he mentioned for the discharge, the cost of training an employee, was clearly not applicable to her; she was fully trained, having worked on the job twice before.

5. Finding of discrimination

Store Manager Romeo was not concerned about Jividen's membership in UFCW until that union began organizing at his store. The next day after the handbilling began, Romeo's assistant manager unlawfully interrogated her in an employee meeting about what she thought about her union at Kroger. Despite the Company's vigorous opposition to the store being unionized, Jividen answered that she was very satisfied with the Kroger union and that she thought the benfits were good. A month later, Romeo called another meeting and told the employees not to be misled by grocery store employees about possible union wages at the store. (Jividen was the only employee who also worked at an organized grocery store.) Seven days later, Romeo suddenly discharged her near quitting time, without any prior discussion or warning. He claimed the reasons were high training costs and her "inflexibility in working hours," although she was already trained, and her working hours were flexible by prior arrangement at Kroger. Two days later, a supervisor advised another employee that Jividen was not discharged because of inflexibility in working hours, but because "she was running her mouth about the union."

I find that the General Counsel has made a prima facie showing that Jividen's union activity was a motivating factor in the Company's decision to discharge her. Having found the Company's defenses to be frivolous, I find that the purported reasons were a mere pretext and that the Company discriminatorily discharged her because of her union activity, in violation of Section 8(a)(3) and (1).

B. *Overly Broad No-Distribution Rule*

The Company's "Heck's and You" employee manual, which was last revised in September 1980, was issued to all employees at the Nitro warehouse and in all its stores (G.C. Exh. 3; Tr. 63). Under "Rules and Discipline Procedure" (at 21–23), the manual provides that "Employees will be subject to disciplinary action for any of the following [42] offenses." Rule 13 prescribes a written warning, 1 week off, and discharge for the first, second, and third offenses and forbids (at 21)

> 13. Distributing written or printed matter of any description on company premises unless approved by Management.

At the Cross Lanes store, Assistant Manager Karam read this rule in the employee meetings he held September 20, the day after union handbilling began.

The General Counsel contends that this rule is overly broad and illegal on its face. The Company contends that there is no indication that the rule related to the union movement at all and, ignoring Karam's admission that he read the rule to employees after the union organizing began, argues that "clear testimony of [Store Manager] Romeo establishes that this Rule was not enforced in any way." The Company also contend that unless the rule is issued to limit or disrupt Section 7 rights, the rule should not be declared invalid.

I agree with the General Counsel. In one of the cases he cites, *Olympic Villas*, 241 NLRB 358, 363 (1979), the employee manual prescribed a penalty "up to and including discharge" for "distribution of literature of any kind" anywhere on the premises "without the general manager's approval." There, the employer "made no effort whatsoever to inform its employees either before or during the union campaign that the rule was not in effect," the rule remained to be invoked anytime the employer chose to do so, "By the mere existence of the rule the employees remained under a continuous threat" that the employer would invoke the rule, and "Thus, the rule constitutes interference with the organizational rights of employees that Section 8(a)(1) of the Act condemns."

Similarly here, I find that by maintaining the overly broad no-distribution rule, prohibiting the distribution of any written matter on company premises unless approved by management, the Company coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1).

C. *Alleged Surveillance*

About 4:55 p.m., October 21, several UFCW representatives went to the company offices at the warehouse to handbill the secretaries. A member of management came out and requested them not to block traffic. A few minutes later, Business Representatives Claude Roster and Sterling Ball went about a quarter mile away, to the entrance of the complex, and began handbilling at the intersection. On instructions from Company President Ray Darnell, who was in the parking lot, Personnel Director Henry Babcock drove Darnell's car (a sable-colored Cadillac) to the intersection to determine the reason for the traffic jam. After observing the efforts to handbill employees as they were leaving, Babcock drove into the intersection, turned around and waited 3 or 4 minutes to get back into the traffic, and returned to the parking lot.

When Bobcock reported to President Darnell that there was no accident, that handbilling was slowing down the traffic, Darnell asked him to go back and request the union representatives not to block the traffic so badly. The second time, however, Babcock found that the traffic was moving faster and did not relay the request. He again turned around, waited a short time for the traffic to let him through, and returned to the parking lot. (Tr. 64–67.)

The General Counsel contends that "Babcock's only purpose in driving out onto the road in Respondent's president's automobile was not only to observe the handbilling but to signal employees by the use of a conspicuous automobile owned by Respondent's president, that he was there to observe their activity." To the contrary, however, I credit Babcock's testimony that he went there the first time to determine the reason for the traffic jam, and the second time to ask the organizers not to obstruct traffic so much.

I therefore agree with the Company that it was not engaged in surveillance of its employees' union activities, and find that this allegation must be dismissed.

D. *Coercive Letter to Employees*

1. Contested language and contentions of parties

About October 10, the Company distributed a letter (G.C. Exhs. 2A and 2B) to employees at the Cross Lanes store and the warehouse. The one-page letter (written in all capitals) was signed by Company Chairman Russell Isaacs. The letter opposed the signing of union cards, stating toward the end "We feel that a union would be of no advantage to any of us and it would hurt the business that we all depend on for our livelihood," and "if anyone should come to you and ask you to sign a union authorization card, we are asking you to refuse to sign it."

The middle paragraph of the letter (the capitalization retained in only the last sentence for emphasis) read

> These cards are often obtained by unions by making false statements or misrepresentations. These cards could be used as evidence with the National Labor Relations Board to get into a company without an election. The Union is telling you that Heck's will never see the union cards you sign. *This is just not true.* In past cases with this Union we have seen these cards which were shown to us by the NLRB where the Union claims bargaining rights without

an election. HECK'S HAS AN ABSOLUTE RIGHT TO SEE THE UNION CARDS.

In his brief, the General Counsel "submits that not only is this statement inaccurate but it also is incomplete and a misstatement of applicable Board law." The Teamsters' brief argues that "The statement, 'HECK'S HAS AN ABSOLUTE RIGHT TO SEE THE UNION CARDS,' is manifestly false and is presented to its employees to make them believe that the identity of union supporters and members would be made known to Mr. Isaacs, and appropriate reprisals would be taken."

The Company argues in its brief that when the sentence, "Heck's has an absolute right to see the union cards," is "read in the context of the entire paragraph, it is obvious that what Mr. Isaacs is saying in that particular sentence is that where the union is demanding bargaining rights without an election, Heck's has the right to see the cards." I disagree. That is a paraphrase of two preceding sentences, "These cards could be used as evidence with the National Labor Relations Board to get into a company without an election" and "In past cases with this Union we have seen these cards which were shown to us by the NLRB where the union claims bargaining rights without an election." It is clearly not the meaning of the last, unequivocal statement, that Heck's "has" the "absolute" right to see the union cards.

Even if employees could be expected to ignore the clear, plain message in the unqualified statement, "Heck's has an absolute right to see the union cards," and to analyze the whole paragraph to derive some limited meaning, this added sentence would still place the confidentiality of their cardsigning in jeopardy. Thus the company chairman asserts that "The Union is telling you that Heck's will never see the union cards you sign," and makes three responses. The first is "*This is just not true.*" The second is that "In past cases with this Union we have seen these cards which were shown to us by the NLRB where the Union claims bargaining rights without an election." Those are complete responses to the purported union contention that the Company "will never see the union cards you sign." But then the chairman adds a third response—without making any reference to the right the Company "had" in past cases to see the cards, or to the right it "would have" if the Union claimed bargaining rights without an election. Claiming a present, unqualified right to see the cards, he adds that "Heck's *has* an *absolute* right to see the union cards" (emphasis added).

2. Concluding findings

It is well recognized that employees would be coerced or "chilled" in the exercise of their Section 7 right to sign union authorization cards if they knew that the employer had the absolute right to see the cards.

In denying an employer access to union authorization cards under the Freedom of Information Act, 5 U.S.C. § 552, the court held in *Committee on Masonic Homes*, 556 F.2d 214, 221 (3d Cir. 1977) (footnotes omitted)

> [I]t is entirely plausible that employees would be "chilled" when asked to sign a union card if they knew the employer could see who signed. . . . To order disclosure here would effectively do away with union cards as they are used now. We need only consider whether employees would be likely to sign a prominently displayed notice at work, "Sign up for the union here. Organize for better working conditions and higher wages." Solicitation of authorization cards plays a vital role in organizational campaigns, and we cannot envision a workable substitute.
>
> Furthermore, union elections must be conducted by secret ballot. Whatever reasons and policies lie behind that would be directly undercut by forcing employees to acknowledge in public their support of the union, in order to be given the right to vote in secret for the union.

After quoting this language in *Pacific Molasses Co.*, 577 F.2d 1172, 1182 (5th Cir. 1978), the court observed

> We agree with the Third Circuit, and feel that the Freedom of Information Act does not compel disclosure of these cards. . . . We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information. The inevitable result of the availability of this information would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the NLRA and, for all intents and purposes, would make meaningless those provisions . . . which guarantee secrecy in union elections.

In *Madeira Nursing Center*, 615 F.2d 728, 730–731 (6th Cir. 1980), the court cited *Masonic Homes* and *Pacific Molasses* and found

> Both the 3rd and 5th Circuits have held that union authorization cards are not discoverable under the Act. . . .
>
> . . . .
>
> When an employee signs an authorization card during the initial phase of union organization, he expresses a personal decision to seek the support of a union in future dealings with his employer. Since the union organization of a company may take the form of a protracted and bitter struggle over employee loyalties, an employee may be amply justified in wishing to protect his prounion declaration from employer scrutiny.
>
> . . . .
>
> Appellant insists that an employee can have no expectation of confidentiality when he signs a card. This contention is apparently based on the fact that a union which holds authorizations from the majority of a bargaining unit may bypass the election process by submitting its authorization cards directly to the employer. Appellant's argument ignores an important distinction. An employee may reasonably feel less vulnerable after he knows his union is likely to prevail than at the outset of an organization campaign when the ultimate result remains un-

> certain. Indeed, it is in such a case as this one, where the defeated Union may be unable to give the support anticipated by its adherents, that employees who sign authorization cards could be most justified in seeking to preserve their anonymity.

Several cases involve alleged coercion when an employer refers to this anonymity of cardsigning being lost when a union seeks recognition without an election. In *NLRB v. Finesilver Mfg. Co.*, 400 F.2d 644, 645–646 (5th Cir. 1968), the employer posted a notice, stating that "The union says the signing of cards will be confidential," but the truth is that "Any employee who signs a card for a union may be called upon to testify in open court under a subpoena," and commenting that "The best way to avoid this is to stay away from the union meetings, and then you can't be forced to sign cards." The court observed that "we see no reason for informing employees that they might be required to testify in open court other than to let them know that the names of union adherents could be ascertained and appropriate reprisals taken." It held that whether or not this and another statement were legally correct, they "have unlawfully coercive implications, especially when considered in the context of the company's widespread patter of antiunion conduct."

In *Lundy Packing Co.*, 223 NLRB 139 (1976), enf. denied in relevant part 549 F.2d 300, 301 (4th Cir. 1977), the Board found "there was no reason for informing employees that they might be required to testify in open court other than to let them know that the names of union adherents could be ascertained and appropriate reprisals taken." Similarly, except this time with court approval, the Board in *Arrow Automotive Industries*, 256 NLRB 1027, 1033–1034 (1981), enfd. mem. 679 F.2d 875 (4th Cir. 1982), adopted the administrative law judge's finding that "Absent . . . any valid reason for repeatedly informing employees that those employees who sign union cards could be required to appear in court to testify about them and occurring in the context of other unfair labor practices," the vice president's statements in letters to employees, in the employer's newspaper, and in a speech "were to discourage employees from signing union authorization cards," violating Section 8(a)(1).

In *Huntington Rubber Co.*, 260 NLRB 1008 (1982), the employer's vice president told employees in a meeting that "if the Union obtained signed cards from over 50 percent of the employees, the Union would take the cards out in [his] office and lay them on his desk." The Board adopted the judge's finding that the statement, in the context of several other unfair labor practices, "conveyed a threat to the employees that the identities of those who signed union cards would be revealed" to the employer, "followed by appropriate reprisals."

All four of these decisions involved the loss of confidentiality if the union uses the cards to seek bargaining rights without an election. In *Finesilver, Lundy*, and *Arrow*, the employer's statements about cardsigners having to appear in court were held to be coercive, and in *Huntington*, the statement about the union's laying the cards on the employer's desk after obtaining a 50-percent majority was found to be.

Here, in contrast, the statement that "Heck's has an absolute right to see the union cards" is an uneqivocal warning to the employees that they cannot sign union authorization cards in confidence, even if the cards are used merely to show sufficient support for a secret Board election. The General Counsel does not allege to be coercive the two statements in the October 10 letter about cards being used "to get into a company without an election" and about the Company seeing the union cards "where the Union claims bargaining rights without an election."

I find that this added, last sentence in the quoted paragraph, that the Company "has an absolute right" to see the cards, was intended to discourage employees from signing the union authorization cards by instilling fear of reprisals. I therefore find that the statement tends to coerce the employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Roxanne Jividen October 27, 1983, because of her union activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By coercively interrogating an employee, the Company violated, Section 8(a)(1).

3. By telling an employee that the Company had discharged an employee for engaging in union activity, a company supervisor violated Section 8(a)(1).

4. By maintaining in its employee manual an overly broad no-distribution rule, prohibiting the distribution of any written matter on company premises unless approved by management, the Company violated Section 8(a)(1).

5. By informing employees that "Heck's has an absolute right to see the union cards" to discourage them from signing union authorization cards by instilling fear of reprisals, the Company violated Section 8(a)(1).

6. The Company did not engage in surveillance of its employees' union activities.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee hired for the 1983 Christmas season, it must make her whole for any loss of earnings and other benefits, computed on a quaterly basis from the date of her discharge to the date her seasonal employment would otherwise have ended, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Heck's, Inc., Nitro and Cross Lanes, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Food Store Employees Union, Local 347, United Food and Commercial Workers International Union, AFL–CIO–CLC, or any other union.

(b) Coercively interrogating any employee about union sympathies.

(c) Telling any employee that it has discharged an employee for engaging in union activity.

(d) Maintaining a rule prohibiting employees from distributing any written matter on company premises unless approved by management.

(e) Discouraging employees from signing union authorization cards by informing them that "Heck's has an absolute right to see the union cards."

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Roxanne Jividen whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its warehouse at Nitro, West Virginia, copies of the attached notice marked "Appendix A," and at its store at Cross Lanes, West Virginia, copies of the notice marked "Appendix B."[3] Copies of notices, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain a rule prohibiting you from distributing any written matter on company premises unless approved by management.

WE WILL NOT discourage you from signing union authorization cards by claiming that "Heck's has an absolute right to see the union cards."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HECK'S INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Food Store Employees Union, Local 347, United Food and Commercial Workers International Union, AFL–CIO–CLC, or any other union.

WE WILL NOT coercively question you about your union sympathies.

WE WILL NOT tell you that we have discharged an employee for engaging in union activity.

WE WILL NOT maintain a rule prohibiting you from distributing any written matter on company premises unless approved by management.

WE WILL NOT discourage you from signing union authorization cards by claiming that "Heck's has an absolute right to see the union cards."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Roxanne Jividen whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

HECK'S INC.

Arlington Hotel Company, Inc. *and* International Ladies' Garment Workers' Union, AFL–CIO. Cases 26–CA–8974 and 26–CA–9024

12 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 9 August 1982 Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs, and the Charging Party filed a brief in opposition to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by implementing a striker recall policy which restricted the recall of strikers to their prestrike positions and resulted in the preferential hiring of new employees in jobs which, the parties stipulated, the unrecalled strikers were qualified to perform. Inasmuch as valid business considerations might well justify such restrictive recall measures, our affirmance of the judge's above findings rests on the evidence of record which belies any possible business justification for the Respondent's recall procedure here.

The judge found there is ample evidence of the Respondent's avowed policy favoring cross-training and multiple capabilities for all hotel employees. The record evidence concerning the Respondent's past transfers—of a painter to dishwasher to houseman; houseman to hotel trainee; bar porter to furniture refinisher; bartender to room service manager—serves to establish the disparateness of promulgating those jobs as separate work functions for purposes of recalling economic strikers who have made unconditional applications for reinstatement. A further illustration of the Respondent's inconsistency vis-a-vis employment and recall policy is shown by the separate grouping of *Dining Room PM* and *Dining Room AM* on the recall document despite the lack of evidence that the Respondent ever classified new dining room hires as PM or AM. Accordingly, for the above reasons and the total absence of evidence of any business justification for the recall procedure utilized by the Respondent, we affirm the judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act.[4]

ORDER

The National Labor Relations Board adopts the Order of the administrative law judge as modified below and orders that the Respondent, Arlington Hotel Company, Inc., Hot Springs, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] In the absence of specific exceptions thereto, we adopt pro forma the judge's finding that the Respondent violated Sec. 8(a)(1) and (3) of the Act by refusing to reinstate striker Aretha Collins.

[3] We have concluded that a broad remedial order is inapposite and we have substituted the narrow injunctive language. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[4] We are unable, due to the absence of striker seniority dates, to pass on the accuracy of the respective strikers' recall dates as found by the judge. We will accordingly refer the matter to the compliance stage of this proceeding.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminate against striking employees who have applied for reinstatement at a time when their former positions were occupied by replacement employees by refusing to offer each reemployment to an existing vacancy.

WE WILL NOT give job preference to newly hired employees over our returning striker employees.

WE WILL NOT give job preference to striker replacement employees over our returning striker employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer each striker against whom we have found to have been discriminated full and immediate reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position of employment without prejudice to his or her seniority or other rights and privileges previously enjoyed; and WE WILL make each striker whole for any loss of pay suffered as a result of the discrimination against her or him, with interest.

ARLINGTON HOTEL COMPANY, INCORPORATED

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on December 9, 10, and 11, 1981, in Hot Springs, Arkansas, based on amended charges filed by International Ladies' Garment Workers' Union, AFL–CIO (the Union) on March 23 and April 22, 1981, and a complaint issued by the Regional Director for Region 26 of the National Labor Relations Board on May 29, 1981.[1] The complaint alleges that Arlington Hotel Company, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to reinstate economic strikers to their former positions or substantially equivalent positions after the strikers made an unconditional offer to return to work. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel, Respondent, and the Union. All briefs were duly considered.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Arlington Hotel Company, Inc. is an Arkansas corporation engaged in the operation of a nonresidential hotel in Hot Springs, Arkansas. Jurisdiction is not in issue. Arlington Hotel Company, Inc. annually in the course and conduct of its business operations derives gross revenues in excess of $500,000 and purchases and receives at its Hot Springs, Arkansas facility goods and materials valued in excess of $50,000 directly from points located outside the State of Arkansas. I conclude and find that Arlington Hotel Company, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. OVERVIEW[3]

Respondent operates a resort hotel in Hot Springs, Arkansas throughout the year. Besides the horse race season, there is tourism and visitations to the natural spring baths. General Manager Horst Fischer came to the hotel during the winter of 1979. It was his function as general manager to revitalize an ailing facility. He proceeded to upgrade the services of the facility to a first-class establishment for guests. Included in Fischer's renovations were a new chef and reorganization of the various functions such as food, beverage, and specialty preparations and the service facilities to dispense the products. As a result of the changes, a gourmet dining room was added to the hotel. By the fall of 1980 the changes were well in place and the hotel was functioning as a first-class resort under the guidance of Fischer. The horse race reason runs from February 5 to April 11 annually and the 1981 season brought over 1000 guests to the hotel. Fischer's expectations were to maintain 99-percent occupancy. The race season is one of the busiest times for the hotel and the 81 season was interrupted by a strike called by the Union. Fischer was notified of the impending strike on March 12 by an official of the Union. The following morning approximately 66 employees did not report for work. Respondent began hiring replacement employees to carry on its business. After the strike Respondent began recalling the striking employees it considered eligible for reinstatement.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Strike's End; Offer to Return; Recall Procedure*

The uncontroverted and/or corroborated evidence in the record discloses the following:

The strike which began on the morning of March 13 ended at 5 p.m. on March 16 when the Union sent Respondent a telegram. The telegram reads:

> On behalf of all striking employees we hereby apply unconditionally for reinstatement to their old positions and/or their maximum employment rights under the law.

On March 17 the striking employees returned individually and presented Respondent's management with a form letter which reads:

> I hereby apply unconditionally for my old job back, or if my old job is not available, my maximum employment rights under the law. Please consider this a continuing application for employment.

[1] All dates herein are in 1981 unless otherwise indicated.

[2] Jt. Exhs. 1 and 2 are received into the record.

[3] The facts necessary to resolve the issues in this case are largely undisputed. Several fact issues involving conduct of individual employees will be determined as they arise.

Respondent ceased hiring replacements on March 16 and devised a recall system to implement the placement of returning strikers. Fischer had prepared a list from information supplied by department heads detailing all employees who had not reported for working during the strike to enable Respondent to determine who had to be replaced during the strike. This list plus a list of employees hired as replacements formed the basis for the recall system on March 16. All jobs in the hotel which included striking employees were grouped into categories and structured as the striking employees' former positions and substantially equivalent positions. All striking employees were listed by seniority within each category and any vacancies existing in any category were filled by the most senior striker who held that vacant position before the strike. On this basis 31 strikers were reinstated to their former positions. All remaining strikers were considered by Respondent to be permanently replaced. Any vacancy arising in any category of the recall list was filled by the most senior replaced striker who had occupied the position before the strike. All other vacancies occurring in the hotel were filled by newly hired employees without any consideration being given to striking employees awaiting return to work. Fischer stated that it was indicated to him very plainly that the strikers wanted their jobs back and there was just no other way to call them back except to their old job. For whatever reason, Fischer established the policy that striking employees would only be recalled to their specific prestrike job. Fischer also stated that he did not consider any striking employees' work history in the hotel or any past experience in classification of work other than the employee's prestrike classification when recalling replaced strikers.

As a result of Respondent's devised recall system and its policy to only recall strikers for vacancies in their specific prestrike position, 25 striking employees were not recalled to work. The 25 were composed of 5 maids, 1 floor supervisor in housekeeping, 1 evening waitress in the Venetian dining room, 4 morning waitresses in the Venetian dining room, 1 garde-manger, 1 room service waiter, 4 cashiers, 2 bellmen, 3 banquet employees, 1 maintenance man, 1 furniture refinisher, and 1 carpenter. The five maids were grouped for recall as housekeeping-maids-permanent.[4] Ann Pascoe, the floor supervisor, was grouped separately under housekeeping. The dining room bus help grouping was divided between busman, p.m. waitresses, and a.m. waitresses with only the Venetian dining room represented.[5] The kitchen group was divided into cooks, pantry, pantry temporary, stewards, and garde-manger, naming Frank Avant as the incumbent. Room service was a separate grouping showing Richard Alexander as the only striker. Cashiers were grouped as permanent and temporary with Bertha Welhelmi and Linda Portwood as permanent and Freida Wallace and Gloria Morse as temporary. Frank Jones and Nathan Dendy were grouped as bell stand. Three employees, Barbara Dooley, Rita Taylor and Lillie Boone were grouped under the heading banquet. The engine room was represented by separate groupings: maintenance, naming Monte Cales; furniture, naming Wade Ashburry; carpenter, naming Leroy Doll. Other groupings contained striking employees who were among the 31 recalled immediately or the 10 recalled within several weeks. The striking employees who were denied immediate recall were, according to Respondent, either not needed to carry on its business at strikes end or had been replaced permanently by an employee hired during the strike with the following exceptions: Aretha Collins, maid, denied recall due to strike misconduct; Marie Halpain, a.m. waitress, denied recall due to outside employment; Frank Avant, garde-manger, denied recall due to abolishment of his position; and Freida Wallace, cashier, who could not be located by Respondent for recall. Excluding the two bellmen, Respondent recalled all other strikers eligible for recall before the case came on for trial.

The record evidence shows that housekeeping maids Omans, Richardson, Morgan, and Willis were recalled on May 7. Floor Supervisor, Pascoe was recalled on September 4. Waitress Lloyd was recalled on April 23 and waitresses Doll, Mauldin, and Brundage were recalled August 5. Room service waiter Alexander was recalled April 29. Of the cashiers; Welhelmi was recalled July 2, Portwood was recalled September 8, and Morse was recalled October 12. Banquet waitresses Taylor, Dooley, and Boone were reinstated to the banquet call list on July 3. Engine room strikers were recalled as follows: maintenance, Cales on August 20; furniture, Ashberry on September 8; and Carpenter, Leroy Doll on October 27.

General Counsel's Exhibit 4 is the compilation made by Respondent of striking employees and their respective groupings. Replacement employees hired during the strike are listed within their respective group to the right on the exhibit.

B. *Ineligible for Recall*

Aretha Collins was denied recall because Fischer identified her as making a threat to a nonstriking employee. Fischer testified that he had feedback on March 13 that an employee was somehow threatened. Fischer had the non-striking employee brought to his office. The employee, Angela Brown, was interviewed by Fischer and his attorney. Fischer stated that Brown related an incident in the hotel lobby where four or five maids, as they walked through the lobby, said to Brown, "We're going to beat the fat off you after work tonight." Brown identified Aretha Collins as the declarant and said that the statement was directed to her. Brown also named Lois Richardson and Mary Willis as among the group of maids. Fischer stated that Brown did not disclose any further substance of the conversation. Fischer said that Brown was distressed, crying, and upset and afraid to go home at night now. The hotel saw that she had a cab that evening to go home. Fischer and his attorney decided that Collins was to be denied recall as a result of the incident without any further investigation.

[4] Aretha Collins, Betty Omans, Joyce Richardson, Wanda Morgan, and Mary Willis.

[5] Waitresses—p.m., Helen Lloyd; a.m., Violet Doll, Debbie Mauldin, Marie Halpain, and Maggie Brundage.

Collins testified that she went through the picket line on Friday, March 13, to get her paycheck accompanied by four other employees, Johnnie Moore, Joyce and Lois Richardson, and Lula Mae Buckley. As they walked through the lobby they saw Angela Brown dusting. Collins said to Brown, "You're down here dusting, and they are down there picketing. You need a whipping girl." Brown smiled back at Collins but did not respond. Collins has known Brown for 3 or 4 years since Brown has worked at the hotel. Brown is the inspectress on the floor that Collins worked on as a maid. Collins returned to work on March 18 but was told by Fischer she had been replaced temporarily and would be recalled in a month or so by seniority. Fischer did not then, nor since, say anything to Collins about misconduct during the strike.

Angela Brown testified that she worked with Collins both as a maid and a supervisor for a couple of years. When the strike started she was working in the lobby. As she was heading for an elevator she heard someone say, "Girl when you get off work we're going to beat the fat off you." Brown turned around and saw Collins and several other maid-housekeepers. Brown reported the incident to her supervisor, who in turn informed Fischer. Brown stated that she was not upset nor crying over the incident when it happened or when she reported it to Fischer. Brown also stated that she and the other maids, including Collins, joke with one another while in the hotel.

Marie Halpain was denied recall because she obtained employment elsewhere during the strike. Halpain had worked at the hotel as a waitress in the Venetian dining room for 5 years, 10 months, and 12 days. She went on strike from March 13 to March 16. On March 17, she presented a copy of the union form letter to Fischer. Halpain testified that Fischer said, "As of now you have been replaced, but when your job becomes available, you will be called back." During the strike while the race season was in full swing, Halpain worked two nights at a neighborhood steak house replacing a girl who was off sick on the weekend. On July 22, after her unemployment ceased, Halpain began working casual at the Downtowner in Hot Springs. She had no other employment during the strike or since the strike ended. In October, Halpain contacted Fischer by phone inquiring why she had not been recalled and stating that she wanted to return to work. Fischer responded, "Marie, your name had been erased from the list." Halpain asked why, and Fischer mentioned something about a steak house. Halpain told Fischer she only filled in for another girl and Fischer said, "I'll talk to my attorney, and get back to you." Halpain has not, to date, received any response from Fischer.

Fischer acknowledged that Halpain returned for work at strikes end but was not recalled. Fischer learned from supervisors 2 to 3 weeks after the strike that Halpain was working in a steak house as a waitress, a job equal to her former position at the hotel. At this time Fischer in consultation with counsel eliminated Halpain for recall. Subsequent to the decision not to recall Halpain, Fischer was contacted by Halpain on two occasions. Once in the summer and second in late fall. On the first occasion Fischer confronted Halpain with the steak house employment and she stated to Fischer that it was temporary work during the race season only. Halpain told Fischer that the steak house was closed down and she was not presently working and wanted to return to the hotel. Fischer testified, "She said, 'Why did you not call me back,' and I said, 'You have another job.'" Fischer informed counsel of Halpain's circumstances but her removal from the recall list remained extant. During the second conversation Halpain told Fischer that she was desperate to go to work but she was not recalled. Other waitresses who participated in the strike were recalled and new employees were hired off the street throughout the summer and fall.

Frank Avant was refused recall because his former position was abolished prior to the end of the strike. The uncontroverted evidence in the record shows that Avant was employed in the mid-1950s. In 1977 he was classified as butcher at $3.40 an hour. In January 1978 he was put on a salary of $500 biweekly. A year later his salary was increased to $540 and he was reclassified as assistant chef. In February 1980 he received a $60 salary increase but the hotel records show no classification at that time.

Fischer testified that when he assumed the helm in the fall of 1979 he found kitchen conditions deplorable in that canned and frozen foods were used exclusively and he set out to change that. Fischer immediately hired an executive chef, Paul Healy, demoted the former chef, Parker, to sous chef, removed Avant from assistant chef to the pantry, and hired two new sous chefs. Fischer found that kitchen employees had certain titles but did not necessarily perform the duties of the title. Fischer was particularly concerned about establishing a basic kitchen first and then getting fancy. Fischer's policy is to use everyone in the kitchen to do any job especially during rush times. Fischer himself worked in the kitchen to get first-hand knowledge of how employees functioned. He was not impressed with Avant, particularly in the area of cooperating with other employees. In mid-1980 Fischer hired a food and beverage director, Heinz Graf Polke, to share the responsibilities with chef Healy. By the fall of 80 Fischer directed chef Healy and Polke to lower the cost of the kitchen and to improve the efficiency. Polke and chef Healy discussed the kitchen situation for several months and decided on March 16 to abolish the position of garde-manger. They jointly made the decision and Fischer approved the decision. When Avant offered to return after the strike Fischer told him his prestrike position of garde-manger had been abolished and he would not be recalled.

Chef Paul Healy testified that he was employed by Respondent on November 26, 1979. After the prior chef was demoted and Avant was moved to the pantry, Healy and Fischer decided that Avant's creative abilities would qualify him to be garde-manger. A garde-manger traditionally is in charge of cold production in the kitchen, including salads, hors d'oeuvres, cold hors d'oeuvres, canapes, and some cold meats such as corned beef and turkey, also makes decorative pieces for buffets, aspics, ice carvings, cheese mirrors, and cheese trays. Chef Healy considered Avant a good cook and qualified to

perform as garde-manger albeit he had difficulty helping other employees and cooperating with supervision for extra duties., e.g., Avant did not like to do the ice carvings or work extended hours at the hot stone. Nonetheless, Avant performed the tasks of a garde-manger without incident until October 1980. At this time Avant was moved to the pantry and assumed additional duties of the a la carte variety. This move eliminated one pantry employee and was designed to make the kitchen preparations more cost effective. Avant functioned in this capacity up to the strike although chef Healy and Polke continued their review of kitchen procedures to further eliminate waste and inefficiency. Immediately after New Years' Day 1981 one of the three sous chefs quit. Thereafter, chef Healy discussed with Fischer the need for further reductions of personnel in the kitchen to lower cost. Avant was among the highest paid help in the kitchen and his productivity was weighed against cost to the hotel. Both Healy and Fischer felt a lot of payroll was tied up in a low production position. When Avant chose to join the strike chef Healy parceled his duties among the kitchen employees who were not as busy as they should have been and on March 15 or 16 made a joint decision with Polke to close the position of garde-manger for economic reasons. Chef Healy, however, had no intention of terminating Avant as an employee. With employees out on strike Healy fully realized that the garde-manger position was an unnecessary luxury. After the strike was over the four pantry employees that had participated were recalled to their former positions. In addition, after the strike ended chef Healy needed more help in the kitchen and during the months following the strike hired 6 pantry employees, 26 stewards, 9 dishwashers, and 6 cooks. Cooks were hired on March 25, April 27, July 2, August 5, September 11 and 28, and October 28, including a replacement for an interim cook who had quit. By August Polke and Healy needed an additional sous chef at a salary comparable to Avants' so Polke placed an advertisement in the local paper. The ad was seeking an experienced sous chef with garde-manger capabilities. Chef Healy did not consider Avant for any of the positions that were filled following the end of the strike nor did he consider Avant qualified as a sous chef. Chef Healy testified that Avant was capable of performing the tasks for which he had hired new employees but added, "Aren't we reaching the point of asking a brain surgeon to take out a splinter." Healy stated that Avant was overqualified even for the cook's positions.

C. *Analysis and Conclusions*

The General Counsel's complaint alleges that the striking employees on March 16 made an unconditional offer to return to their former or substantially equivalent positions of employment and that Respondent refused to reinstate or offer to reinstate the named employees to their former or substantially equivalent positions of employment because the employees engaged in strike activity.[6]

Respondent's answer denied that the employees offered to return to substantially equivalent positions and that the refusal to reinstate or offer to reinstate the employees was due to their strike activity.

The issues drawn at the trial of the case center on Respondent's designed recall procedure and the results of that procedure. The General Counsel contends that any striker who was denied an opportunity to return to work in a substantially equivalent position prior to recall to a prestrike position is a discriminatee. Respondent contends that the strikers sought only their prestrike positions expressing no interest in any other positions. With three exceptions, the opposing contentions cover all 25 striking employees named in the complaint. The circumstances surrounding the failure to recall Frank Avant, Marie Halpain, and Aretha Collins are separate and distinct.

At the outset it seems appropriate to note that this is not a case where the employer's productivity suffered as a result of the strike (not just because the strike was of short duration but additionally Respondent basically operated a service organization) nor was there any increase in business during the strike which necessitated an expansion of services. The Union called the strike at the height of Respondent's busiest season in an obvious attempt to strengthen its position as representative of the employees. Either through miscalculation or lack of support the strike lasted only 2 days. Admittedly, the timing of the strike was not lost on Respondent for Fischer opined that the Union attempted to shut him down at the height of his busiest season. Neither was the short duration of the strike any consolation to Respondent for Fischer viewed the nonstriking employees as loyal employees who deserved rewarding treatment from Respondent. Fischer took his hat off to the employees who worked during the strike. Respondent had a commitment for 99-percent occupancy during the race season and the record shows there was no decline. It was admittedly the busiest time of the year for the kitchen. Thus, Respondent's actions during recall of the strikers must be viewed as deliberate and in no way qualified by peaks and valleys of productivity as normally influenced by striker activity.[7] Further support for this view is found in Fischer's testimony detailing how the recall list was determined and the basis for that determination, i.e., each striker was listed by work function and thus confined to a specific grouping on the recall list. If several work functions were within the same department of the hotel they were nevertheless grouped separately.[8] Respondent further determined, in its own mind, that such grouping was the only proper basis for recall because the prestrike work function of each striker was equated with the "only" substantially equivalent employment. Moreover, Fischer, admittedly did not consider any striker's past employment experience in the hotel when faced with filling any poststrike vacancies, notwithstanding his avowed policy

[6] The economic nature of the strike is not in dispute.

[7] The record discloses that during the period following the strike new employees were hired due to factors such as, increased business, expanded pantry work, heavy banquets, need for extra employees, workload, race traffic, and heavy business. Although five replacements for one striker were hired in the garage the lone striker was still recalled immediately.

[8] The strikers were listed in each group according to hotelwide seniority.

of cross-training and multiple capabilities for all hotel employees. In effect, Respondent disqualified all strikers for recall except to their specific prestrike positions arguing in brief that an employer has no obligation to recall a permanently replaced striker at strikes end. In my view, Respondent's recall list as designed precludes consideration of an offer to any striker of a position that is substantially equivalent to his or her prestrike position.

Respondent cites many cases quoting selective language of the Courts and the Board to support its failure to recall the named strikers. The General Counsel, in turn, cites several cases quoting language from the courts and the Board which is supportive of his complaint allegations. As is sometimes the case both parties can find solace in the reported cases but such ambivalence must be resolved. My reading of the cases leads me to conclude that Respondent was victimized by conceptualism and failure to distinguish factual support for the law of the case. Respondent's arguments, as general propositions, may be accurate when viewed in isolation but when viewed in conjunction with each case's factual circumstances become less efficacious. Respondent's main case support is *Lincoln Hills Nursing Home*, 257 NLRB 1145 (1981), cited for the proposition that Respondent has no obligation to recall a replaced striker to any other available position for which the striker may be qualified. Respondent further argues that its recall procedure is identical to that approved by the Board in *Lincoln*. Suffice it to say that the evidence in *Lincoln* showed that recalls were made by seniority as vacancies occurred in *any* available position. With regard to Respondent's specific argument that the respondent in *Lincoln* was not obligated to recall a physical therapist to a nurses aide position, the decision clearly shows that the record did not contain evidence that any prestrike position was available at strikes end, resulting in a failure of proof on the part of the General Counsel not an approval of Respondent's conduct. Likewise, Respondent's reliance on *New Era Electric*, 217 NLRB 477 (1975), is misplaced. In *New Era* the General Counsel argued that the respondent should have recalled a first-class lineman to a second-class lineman's position that was filled by a new hire. The administrative law judge found that the striker's status was in question in addition to finding that the General Counsel was in error in his argument that a prestrike position was available for the alleged discriminatee which the General Counsel argued placed an obligation on the respondent to offer the position to the questionable striker.

In addition to disagreeing with Respondent's argued case support, I reject the dual premise for structuring the recall list, i.e., Respondent's only obligation to a returning striker is reinstatement in to his prestrike position and, if the striker's prestrike position is filled with a permanent replacement hired during the strike, Respondent has no further recall obligations to the striker unless and until the permanent replacement leaves.[9] In my view, Respondent has confused its *obligations* to reinstate returning strikers with the rights of economic strikers who have unconditionally applied for reinstatement. If an economic striker fails to apply unconditionally for reinstatement the employer is free to continue hiring replacement employees; however, on a striker's unconditional application to return the employer has obligations of reinstatement as a matter of law. Such obligations are not qualified by the language of the unconditional offer. Respondent's erroneous view of its reinstatement obligations and the law in this regard is not a defense. Accordingly, I reject Respondent's argument that an economic striker is only entitled to full reinstatement to his prestrike job. Further, I reject Respondent's reliance on the failure of any striker to express an interest in a job other than his or her prestrike job. Respondent has the obligation to offer reinstatement to returning strikers and must do so without discrimination against the returning strikers. A lesser job with less pay and/or reduced benefits may not be as attractive but it is better than no job at all. The cases cited by Respondent make it abundantly clear that oftentimes replaced economic strikers are offered lesser jobs until their prestrike positions become vacant. No cited case stands for the proposition that an employer can refuse to offer other jobs to the economic strikers because they have been replaced.

The Board in *Zapex Corp.*, 235 NLRB 1237 (1978), synthesized rights and duties attendant to reinstatement of strikers as follows (at 1238):

> Certain principles governing the reinstatement rights of economic strikers are by now well settled. In *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer "refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act . . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer." The Court in *Fleetwood* relied on its decision in *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), stated that:
>
> > The underlying principle in both *Fleetwood* and *Great Dane, supra*, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.[14] Specifically in *Fleetwood*, the Court found that hiring new em-

[9] Except for specific instances raised in the record or alluded to in this decision it is undisputed that the replacement employees hired during the strike were permanent.

> ployees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and substantial reasons for his failure to hire the strikers.

[14] See also *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221 (1963). Even if a finding of antiunion motivation is necessary, the employer's preference for strangers over tested and competenent employees is sufficient basis for inferring such motive, and we, in agreement with the Trial Examiner, would do so if we considered motive material.

In addition the Supreme Court in *Fleetwood* stated: "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." 389 U.S. at 381. The right can be defeated only if the employer can show "legitimate and substantial business justifications." Obviously, the Court is requiring an employer to be impartial in hiring for any and all vacancies, particularly when there are outstanding applications from replaced economic strikers. In the instant case, with the exception of three employees, the record evidence shows that Respondent made a judgment based on the strikers' written offer to return to work and supported by the meekest of testimony dealing with attitude of employees. There was no legitimate and substantial business justification for preferring newly hired employees over the returning strikers to fill necessary vacancies in the hotel. Respondent had in the past transferred a painter to dishwasher to houseman, a houseman to hotel trainee, a bar porter to furniture finisher, and a bartender to room service manager.

Rather than consider striking employees for reinstatement to vacancies occurring after a cessation of strike activities Respondent hired new employees. From March 20 through November 3 (the date Respondent recalled the last striker) Respondent hired as new employees 14 waitresses, 4 waiters, 44 maids, 2 inspectresses, 16 bar persons, 1 beverage person, 29 housemen, 2 newsstand employees, 1 garage employee, 5 repairmen, 1 watchman, 1 cashier, 9 restaurant hostesses, 6 pantry employees, 26 stewards, 9 dishwashers, and 6 cooks. During this entire employment period the strikers were recalled by seniority only as vacancies occurred in their prestrike positions.

It is clear that Repondent's expressed policy of recall resulted in the discriminatory conduct alleged by the General Counsel. Moreover, Respondent's implementation of the recall policy included delayed discrimination in that Respondent hired new employees rather than consider the outstanding applications of the strikers.

Respondent argues alternatively that the General Counsel has not proven a discriminatory motive for the recall policy and the resulting failure to reinstate striking employees. In my view the General Counsel has met his burden of proving discrimination whether he must prove motive or not and Respondent has not proffered legitimate and substantial business justifications for refusing to recall the strikers to various existing positions when the strike ended. Further, the parties stipulated that the named strikers were qualified for the very vacancies that existed at strikes end and those that occurred during the recall period. In addition, Respondent's records reflect the following: In housekeeping-maids-permanent, three prestrike positions, over and above those filled at strikes end, were vacant.[10] Therefore three additional striking maids should have been recalled immediately. Also, on April 23 Catherine Woodall was transferred out of housekeeping creating a vacancy for a maid which should have been offered to a striker. The dining room positions of waitress had eight strikers. Four replacements were hired before the strikers made application to return. Three strikers were recalled leaving one prestrike position open at strikes end. The most senior a.m. waitress should have been recalled to that vacancy. Further, a newly hired waitress was employed on March 20 for the tackroom but such vacancy should have been offered to the most senior waitress with an outstanding application. Three more newly hired employees reported as waitresses in May and these vacancies should have been offered to the remaining strikers who had applied for reinstatement. Respondent's argument a.m. waitress positions are not comparable to p.m. waitress positions is rejected in that Respondent does not classify waitresses when hired as a.m. or p.m. In fact, the record shows that waitresses transfer from one dining room to another. Four cashiers went on strike and were premanently replaced. As cashier vacancies occurred the strikers were recalled by seniority. However one newly hired employee transferred to food and beverage cashier prior to the last striker's recall and that vacancy should have been filled by the remaining striker. Three banquet waitresses whose names were on the call list participated in the strike. Respondent immediately removed their names from the call list ostensibly to replace them permanently. The record shows that one such replacement, Horne, was transferred from part-time to regular part-time banquet waiter from the nonemployee group on the call list. Since Horne was previously on the call list he could not operate as a replacement employee. Sonnier was a hotel employee and not on the nonemployee call list but rather the hotel employee call list as extra help if the nonemployee call list was exhausted, and, therefore she could not be a replacement employee for the nonemployee call list. Larry Guinn, a newly hired employee for the nonemployee call list, was indeed a replacement employee. Thus, at strikes end two prestrike positions on the nonemployee banquet call list were open and two strikers should have been immediately recalled. The first banquet work after the strike was March 18, 19, 20, and 22, which was worked only by nonemployees on call, Horne, Guinn, and Berthia. Berthia was newly hired but did not appear on Respondent's list as a replacement employee, therefore, banquet work was available for all three striking employees immediately after the strike and they should have been recalled. Respondent argues that Banquet Supervisor Hoffman did not follow Fischer's instructions to recall the strikers before hiring any outside employees and, therefore, Hoffman's dereliction of duty

[10] Catherine Woodall was erroneously listed as a permanent replacement.

cannot be discrimination by Respondent. Such an argument places the onus on the returning striker which I am not inclined to do. Hoffman is Respondent's supervisor and Respondent is responsible for his actions. Moreover, Fischer's instructions to Hoffman do not recognize the accepted practice prior to the strike, i.e., that hotel employees as alternates were only used for banquets after the nonemployee call list was exhausted. Also, the record shows that a striker replacement in the employee cafeteria, Ashley Norling, who was not on the banquet call list, worked banquets before striking employees were recalled. In fact, the three strikers' names should not have been removed from the list but should have simply been passed over for banquet work. I perceive the nonemployee banquet call list as analogous to the hotel's payroll from which striking employees are not removed when engaging in a strike.[11] With regard to maintenance man Monte Cales he was one of three that engaged in strike activities. Respondent hired two replacement employees but the record is unclear whether one or both of the other striking maintenance men were recalled at strikes end. If they were not recalled a prestrike position was open and should have been offered to Cales on March 17 predating his actual recall of August 20 by several months. If the other strikers were recalled to maintenance positions then Cales should have been considered for other vacancies which occurred before his recall to his prestrike position. Based on the above I conclude and find that several striking employees (enumerated above) should have been recalled immediately to their prestrike positions and that those strikers whose positions were filled by permanent replacements should have been offered the vacancies present in other positions in the hotel which Respondent filled with newly hired employees. It is Respondent's obligation, by Law, to treat returning strikers impartially and I specifically find that Respondent's refusal to consider striking employees, who had made application to return, for positions other than their prestrike positions discriminated against the strikers by such refusal and by showing partiality for newly hired employees. Respondent's obligation is to offer vacancies to returning strikers. The returning striker has the right as an employee to refuse the offer and elect to await a vacancy in his prestrike position.

Aretha Collins: Respondent contends that Collins engaged in conduct sufficient to deny her reinstatement rights. The alleged conduct did not take place on the picket line nor was there evidence of any picket line misconduct. The alleged conduct of Collins was the single isolated incident subject to scrutiny. While no misconduct by strikers is to be condoned it is manifest that the alleged conduct be fully considered before imposition of discipline on strikers. To hold individual striking employees subject to discipline, including the loss of reinstatement rights the proof must be substantial for the effect is to render the right to strike nugatory.

It is fully recognized that an employer has the burden of proving that strikers engaged in conduct barring their return to employment. An employer's honest belief that strikers engaged in misconduct of a nature serious enough to require discipline therefor is not a defense if it affirmatively appears that such misconduct did not, in fact, occur as alleged or was less serious in nature. The question in the instant case becomes: Was the alleged misconduct of the striker of a nature requiring disqualification for reemployment? I conclude and find that the alleged statement of Collins was not of such a serious nature as to deny her reinstatement rights. My conclusion is based on the lack of evidence from Respondent. The evidence presented only evinces a terse conversation between a striker and nonstriker which occurred off the picket line on the Employer's premises. The apparent basis for Respondent's decision to deny reinstatement was subjective and not supported by the testimony of its main witness. Thus, Brown's testimony did not disclose fear of reprisal or apprehension to continue working during the strike. Rather, Brown displayed lack of concern for the statement and affirmatively passed the statement off as the usual talk among maids who are and have been coworkers. Further, Respondent did not fully investigate the incident which to me evinces an attempt to seek reasons, however slight, not to reinstate certain strikers to retaliate for striking. I also note that of the group Collins was singled out by Respondent on the slimmest of identity facts. Accordingly, I find that Collins was denied reinstatement as a returning striker unlawfully and shall order her full reinstatement.

Marie Halpain: Respondent removed Halpain's name from its recall list 2 to 3 weeks after the strike ended as a result of information that Halpain was employed at a local steak house. Subsequent to Halpain's removal several waitresses were hired by Respondent in March, May, June, and July contrary to Respondent's argument that the first available position for Halpain existed on August 17.[12] Respondent further argued that if Halpain did not lose her employee status in April she did so in July when she secured her second employment as a waitress which eliminated any recall rights prior to the first available vacancy. I reject Respondent's arguments as unsupported by record evidence. Respondent's claims are based on strikers securing regular and substantially equivalent employment elsewhere which by statute causes the striker to lose employee status and therefore any reinstatement rights to which they may otherwise be entitled. Respondent has the burden to establish that the striker has lost employee status and that burden must be met with objective evidence. The employer's belief, however honest or reasonable, is not sufficient. The Board has stated, "The question of what constitutes 'regular and substantially equivalent employment' cannot be determined by a mechanistic application of the literal language of the statute but must be determined on an *ad hoc* basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned.[13]

[11] Had the General Counsel alleged that Dooley, Taylor, and Boone were discriminatorily removed from the list when they went on strike I would have so found.

[12] I previously found that Respondent makes little or no distinction between dining rooms when hiring waitresses, making Respondent's argument that no vacancies occurred in the Venetian dining room (Halpain's former work station) unavailing.

[13] *Little Rock Airmotive, Inc.*, 182 NLRB 666 (1970).

It appears from the testimony of Fischer and Halpain that the compensation and benefits received by Halpain from the subject employment was not equivalent nor was Halpain satisfied with the interim employment. Fischer knew, or should have known, that Halpain's outside employment was temporary while awaiting recall. Halpain testified such was the case and Fischer reluctantly acknowledged he could not recall the entire conversation. Fischer did admit he knew at the time he was considering Halpain's continued status as an employee of Respondent that the steak house was not a full-time business and in fact was closing. In addition, Fischer made no conscious effort to determine what employment Halpain had secured on either occasion. He was satisfied that someone saw her working. That is not enough. The statute requires more before a striker will be relieved of employee status and the attendant rights. In my view, Respondent has again seized upon a meager circumstance in an attempt to punish an employee for engaging in a strike. Accordingly, I conclude and find that Respondent has unlawfully withheld recall from Halpain in violation of the Act and shall order her full reinstatement.

Frank Avant: Avant, on applying for reinstatement at the strike's end, was told by Fischer that his job of garde-manger had been abolished and therefore he would not be reemployed by the hotel. Respondent specifically contends that there are no substantially equivalent positions for which Avant is qualified. Apparently, Respondent refers to the sous chef position since the testimony of both chef Healy and Avant leads me to conclude that Avant is not a sous chef. The record shows that Avant performed numerous kitchen tasks in his tenure with Respondent but sous chef was not among them. Albeit Avant was performing some tasks of a garde-manger before the strike, it appears that Fischer's bestowment of the title was benevolent in nature rather than a promotion. The employment records show no reclassification of Avant to garde-manger nor did Avant train or supervise any employees in the garde-manger tasks. As I perceive the evidence, Fischer was simply trying to add class to the kitchen operation and was recognizing an existing highly paid kitchen employee who had recently been demoted. However, whether or not Avant was in fact garde-manger, Respondent has the right to reduce kitchen cost and, if a strike presents the first opportunity, there is no vice in making adjustments at that time. The evidence does show that Avant's salary and performance were discussed prior to the strike and several adjustments had already been made by the time the strike started. There are certain risks attached to employees electing to engage in strike activity and one of those is that the employer may be forced into belt tightening circumstances which subsequently eliminate the need for employees or their functions. That, I feel, is the case here. The record is clear that Fischer was in the midst of a renovation of the hotel's services, particularly the kitchen. Such reworks do not happen overnight nor are they accomplished by a single stroke of the brush. Observation and opportunity can be time consuming as it was here. The need for changes in the kitchen is well substantiated in the record; however, the effect on Avant does not end there. As I view the circumstances and the law Respondent may very well abolish a striker's job or downgrade the functions for legitimate business reasons but that does not mean that the striker must be denied reemployment. Only in the case where no other vacancies exist can the striker be denied his reinstatement rights. That is not the case here. From March 21 through October 28, 47 positions in the kitchen were filled with newly hired employees. Of those 47 positions 12 were functions that Avant had specifically performed for Respondent. Whereas Avant's abilities to perform as sous chef can be questioned, his capabilities in the pantry or as a cook cannot. Notwithstanding Avant's qualifications (past work history) Respondent refused to consider Avant for any vacancy. Therein lies the violation as I see it. Respondent has the obligation to treat returning strikers impartially, which includes preferential treatment for the returning strikers in filling vacancies as they occur. Respondent cannot be heard to say that seeking out strikers to fill usual vacancies is burdensome or unduly restrictive. I see no other way that an employer's obligations to strikers can be fulfilled if impartial treatment is the rule. In the last analysis, the Respondent only has to offer a lesser position that is open. It is up to the striker whether he is actually reemployed or not. To refuse to give a returning striker the opportunity to resume his employment for less compensation or benefits, by preferring newly hired unknown employees, is prima facie partiality which I conclude and find is violative of the Act. Accordingly, I shall order Respondent to offer reinstatement to Avant to a kitchen position for which he is qualified. This includes the discharge of an incumbent if necessary.

While the testimony of Freida Wallace, cashier, is partially corroborated by objective evidence, I cannot fully credit her statements. Her recall of events and their chronology was not specific enough to be helpful, except for the ultimate fact, which I feel was more imaginative than real. Respondent had what appeared to be a current address in its files (which was occasioned by Wallace's giving such notice to her employer) and used it to recall Wallace. There was no forwarding by the Postal Service, which indicates a failure by Wallace to be concerned. There is no credible evidence in the record to suggest any wrongdoing on Respondent's part toward Wallace. Respondent having discharged its obligation to Wallace, as shown by the objective evidence, I conclude and find that Respondent has not violated the Act in regards to Freida Wallace. Accordingly, I shall dismiss the allegation as it pertains to Wallace.

In summary and pursuant to my findings above the following strikers should have been reinstated to their prestrike positions on the dates indicated:

Aretha Collins	March 17
Betty Omans	March 17
Joyce Richardson	March 17
Wanda Morgan	April 23
Mary Willis	May 7
Helen Lloyd	March 20
Violet Doll	March 17
Debbie Mauldin	May 6
Maggie Brundag	May 15

Marie Halpain	May 20
Rita Taylor	March 18
Barbara Dooley	March 18
Lillie Boone	March 18
Gloria Morse	October 6

The following strikers should have been offered vacancies for which they qualify pursuant to the stipulation of the parties on the date and position indicated:

Ann Pascoe—May 10—maid
Richard Alexander—March 19—houseman
Frank Jones—March 26—houseman
Nathan Dendy—March 28—houseman
Monte Cales—April 10—houseman
Wade Asbury—April 10—houseman
Leroy Doll—April 14—houseman
Frank Avant—March 26—cook

I acknowledge the difficulty attached to determining whether any replaced striker would have accepted the alternative job offer or not; however, this circumstance is caused by Respondent's discriminatory conduct and therefore the returning strikers should not be held to suffer for conduct not their own.

Additional Conclusions of Law

1. Respondent discriminated against economic strikers who had applied unconditionally to return to work in violation of Section 8(a)(1) and (3) of the Act by refusing to recall them to their vacant prestrike positions.

2. Respondent discriminated against replaced economic strikers who had unconditionally applied to return to work in violation of Section 8(a)(1) and (3) of the Act by hiring new employees to fill vacancies for which the replaced strikers were qualified.

3. Respondent discriminated against economic strikers Aretha Collins, Marie Halpain, and Frank Avant, each of whom applied for reinstatement, in violation of Section 8(a)(1) and (3) of the Act by denying them reinstatement rights to employment.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminated against its striking employees, I find it necessary to order it to offer them full reinstatement to their former positions or, if these positions no longer exist, to substantially equivalent positions, with backpay computed on a quarterly basis and interest therein to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977),[14] from the date that each should have been offered reinstatement to the date that each returning striker was actually reinstated or is actually reinstated.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Arlington Hotel Company, Inc., Hot Springs, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees by failing to accord them their reinstatement rights as economic strikers and without regard to whether each individual striker had been permanently replaced or not.

(b) In any other manner interfering with, restraining, coercing, or discriminating against its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer each striker, against whom the Respondent has been found to have discriminated by refusing reinstatement, full and immediate reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position of employment, without prejudice to his or her seniority or other rights and privileges, or to a position for which the striker is qualified; and make each such striker whole for any loss of pay suffered as a result of the discrimination against him or her in the manner set forth hereinabove in the section entitled "Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to a determination of each striker's seniority and the position Respondent is required to offer each striker and the amount of backpay due each discriminatee.

(c) Post at its Hotel in Hot Springs, Arkansas, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[14] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Taracorp Industries, a Division of Taracorp Inc. *and* Fred Elmore. Case 14–CA–13551

12 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 31 July 1981 the National Labor Relations Board issued a Decision and Order[1] in this proceeding, adopting, with minor modifications, an administrative law judge's findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by conducting an investigatory interview of employee Fred Elmore after having denied Elmore's request for union representation at the interview. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The Respondent was ordered to cease and desist from its unlawful activity and to take certain affirmative actions, including offering Elmore reinstatement and making him whole for any loss of earnings or benefits resulting from the unlawful interview.

Thereafter, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the Eighth Circuit. Subsequently, the Board moved the court for withdrawal of the record so that the Board could reconsider its Decision and Order. The court granted the Board's motion.

On 14 December 1981 the Board informed the parties that it had decided to reconsider sua sponte its decision and that they were entitled to file statements of position. The General Counsel and the Respondent filed statements of position.

After reconsideration, we have decided to reaffirm the Board's finding that the Respondent's interview of Elmore violated Section 8(a)(1).[2] We have further decided, however, that a make-whole remedy is inappropriate for this or any similar *Weingarten* violation. Accordingly, we shall vacate the Board's original order in this proceeding and issue a new order setting forth the appropriate remedy for violations of this type.

The pertinent facts are as a follows: Employee Fred Elmore worked as one of several "feeders" of used storage batteries to a moving belt. The belt was subject to frequent jamming; freeing it required the feeders to pull the belt. On the day at issue here, the belt jammed and Foreman Greg Vaughn twice told Elmore to help pull the belt. Each time Elmore replied, "It's not my job." Vaughn then told Elmore he was suspended and should report to Plant Manager Charles Harper's office.

While Elmore was enroute to Harper's office, Vaughn telephoned Harper and described the incident. Harper replied, "[I]f Fred Elmore refuses to do the job, that's termination." Once in Harper's office, Elmore asked for a union representative. Harper refused. Elmore then told Harper his version of the incident, admitting that he had not obeyed Vaughn, but claiming that he had explained to Vaughn that he "couldn't pull on the belt . . . it was unsafe" and that it was not his job. At that point Vaughn was invited to join the interview. He recounted the incident as it is described in the previous paragraph.[3] Harper then terminated Elmore.

The judge found that the Respondent violated Section 8(a)(1) by conducting an investigatory interview[4] of Elmore after denying his request for union representation at the interview. The judge rejected, however, the complaint allegations that Elmore was discharged for requesting a representative, for raising a safety complaint, or for engaging in any other union and/or protected concerted activity. The judge found that the Respondent discharged Elmore solely because of his conduct in the belt-pulling incident. As a remedy, the judge ordered Elmore's reinstatement and backpay. As noted above, the Board adopted the judge's decision and recommended Order with minor modifications.

In its statement of position, the Respondent again argues that the remedy of reinstatement and backpay is inappropriate because Elmore was discharged for just cause, i.e., insubordination. For the reasons set forth below, we agree with the Respondent. We find that this make-whole relief in the context of a *Weingarten* violation is contrary to the specific remedial restriction contained in Section 10(c), the general remedial framework of the Act, and, independent of those restrictions, consti-

[1] 257 NLRB 463.

[2] In its statement of position, the Respondent again seeks reversal of some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As in our original decision, we do not rely on the judge's finding that the Respondent developed a "new" theory at the hearing to explain its actions; nor do we draw any adverse inference from the Respondent's failure to call Manager Harper as a witness at the hearing; and we do not adopt the judge's reference to possible "bargaining" during the interview, since no such issue was presented here.

[3] The judge credited Vaughn's version of the incident.

[4] As noted in our original decision, the judge found that the Respondent, prior to discharging employee Elmore, conducted an unlawful investigatory interview. Thereafter, he consistently denominated the interview as "investigatory" except in one part of the decision. In the first Conclusion of Law the judge inadvertently refers to a "disciplinary" interview. As before, we hereby correct this inadvertent error and insert "investigatory" in place of "disciplinary."

tutes bad policy. Accordingly, we hereby overrule *Kraft Foods*, 251 NLRB 598 (1980),[5] and its progeny[6] to the extent inconsistent with this decision, and henceforth, we will not impose make-whole remedies for *Weingarten* violations.

The Board possesses a certain latitude in fashioning remedies for unfair labor practices. Our discretion, however, is not absolute. Thus, we are bound by certain specific and general restrictions that limit our remedial authority. This is particularly true regarding our authority to impose a remedy of reinstatement and backpay.

The clearest example of when a make-whole remedy of reinstatement and backpay is appropriate is where an employee is discharged or disciplined for engaging in union or other protected concerted activities. Such a remedy was imposed in the Board's first published decision[7] and, since that time, has become the traditional means by which the Board seeks to neutralize employer discrimination. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). This is achieved by restoring the status quo ante, thereby placing the employee in the position enjoyed prior to the discriminatory conduct.

Conversely, an employee discharged or disciplined for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and backpay even though the employee's Section 7 rights may have been violated by the employer in a context unrelated to the discharge or discipline. This principle is embodied in the remedial restriction in Section 10(c) of the Act, which provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Thus, when an employee is discharged for "cause"[8] the Board, normally, is precluded from imposing a make-whole remedy. *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964).[9]

A third category of cases involving the issue of whether a make-whole remedy is appropriate arises where an employee is discharged or disciplined for what appears to be a legitimate reason, but further examination reveals that the discharge or discipline was the result of an act that was, itself, an unfair labor practice. That was the situation in *Fibreboard*, supra. There the employer discharged a group of employees pursuant to its decision to subcontract the employees' work, a seemingly legitimate basis for the discharges. Because, however, the employer failed and refused to bargain with the union over its decision to subcontract, the subcontracting violated Section 8(a)(5). The Supreme Court ruled that in such circumstances an order reinstating the discharged employees with backpay was appropriate because the discharges stemmed directly from the unfair labor practice. 379 U.S. at 217. In other words, when the reason for the discharge is an unfair labor practice, a make-whole remedy is appropriate since the "loss of employment stems directly from an unfair labor practice." Id.[10]

Applying these and related principles in the context of *Weingarten* violations, we are unable to justify the imposition of a make-whole remedy where an employer's only violation is the denial of an employee's request for representation at an investigatory interview. In this regard, we note that the courts of appeals have repeatedly refused to endorse the Board's previous efforts to impose a make-whole remedy for a *Weingarten* violation.[11] In our view, these courts are correct.

---

[5] Under the *Kraft Foods* test the General Counsel could make a prima facie showing that a make-whole remedy was appropriate by demonstrating that a *Weingarten* violation was committed and that the employee subjected to the unlawful interview was disciplined for conduct that was the subject of the interview. The burden then shifted to the Respondent, who could avoid a make-whole remedy by demonstrating that the decision to discipline the employee was not based on information obtained at the interview.

[6] See, e.g., *Illinois Bell Telephone Co.*, 251 NLRB 932 (1980); *Ohio Masonic Home*, 251 NLRB 606 (1980).

Member Hunter notes that he agreed with the application of a *Kraft Foods* analysis in *Chromalloy American Corp.*, 263 NLRB 244 (1982). Upon further consideration, however, and for the reasons set forth in today's decision, he believes that the remedy ordered in *Chromalloy American Corp.* was erroneous.

[7] *Pennsylvania Greyhound Lines*, 1 NLRB 1, 51 (1935).

[8] It is important to distinguish between the term "cause" as it appears in Sec. 10(c) and the term "just cause," which is a term of art traditionally applied by arbitrators in interpreting collective-bargaining agreements. Just cause encompasses principles such as the law of the shop, fundamental fairness, and related arbitral doctrines. Cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason. For under our Act:

> Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids. [*NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956).]

[9] As the Court stated in *Fibreboard*: "The legislative history of [Sec. 10(c)] indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." 379 U.S. at 217.

[10] The Board consistently applies make-whole remedies in similar situations. See, e.g., *Boland Marine Mfg. Co.*, 225 NLRB 824 (1976) (employees made whole where suspensions and discharges resulted from work rules imposed in violation of Sec. 8(a)(3)). Even in those cases, however, a make-whole remedy is appropriate only for employees whose discipline resulted "solely" from the unlawfully promulgated work rules. See also *Alfred M. Lewis, Inc.*, 229 NLRB 757, 759 (1977).

[11] *NLRB v. Potter Electrical Signal Co.*, 600 F.2d 120 (8th Cir. 1979); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095 (8th Cir. 1981); *General Motors Corp. v. NLRB*, 674 F.2d 576 (6th Cir. 1982). See also *NLRB v. Illinois Bell Telephone Co.*, 674 F.2d 618 (7th Cir. 1982) (remanding to the Board for determination of whether discharge was solely dependent upon evidence obtained at the unlawful interview), and *NLRB v. Southern Bell Telephone & Telegraph*, 676 F.2d 499 (11th Cir. 1982) (refusing to enforce a make-whole remedy on the facts while preserving the legal issue).

Initially, it is plain that typical *Weingarten* cases do not present a situation where an employee is discharged for engaging in union or other protected concerted activities. Rather, the employee is discharged for what the employer considers misconduct. Indeed, this fact is recognized implicitly in the first step of the *Kraft Foods* test (see fn. 5 above) whereby the General Counsel must demonstrate that the employee was denied his or her *Weingarten* rights and was disciplined subsequently "for the conduct *which was the subject of the unlawful interview.*" *Kraft*, 251 NLRB at 598 (emphasis added). Accordingly, *Weingarten* violations do not fit into the category of cases where a make-whole remedy traditionally is necessary and appropriate.[12]

Similarly, any attempt to fit *Weingarten* violations into the *Fibreboard* line of cases that permit a make-whole remedy when the loss of employment stems directly from an unfair labor practice is unavailing. In *Fibreboard* and cases that properly apply its doctrine (see fn. 10, supra), the reason for the discharge is itself an unfair labor practice. By contrast, in *Weingarten* cases, the reason for the discharge is not an unfair labor practice, but some type of employee misconduct. In short, there simply is not a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy.[13]

Accordingly, we are compelled to conclude that *Weingarten* cases fall into the category of cases where a make-whole remedy is precluded by operation of Section 10(c). Thus, when an employee is discharged or disciplined for cause,[14] that employee will not be entitled to reinstatement and backpay simply because his or her *Weingarten* rights were violated.

In addition to the remedial restrictions imposed by Section 10(c), we must recognize other limitations placed on our authority by the Act. Thus, the Board may not order punitive remedies. *Carpenters Local 60 (Mechanical Handling) v. NLRB*, 365 U.S. 651, 655 (1961). Nor should our remedies serve as a windfall to employees or employers. *Service Roofing Co.*, 200 NLRB 1015, 1017 (1972). Yet these are precisely the results of this Board's previous impositions of make-whole remedies for *Weingarten* violations. In those cases, employers had discharged employees for reasons wholly independent of any unfair labor practice, yet were required to reinstate them with full backpay.

Even if this Board were not bound by the various remedial limitations discussed above, we would find a make-whole remedy in *Weingarten* cases inappropriate because we believe that past Board decisions have exceeded the intended scope and limitations found in the Supreme Court's *Weingarten* decision. What began as a limited protection of employees and a potential guide to management in conducting fair and expeditious investigations of employee misconduct has become a labyrinth of rules and procedures analogous to the law of criminal procedure. As Member Hunter stated in a related context, the Board's expansionist policies in the *Weingarten* field have served "to encourage the transformation of investigatory interviews into formalized adversary proceedings, a result the Supreme Court clearly wished to avoid."[15]

We believe that the expansionist approach to *Weingarten*, including make-whole remedies, has served to assure that the adversarial nature and complexity of the investigatory process would increase until employers are tempted to forgo interviews altogether. We believe that, in the long run, our refusal to grant make-whole remedies for *Weingarten* violations will serve the interests of the entire labor-management community.

In summary, we hold that we are without authority to order reinstatement and backpay as a remedy for a *Weingarten* violation. Accordingly, *Kraft Foods*, supra, and its progeny are hereby overruled to the extent inconsistent with this Supplemental Decision and Order.

Finally, applying these principles to the instant case, we find that a make-whole remedy for Elmore is inappropriate. As indicated above, the only violation committed by the Respondent was a *Weingarten* violation. The record does not establish that Elmore was discharged for asserting his *Weingarten* rights at the interview. On the contrary, it is undisputed that Elmore was discharged for what the Respondent determined to be a "refusal to per-

[12] A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation. See, e.g., *Garment Workers ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975). In such circumstances, the employee's employment status is adversely affected *because* the employee engaged in protected concerted activity. We will continue to apply our traditional make-whole remedy in such cases.

[13] As the court stated in *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981), when confronted with the claim that the discharge of employees for theft stemmed from the employer's denial of their *Weingarten* rights: "[T]he employees effected their own discharge for stealing and the [*Weingarten*] violation was simply incidental to the investigation which preceded the firing."

[14] We emphasize again that the Board will not seek to determine whether the asserted "cause" for the discharge was good cause or just cause. The extent of our authorized inquiry is whether or not the employee was discharged for union or other protected concerted activity or whether the reason for the discharge was, itself, an unfair labor practice. See fn. 8, supra.

[15] *Materials Research Corp.*, 262 NLRB 1010, 1021 (1982) (Member Hunter concurring and dissenting).

form assigned work." It is also clear that the reason for his discharge was not, itself, an unfair labor practice. Thus, since Elmore was discharged "for cause" within the meaning of Section 10(c), the Board is without authority to require his reinstatement or the payment to him of any backpay. Accordingly, we shall vacate the Board's original Order and direct the Respondent to cease and desist from its unlawful activity and take other appropriate remedial action.

ORDER

The National Labor Relations Board orders that the Respondent, Taracorp Industries, a Division of Taracorp, Inc., Granite City, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Depriving any employee of his right to union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Post at its Granite City, Illinois plant, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Board's Order reported at 257 NLRB 463 is vacated.

IT IS FURTHER ORDERED that in all other respects the complaint is dismissed.

MEMBER ZIMMERMAN, concurring.

I join my colleagues in overruling *Kraft Foods*, despite my earlier approval of the remedy prescribed in that case for violations of the *Weingarten* rule.[1] As my colleagues point out, the courts of appeals have consistently refused enforcement of Board decisions imposing a make-whole remedy for a *Weingarten* violation where employees were clearly discharged for cause and not for attempting to assert their *Weingarten* rights.

The Eighth Circuit in a decision rendered prior to *Kraft Foods*, refused to enforce the Board's order requiring a make-whole remedy in a case where employees, whose *Weingarten* rights had been violated, were discharged for participation in a fight which stopped the production line. *NLRB v. Potter Electrical Signal Co.*, 600 F.2d 120 (8th Cir. 1979). There, the court acknowledged the Board's broad authority to restore the status quo to remedy violations effectively, but held that where the discharges were the result of employees' misconduct Section 10(c) barred the Board from imposing a make-whole remedy. Despite the subsequent issuance of *Kraft Foods*, where the Board set forth a new standard for determining the propriety of a make-whole remedy in the *Weingarten* context, the courts of appeals continued to reject the Board's analysis and relied instead on the 10(c) argument espoused by the Eighth Circuit in the *Potter Electrical* decision.[2] Upon reviewing these decisions, I am persuaded that the initial approach of the Eighth Circuit in *Potter Electrical* is correct. I therefore join my colleagues in concluding that make-whole relief in the context of a *Weingarten* violation is contrary to the specific remedial restriction contained in Section 10(c) of the Act.[3] Accordingly, I concur in overruling *Kraft Foods* and its progeny.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See, e.g., *Chromalloy American Corp.*, 263 NLRB 244 (1982).

[2] See, e.g., *Pacific Telephone & Telegraph Co. v. NLRB*, 711 F.2d 134 (9th Cir. 1983); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095 (8th Cir. 1981); *General Motors Corp. v. NLRB*, 674 F.2d 576 (6th Cir. 1982).

[3] Unlike my colleagues, I do not find that past Board decisions such as *Materials Research Corp.*, 262 NLRB 1010 (1982), have exceeded the intended scope and limitations of the Supreme Court's *Weingarten* decisions. Accordingly, I do not join in that aspect of their opinion which holds that make-whole relief for *Weingarten* violations, independent of the restrictions of Sec. 10(c), "constitutes bad policy."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deprive any employee of his or her right to union representation at an investiga-

tory interview which the employee reasonably believes may result in disciplinary action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TARACORP INDUSTRIES, A DIVISION OF TARACORP, INC.

International Union of Operating Engineers, Local 400 *and* Judi Scott *and* Linda Morgan *and* Richard L. Christian, Sr. *and* Ruth Strah. Cases 19–CA–12852, 19–CA–13263, 19–CA–13831, and 19–CA–13891

13 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 6 March 1984 Administrative Law Judge Clifford H. Anderson issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Union of Operating Engineers, Local 400, Helena, Montana, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for the line containing the discriminatee's name and backpay principal.

"Mary Christian	$2,075.00"

MEMBER HUNTER, dissenting.

Contrary to my colleagues, I would not extend the Respondent's financial liability to Mary L. Christian beyond 1 April 1982. In my view, the Respondent's contract with Christian expired on that date and the Respondent was not thereafter liable for further payments to Christian.

As more fully set forth in the judge's decision, on 1 April 1981 the Respondent entered into a contract with Mary L. Christian under which she was to provide cleaning services to the Respondent for a monthly fee of $650. In relevant part, the contract provided for a duration of "one year from 1 April 1981 until 1 April 1982 at which time this contract may be renewed for one year by mutual consent of the parties." It further provided that "either party may cancel this contract on thirty (30) days written notice. . . ."

In late July or early August 1981 the Respondent notified Christian that it was canceling the cleaning services contract effective 3 September 1981. About the same time, the Respondent discharged Richard Christian, Mary L. Christian's husband, from his position as a dispatcher. In the underlying unfair labor practice proceeding, the Board adopted the judge's conclusions, in the absence of exceptions, that the Respondent took these actions in retaliation for Richard Christian's protected concerted activities and thereby violated the Act. Accordingly, the Board ordered reinstatement of Mary Christian's contract and payment of lost revenues caused by the Respondent's unlawful cancellation of her contract.[1]

The judge concluded that the Respondent's backpay liability to Mary Christian continued at all times after cancellation of her contract. In so doing, he found that the 30-day cancellation provision in the Respondent's contract with Christian rendered it one for an unlimited term and that the Respondent had not met its burden of demonstrating that its contractual relationship with Christian would have terminated at any time.

I do not agree with the judge's finding that the Respondent's contract with Mary Christian was of unlimited duration. The plain language of the contract established that it terminated on 1 April 1982, absent earlier cancellation on 30 days' written notice. Under the circumstances, the Respondent's liability to Christian should not extend beyond 1 April 1982, the date upon which its contractual obligations to Christian ceased. Christian was an independent contractor and the loss suffered from the Respondent's conduct was the contract rights she possessed at the time, i.e., a contract expiring 1 April 1982. Under the circumstances, the coercive effects of the Respondent's conduct will be fully remedied by requiring that the Respondent make

[1] Contrary to our dissenting colleague's view, continuing the make-whole remedy effectuates the purposes of the Act because Mary Christian's contract was terminated in retaliation for her employee husband's protected activity. The 30-day cancellation provision and the renewal clause rendered the contract equivalent to a contract for an unlimited duration. Therefore, the judge correctly found that, because the contract would not automatically have terminated on the contract's anniversary, the proper consideration for the make-whole remedy was what actions the Respondent and Christian would have taken at relevant times. In these circumstances, the Respondent's burden, which it failed to satisfy, was to show that it would have ended the contract.

[2] In calculating Mary Christian's gross earnings for quarter IV of 1981 in fn. 7, the judge incorrectly computed the amount to be $475. The correct figure is $1425 making the total backpay principal $2075.

[1] It is clear from a review of the Board's original Decision and Order, reported at 265 NLRB 1316 (1982), that the specific terms of the Respondent's contract with Mary Christian were not in issue.

Christian whole for these lost contract rights. As Christian is not an employee entitled to the protection of the Act, I do not find that it is necessary to effectuation of the Act's purposes to assume that Christian and the Respondent would have mutually agreed to renew their contractual relationship after 1 April 1982. Accordingly, I would find the Respondent's gross backpay liability equivalent to the contractual revenues payable to Mary Christian during the balance of the contract period ending 1 April 1982.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. On December 16, 1982, the Board issued a Decision and Order in the above-captioned case adopting with modification the May 21, 1982 decision of Administrative Law Judge David G. Heilbrun. The Order as adopted by the Board, inter alia, ordered Respondent:

> 2. Take the following affirmative action designed to effectuate the policies of the Act:
>
> (a) Offer Linda Clark [and others not here relevant] . . . reinstatement to their former positions of employment without prejudice to seniority or other rights and privileges, or if in any case their former job no longer exists, to a substantially equivalent job, discharging, if necessary, any employee hired in replacement, and make them whole in the manner provided in *F. W. Woolworth*, 90 NLRB 289 and *Florida Steel Corporation*, 231 NLRB 651,[15] for any loss of earning incurred as a result of their being terminated.
>
> (b) Offer Mary Christian reinstatement of her janitorial contract and make her whole, including interest to be determined in the manner set forth in *Florida Steel Corporation*, supra, for any loss of contractual revenue she may have incurred as a result of her contract being terminated.

[15] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716.

A dispute having arisen over, first, the amount of backpay due Mary Christian and, second, the reinstatement of Linda Morgan nee Clark and Mary Christian, Respondent and the General Counsel entered into a stipulation, quoted in full in the Appendix, infra, and, on July 27, 1983, the Regional Director for Region 19 of the National Labor Relations Board issued a backpay specification and notice of hearing which Respondent answered on October 13, 1983. I heard the matter in trial on October 25, 1983, in Helena, Montana. Thereafter the General Counsel and Respondent filed posthearing briefs.

FINDINGS AND CONCLUSIONS

Based on the record as a whole, including my observation of the witnesses and their demeanor and the posthearing briefs of the parties, I make the following findings and conclusions.

I. LINDA CLARK, NOW MORGAN

A. *Facts*

William K. Burlingame was elected business manager of Respondent on August 11, 1981. As a result of that election, he ultimately took over control of Respondent on October 1, 1981. Assisting him in his campaign were various of the discriminatees in the original unfair labor practice hearing in this matter including Morgan. Soon after the election and the ballot count which resulted in the apparent victory of Burlingame, he, his wife, and the various discriminatees, including Linda Morgan, went to a victory celebration at the Hof-brau restaurant in Helena, Montana. Also present was Mary Fitzpatrick, an election ally of Burlingame and, as of October 1981, Respondent's bookkeeper. Fitzpatrick and Burlingame in speaking to the various election allies and discriminatees indicated that when the new administration took office, those employees, including Linda Morgan, would have their jobs back. Linda Morgan answered that she was getting married and moving to Idaho Falls, Idaho. She indicated that she might be able to help for "a few days if we absolutely needed her" but that she was leaving and could not resume her employment.[1]

Sometime later, but before the administration took power in October, another social event occurred at The Locker Room, a bar in Helena. Les McGetrick, who would be Respondent's business manager in October, addressed various of the discriminatees, including Linda Morgan. He testified, without contradiction, that he told Morgan "if she wanted her job back it was available. And that she replied she was going to get married and move to Idaho, and that she would be unable to accept it."

At the orginial hearing in this matter the parties stipulated that all discriminatees, except for Morgan, were reinstated as of October 15 and that she moved from the vicinity.

The original trial on the underlying unfair labor practices in this matter occurred on November 19, 1981. Representing the General Counsel were Patrick F. Dunham and Stephanie Rene Cottrell, the latter counsel for the General Counsel in the instant litigation. Counsel for Respondent at that time was R. Louis Brown Jr. During the course of the original unfair labor practice proceeding, counsel for Respondent attempted to ask then witness Linda Morgan if she had been offered reinstatement by Respondent's agent McGetrick. Counsel for the General Counsel Dunham objected, stating "this goes to a matter that would be proper in a backpay hearing, but not here." Following record colloquy which made it clear that the General Counsel and Respondent had a dispute regarding whether or not an adequate offer of reinstatement had been made to Linda Morgan, the Gener-

[1] Mary Fitzpatrick and William Burlingame testified to this meeting. Morgan did not. Although Burlingame and Fitzpatrick each advanced a rather vague recollection of the specific remarks made and although their memories do not coincide with precision, it is clear that the offer of reinstatement was made in roughly the terms noted above and that Linda Morgan indicated she would be unable to reassume her position because of her upcoming marriage and move.

al Counsel's objection was sustained by the administrative law judge with the assurance to counsel for Respondent that the litigation of the matter would not be foreclosed if appropriate in a later proceeding.

The administrative law judge in his May 21, 1982 decision ordered Linda Morgan, then Clark, be offered reinstatement, as noted supra, and also ordered that all other discriminatees be offered reinstatement including those individuals who the parties had previously stipulated were already reinstated. The judge included in his order the following:

> 2(e) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.[17]

[17] I recognize that General Counsel has represented all discriminatees except for Clark [now Morgan] were reinstated as of October 15, and that she had moved from the employing vicinity. In view of unusual circumstances in this case, I nevertheless recommend couching reinstatement rights in prospective terms, and would envision the notification procedure of this paragraph 2. (e) as the vehicle whereby Respondent may finally and formally verify that job restorations are of settled permanence and that Clark could have become re-employed had she so chosen. It is particularly appropriate to fashion this deviation in light of the Board's newly-announced policy on expunction of disciplinary file references. See *Sterling Sugars, Inc.*, 261 NLRB No. 71.

Respondent filed no exceptions to the administrative law judge's decision and this portion of the Order was accepted without modification. The Board in ruling on the judge's decision on the General Counsel's exceptions substituted a new notice for that recommended by the administrative law judge. In each case the following paragraph of the notice was the same:

> WE HAVE reinstated Mary Fitzpatrick, Joyce McCutcheon, Richard Christian, Ruth Strah, Susan Agostinelli, and Maxine McFarland to their former positions of employment without prejudice to seniority or other rights and privileges previously enjoyed, recognizing too that Linda Clark had such a right to reinstatement before she moved from this job area, and WE WILL make them all whole, with interest, for any losses in pay resulting from their each being terminated during 1981.

B. *Positions of the Parties*

Respondent argues that in the September 1981 conversations, noted supra, Respondent offered Linda Morgan reinstatement and that she declined the offers. Thus, argues Respondent, it has no further obligation to offer or reoffer employment to Linda Morgan.

The General Counsel argues that the original administrative law judge's decision, which was not excepted to by Respondent and in this regard was adopted in its entirety by the Board, is res judicata as to the Linda Morgan matter. Thus, notes the General Counsel, the administrative law judge specifically ordered Respondent to offer Linda Morgan reinstatement and, it is undisputed that no offer of reinstatement has been made to her since the judge's decision issued.

The General Counsel on brief argues that in the underlying unfair labor practice hearing Respondent abandoned its "claim and defense" concerning the Morgan reinstatement matter and further suggest, at footnote 4, page 5 of her brief, that, since Respondent failed to present any evidence during the underlying unfair labor practice proceeding on the issue, an adverse inference should be drawn that such evidence if offered would not have supported Respondent's contention. Respondent with some heat argues that it attempted to introduce evidence concerning the September 1981 reinstatement conversation at the original hearing but was precluded from doing so as a result of the administrative law judge sustaining the objection of counsel for the General Counsel that such matter should be appropriately raised later in a backpay hearing. Thus, argues counsel for Respondent, the General Counsel is attempting to breach or vary from the position taken in the original proceeding in order to prevent Respondent from now adducing evidence on the question.

C. *Analysis and Conclusions*

Having carefully considered those portions of the transcript of the original hearing offered by Respondent to support its position that it was not allowed to introduce evidence concerning the Morgan reinstatement issue and the argument of counsel, I am in complete agreement with counsel for Respondent and reject the factual assertions of counsel for the General Counsel on the matter. More specifically, I find that Respondent did attempt to introduce evidence concerning the Morgan reinstatement conversations of September 1981 at the original hearing and that it persisted in doing so until the ultimate and final adverse ruling on the General Counsel's objection by the administrative law judge. Respondent at the original hearing did not abandon its defense and the claims of counsel for the General Counsel to the contrary are simply wrong.

Having made this threshold finding, I further find that there can be no finding of res judicata or collateral estoppel which would, in any way, preclude Respondent from now raising the September 1981 Morgan reinstatement conversations in its own defense. First, the decision of the Board adopting the underlying administrative law judge's decision in this matter simply makes no findings regarding the question of Morgan's reinstatement. Second, even were this not so, the fact that Respondent was led to believe that its September 1981 reinstatement evidence could be offered in a backpay hearing and the fact that the administrative law judge sustained the objection of the General Counsel to Respondent's offering this evidence at the original hearing, all require that the evidence properly be considered now. Not to allow the presentation of this evidence now would, I find in complete agreement with counsel for Respondent, violate Respondent's fundamental right to due process of law by simply precluding him at each stage in a two-stage proceeding from offering evidence relevant to his defense by suggesting that the evidence should be or should have been offered in the other stage of the proceeding.[2]

[2] I do not take the General Counsel's argument regarding reinstatement of Linda Morgan to go so far as to suggest, if I find that Morgan

Continued

Turning to the evidence regarding the reinstatement offer, the General Counsel argues that Assistant Business Manager Les McGetrick's statement to Morgan "if she wanted her job back, it was available" is no more than an inquiry as to Morgan's desire for a job. The General Counsel further argues that the offer was without specifics regarding terms and conditions of employment. The Board had occasion to consider an offer somewhat similar to the instant case. In *American Enterprises*, 200 NLRB 114 (1972), the Board considered the following job offer: "We are inquiring as to whether or not you will be interested in returning to work for us. We will hold the job open until Monday, August 31, 1970." With Board approval, the administrative law judge undertook the following analysis at 115:

> In his brief, the General Counsel correctly states that a discriminatee is entitled to a specific and unequivocal offer of reinstatement, and that a mere inquiry concerning his interest in returning to work does not constitute such an offer. *Rea Trucking Company, Inc.*, 176 NLRB No. 67; *Barr Packing Company*, 82 NLRB 1. I do not agree with his contention that the August 25 letters were at most a "careful" query concerning the dischargees' possible interest to some "undescribed" job unaccompanied by a specific offer of reinstatement. It is true that taken alone, the first paragraph would not meet the applicable test. A reasonable interpretation of the first sentence of the second paragraph, however, was that Respondent was holding open the dischargees' jobs for them. Admittedly, the offer to hold "the" jobs for the dischargees was not the most felicitous choice of language; and unquestionably, an offer to the dischargees to hold "your" jobs open would have been preferable. But as stated in *Centac Corp.*, 179 NLRB 313 at 322, "If the men had doubt, they could have inquired."

My decision in this matter is reinforced by the larger context of events in which the job offer was made to Linda Morgan. Morgan, along with other discriminatees, had supported the election campaign of Burlingame. The reinstatement offers were made to the discriminatees following his successful election but before his installation as an official of Respondent. Thus the relationship of Burlingame and his political allies to the discriminatees including Morgan at that time, is different from the often adversarial relationship between an employer and a discriminatee seeking reinstatement. Further, although the evidence is hardly specific or crystal clear, it was apparently well known at the time of these conversations that Morgan was soon to marry and leave the area. Indeed, in her conversations she made it clear that, while she could assist Respondent's agents for a short time, she could not accept any employment offers. Thus, under these circumstances, and on the basis of the authority cited, I find Respondent's reinstatement offers to be sufficient to meet Board requirements. I further find Morgan's immediate and unequivocal declination of those offers has ended all reinstatement rights she had under the Board's Order.[3]

Accordingly, having found it appropriate to consider the evidence adduced by Respondent at the hearing concerning its purported offers of reinstatement to Morgan and having found that this evidence supports a finding that good faith offers of reinstatement were made and declined, I find that there are no further reinstatement rights remaining to Linda Morgan. I shall therefore dismiss this portion of the backpay specification.

II. MARY CHRISTIAN

A. *Facts*

On April 1, 1981, Respondent and Mary L. Christian entered into a contract whereby Christian agreed to provide cleaning services for Respondent in exchange for $650 per month. The contract contained the following provisions:

> SECTION 3.
>
> 2. It *is* Mutually agreed between [Respondent] and [Christian] that the duration of this contract shall be one year from April 1, 1981 until April 1, 1982, at which time this contract may be renewed for one year by mutual consent of the parties.
>
> 3. It is further mutually agreed that either party may cancel this contract on thirty (30) days written notice to the other party.

As found by the Board in the initial unfair labor practice litigation, sometime in the last week of July through the first week of August 1981, Christian received a letter from Respondent terminating her contract for "economic reasons" with the added advice that effective September 3, 1981, the service would be provided "in house."

Apparently, Respondent provided these services with its own staff until early October 1981. Then the Burlingame administration determined bids for cleaning services should be solicited. Mary Fitzpatrick, the office manager, was authorized to solicit and consider such bids. There is no dispute and I find that Fitzpatrick specifically asked Les McGetrick whether Mary Christian should be contacted regarding the cleaning contract and that McGetrick told Fitzpatrick that because Mary Christian's husband was working for Respondent and because the Burlingame administration's policy was not to employ husbands and wives, that Christian should not be solicited.[4] On October 9, 1981, Respondent contracted

had been offered and declined reinstatement in September 1981, that a second offer of reinstatement is required by the judge's Order. While this is an arguable construction of the judge's Order, in light of the fact that he ordered Respondent to offer reinstatement to other discriminatees who had already been reinstated, an examination of the notice in the case makes it clear that no additional reinstatement offer is required for employees who had already been reinstated.

[3] While it is true that the offer was not by its terms open for a specific period of time, Morgan's declination was immediate and unequivocal and clearly not influenced by the lack of an opportunity to consider the offer. See, e.g., *Morro Motors Limited*, 216 NLRB 192 fn. 3 (1975).

[4] Richard Christian, husband of Mary Christian, a discriminatee in the underlying case, was reinstated in October but left Respondent's employ by early or mid-December 1981.

for certain cleaning services, not identical to those contracted to by Christian, with an independent cleaning contractor. The contract entered into provided for a payment of $300 per month and contained the following clause:

> SECTION 9. DURATION OF AGREEMENT
>
> This agreement, which commences as of its effective date, all prior agreements written or oral, between the parties concerning the same services having terminated, shall become effective on October 14, 1981, and shall continue thereafter for one year, subject to renegotiation of the terms hereof unless terminated by either party on thirty (30) days written notice to the other. In the event the parties intend to continue the contract past its first year or anniversary date, the party shall give written notice within thirty (30) days of the date of termination of their intention to extend the contract and renegotiate its terms.

Insofar as the record reflects this contract has been carried forward to date without change in its terms or the rate of remuneration.

The hearing in the underlying unfair labor practice proceeding was held on November 19, 1981. The administrative law judge's decision issued on May 21, 1982, and, as noted supra, did not include a remedy for the Mary Christian contract cancellation. The Board's decision, issued on December 16, 1982, and sustaining the General Counsel's exceptions to the decision below, added the previously quoted portion of the Order with respect to Christian. Thereafter, on June 28 and July 18, 1983, respectively, Respondent and the General Counsel entered into the stipulation quoted in the Appendix.

B. *Analysis and Conclusions*

1. Preliminary arguments

Respondent makes several initial arguments attacking the Board's Order as to Christian.[5] Thus on brief counsel for Respondent challenges the hearing in the underlying proceeding as follows:

> Local 400 was never faced with a clear statement of the "charges" with respect to Mary Christian, never provided the opportunity to fully defend regarding the unfair labor practice charge implicating Mary Christian's contract, and has been left throughout this proceeding in a deficient posture in terms of its ability to defend on the issues. There was simply no notice, no specific charges, no clear right of confrontation, and no due process opportunity to defend.

Insofar as Respondent is seeking to attack the validity or propriety of the underlying unfair labor practice proceeding, Respondent should have (1) taken those arguments to the Board on brief in opposition to the General Counsel's exceptions; (2) filed a motion for reconsideration of the Board's decision; or (3) initiated an action with the United States Court of Appeals seeking review of the Board's decision. Respondent undertook none of the above and further entered into a stipulation with the General Counsel which contains the following sentence:

> In the event judicial proceedings are thereafter necessary to enforce or review the Board's backpay and reinstatement determinations, the only issues before the Court will be the validity of the backpay computation and the reinstatement issues, as Respondent concedes that in all respect the Board's Decision and Order of December 16, 1982, is valid and proper.

Thus, in agreement with the General Counsel, I find the underlying unfair labor practice decision in this matter is res judicata and not subject to attack on the grounds quoted supra.

Respondent also argues that certain facts peculiar to the instant case should be considered to reduce any award to Christian. Thus, counsel for Respondent argues on brief that any recovery herein should commence on the date of the Board's Order rather than earlier. In support of its argument, counsel cites Board cases issuing before *A.B.W. Products*, 137 NLRB 25, 31 (1962), as well as circuit court authority for the proposition that, where a Board Order reverses an administrative law judge's dismissal of an allegation, the remedy should be prospective only. Respondent is aware that the earlier Board position favorable to him was reversed and is no longer current law. Counsel argues however that the Board still admits that special circumstances may warrant reduction of the traditional remedies, citing *Ferrell-Hicks Chevrolet v. NLRB*, 357 F.2d 822 (D.C. Cir. 1966). I have considered counsel for Respondent's argument and cases cited in support thereof, and conclude that there is no basis on this record for a tolling of the ordered remedy for particular times. Accordingly, I shall deny Respondent's motion in this respect.

2. The contract to November 15, 1981

Given my earlier rejection of Respondent's arguments challenging the reach of the Board's Order, it follows that Christian shall be made whole from the commencement of the backpay period until the disputed October events discussed infra.

3. The October events

There is no dispute that in October 1981 Respondent's agents sought to obtain contractual cleaning services from an independent contractor and, by contract dated October 14, 1981, procured cleaning services at $300 per month. The parties also stipulated that Respondent at this time was under extreme financial duress. Further the record contains uncontradicted testimony that Respondent declined to contact Mary Christian regarding a cleaning services contract because Respondent's agents in the new administration wished to institute a "no husband and wife" hiring policy.

[5] At the hearing counsel for Respondent moved that I dismiss the backpay specification as to Christian because she was not a Charging Party in the underlying proceeding. I denied that motion at the hearing as without support in reason or precedent and reaffirm that ruling here.

From these facts Respondent argues that the make-whole period for Christian should terminate as of the assumption of the new contract.[6] Respondent further argues that, even were Christian's make-whole period not terminated as of Respondent's negotiation of the new contract, that Christian's period should end as of the expiration of her contract on April 1, 1982. This is so, Respondent argues, because it is clear that Christian's contract would not have been renewed at that time because of the economic necessities which pressed Respondent to accept the lower rate offered by the new contractor.

The General Counsel argues that the obligation of Respondent to Christian continues unabated at $650 a month throughout the backpay period irrespective of Respondent's new contract entered under necessity or no, and irrespective of the Christian contract's 30 day termination clause, 1-year expiration clause or renewal clause.

The initial dispute between the parties may be resolved by consideration of the terms of Christian's contract with Respondent. The contract by its terms is of 1-year duration with a 1-year renewal option by mutual consent. The contract is subject to cancellation by either party on 30-day written notice. Contrary to the argument of the General Counsel, and in agreement with Respondent, I view the 30-day cancellation clause as rendering the contract susceptible to cancellation before the conclusion of its first year. Further, in agreement with the General Counsel and in rejection of Respondent's argument, I find that the 30-day provision renders the contract, for purposes of this analysis, equivalent to a contract for an unlimited term. Thus, I do not find the contract would of necessity by its terms automatically have been cancelled after 1 year or 2 years. Thus, in considering the make whole order, I do not find the first or second anniversary of the contract's execution significant. Rather, I will consider what actions Respondent and Christian would have taken at relevant times, given the burdens and presumptions applicable to backpay specifications.

An administrative law judge is obligated to determine the most accurate method of determining backpay. *J. S. Alberici Construction Co.*, 249 NLRB 751 (1980); *American Mfg. Co. of Texas*, 167 NLRB 520 (1967). Coupled with this obligation however is the fundamental notion that uncertainties will be assessed against the wrongdoer. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). Returning to the October 1981 actions of Respondent in negotiating a substantially less expensive cleaning contract, I find, even assigning the burden on this aspect of the case to Respondent, that the economic necessities pressing upon Respondent at that time would have required renegotiation even if the Christian contract had never been illegally breached. Thus I find that, even if Christian had been continuing satisfactory cleaning services as of that time, Respondent under the press of economic necessity would have sought to renegotiate the contract and would have offered Christian no more than $300 a month for her cleaning services thereafter, i.e., after November 15, 1981. Thus I am in agreement with Respondent that the dollar sums properly accruing to Christian under the Order after November 15, 1981, accrue at a maximum rate of $300 per month.

4. The duration of Respondent's obligation to Christian

Respondent contends that because of the nepotism policy instituted by the new administration, Mary Christian would not have been retained but rather would have been terminated as an independent contractor in October 1981 when the new administration took office. I reject this argument for several reasons. First there is insufficient evidence that the antinepotism policy was benignly arrived at. Second I have grave doubts as to whether or not even a benignly arrived at antinepotism policy could be applied in the middle of a running backpay period to discharge Respondent's obligation under the Board's Order to offer Christian reinstatement. Third, and on the facts of this case most importantly, I am not satisfied that an antinepotism policy on this record would have resulted in termination of Christian's contract. Respondent bears the burden of establishing the merits of this asserted defense. Why should Richard Christian rather than Mary Christian have been reinstated if only one could be? Furthermore the record is clear that Richard Christian was reinstated for a brief period ending in December 1981. There is no record evidence to indicate when it became clear that Richard Christian was leaving, after which it was possible under any interpretation of Respondent's asserted antinepotism rule to reinstate his wife's contract. Considering all of the above I find the asserted antinepotism rule of Respondent, apparently initiated for the first time in October 1981, to be of no force and effect to defeat the Board's Order with respect to Mary Christian or to diminish the amounts necessary to make her whole.

The second argument Respondent offers in support of its contention that Mary Christian's contract should have terminated when the new contract was entered into is the assumption, implicit in Respondent's argument, that Mary Christian would not have continued as a contractor for Respondent at $300 per month. It is this assumption, about which there is no evidence in the record, which must fall to the teaching of *Miami Coca-Cola Bottling Co.*, supra. It is uncertain whether or not Mary Christian would have accepted the lower monthly cleaning rate in late 1981. The record is completely without direct evidence regarding the question one way or the other. The question is of necessity speculative and not susceptible to certain resolution. This is so of course because Respondent consciously decided not to offer the new rate to her. In such circumstances of uncertainty the facts will be assessed against the wrongdoer, here Respondent, whose illegal actions in terminating the contract with Christian and whose later refusal to offer her the lower rate made it impossible to ascertain whether or not Christian would have in fact continued working for Respondent at the substantially lower rate. Thus, I find, while effective November 15, 1981, Respondent's obliga-

[6] While counsel for Respondent was not specific as to the proposed cutoff date, since the Christian contract contained a 30-day cancellation provision, and assuming the date of the contract with the new cleaner is taken as the decision date, the cutoff date advocated is assumed to be November 15, 1981.

tion to Mary Christian reduced from $650 to $300 per month, that obligation continued thereafter.

As I have earlier determined that the 1-year expiration of the contract and the expiration of the second 1-year renewal period do not operate to cancel Mary Christian's contract with Respondent, it follows that I examine the record evidence to determine if Respondent would have continued to use cleaning services through the backpay period. It is clear that a contract was entered into between Respondent and the second contract cleaner, Bompart Cleaning Service. There is no record evidence that the contract was ever cancelled or modified. The burden in this aspect of the case is on Respondent. I find therefore that the $300 per month fee continued to be paid at all times relevant to this proceeding, i.e., through the backpay period ending in June 1983. I further find that Christian is due that sum and that such an amount will continue to accrue on a monthly basis pursuant to the Board's Order unless and until Christian is offered a cleaning contract on equal terms. Thus this obligation continued through the second quarter of 1983, the end of the period at issue herein. Respondent's obligations thereafter will be resolved as necessary in subsequent proceedings and will not be adressed here.

5. Calculation of amounts owing

Using the above findings to determine gross earnings and taking the undisputed interim earnings contained in the backpay specification, the following chart establishes the amounts due and owing to Mary Christian without interest. As noted supra, additional amounts which may accrue for later quarters are not addressed in this proceeding.

YEAR	*QUARTER*	*GROSS EARNINGS*	*INTERIM EARNINGS*	*NET BACKPAY DUE*
1981	III	$650	-	$650
	IV [7]	475	-	475
1982	I	900	$972	- 0 -
	II	900	1177	- 0 -
	III	900	1416	- 0 -
	IV	900	1785	- 0 -
1983	I	900	1278	- 0 -
	II	900	1859	- 0 -
	Total Backpay Principal:			$1125

[7] Calculated as follows:
$650 per month: October–November 15
$300 per month: November 16–December 31

ORDER

On the basis of the foregoing and pursuant to Section 10(c) of the Act, I recommend the following[8]

IT IS HEREBY ORDERED that Respondent, International Union of Operating Engineers, Local 400, its successors or assigns, shall forthwith pay to Mary Christian the amount listed after her name, plus interest to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980),[9] less tax withholding required by state and Federal laws.

Mary Christian $1,125.00

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The specification by calendar quarter as set forth supra shall be used for purposes of interest calculation.

APPENDIX

STIPULATION

The following matters are stipulated by and between counsel for Respondent, and the General Counsel for the National Labor Relations Board:

1. Respondent has no objection to the Board's Decision and Order of December 16, 1982;

2. Respondent has not been able to reach agreement with the General Counsel as to reinstatement issues concerning Linda Morgan and Mary Christian, nor as to the amount of backpay due Mary Christian under the terms of said Decision and Order;

3. The Regional Director for Region 19 may issue an order setting a date for hearing before an Administrative Law Judge to determine the amount of backpay due and the issues of reinstatement in this case; with the understanding that Respondent reserves the right to assert, as an affirmative defense at the backpay proceeding, that circumstances would have caused the Respondent not to renew Mary Christian's janitorial contract after April 1, 1982; notwithstanding the unfair labor practice was found to have been committed;

4. Following the decision of the Administrative Law Judge issued after such hearing, the matter will be subject to review in due course by the Board. In the event judicial proceedings are thereafter necessary to enforce or to review the Board's backpay and reinstatement determinations, the only issue before the court will be the validity of the backpay computation and the reinstatement issues, as Respondent concedes that in all respects the Board's Decision and Order of December 16, 1982, is valid and proper.

The Armstrong Rubber Company, Pacific Coast Division *and* United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 703, AFL–CIO–CLC. Case 32–CA–5876–5

13 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 20 June 1984 Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Armstrong Rubber Company, Pacific Coast Division, Hanford, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening, disparaging, and harassing Shop Steward Tesoriere because of his activity on behalf of the Union, Chairman Dotson and Member Hunter do not rely on any of Supervisor Homen's comments to Tesoriere during August 1983. Further, Member Hunter does not rely on the confrontation between Homen and Tesoriere on 17 September 1983.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that by various statements and actions of Supervisor Homen directed toward employee Tesoriere the Respondent violated Sec. 8(a)(1) of the Act, we do not rely on that portion of the judge's analysis, in III of his decision, which discusses Homen's motivation and asserts that once an antiunion motivation on the part of Homen was shown the burden shifted to the Respondent to show either that the incidents did not occur or that if they occurred they were unrelated to Tesoriere's union activity. We note that the test for finding a violation of Sec. 8(a)(1) such as that alleged here is whether the employer's actions reasonably tended to interfere with, restrain, or coerce the free exercise of employees' statutory rights. *American Freightways Co.*, 124 NLRB 146 (1959).

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This case was tried in Fresno, California on April 26, 1984.[1] The complaint, issued November 30, is based on an original charge filed September 16 by United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 703, AFL–CIO–CLC (Union); a first amended charge filed by the Union on September 30; and a second amended charge filed by the Union on November 21. The complaint, as amended at trial, alleges that The Armstrong Rubber Company, Pacific Coast Division (Respondent), violated Section 8(a)(1) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of counsel for General Counsel and counsel for Respondent.

On the entire record, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent, a Connecticut corporation with an office and place of business in Hanford, California, has been engaged in the manufacture and nonretail sale of automobile, truck, and tractor tires and tubes. During the past 12 months, in the course and conduct of its business operations, Respondent purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California.

I find that Respondent is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 703, AFL–CIO–CLC is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background[2]

Anthony Tesoriere, a member of the Union, has been employed by Respondent approximately 17 years as an industrial mechanic. He has held several offices in the Union, and at all times material has been the union shop steward for Respondent's maintenance department. Since approximately 7 years ago, and at all times material, Tesoriere's immediate supervisor was Bill Homen, Re-

[1] All dates are within 1983, unless otherwise stated.

[2] This background summary is based on credited testimony and evidence not in dispute.

spondent's maintenance foreman,[3] who supervised 10 to 16 employees. Under the collective-bargaining agreement between Respondent and the Union, the first step of grievances in Homen's department often were discussed by Homen and Tesoriere. Those two persons attempted to settle grievances, but written grievances are not seen by Homen—they are filed with Respondent's maintenance superintendent. During the past year Tesoriere filed approximately 30 grievances for the 80 employees of the maintenance department, of which approximately 12 grievances involved Homen.

1. The incidents involved

Tesoriere testified that Homen has threatened and harassed him on several occasions, as follows:

a. On August 29 he discussed a grievance with Homen concerning movement of molds by mechanics, which movement he contended was improper.

> A. Well, I first told him about moving these molds and why the mechanics were doing the job instead of the mold repairmen. He got upset when I started talking to him, and he accused me of just standing there wasting time and ordered me to get back to work, get back to my area and go back to work.
>
> Q. Did he say anything else?
>
> A. Other than accusing me of wasting time, no, he just told me to get back to work.
>
> Q. Did he indicate that he would correct the situation or not correct it?
>
> A. He did say he wouldn't do anything about it. He said the mechanics were moving molds and that was it. He couldn't do any further than that.

b. On August 30 he was called by Homen to the office of Tom Driver, Respondent's maintenance superintendent, to represent an employee, John Smith, who was being investigated. As he left the office, Homen, was standing just outside the door, Homen stated to him, "You were in there long enough. Let's get back to work."

c. On August 26 again he was called by Homen to Driver's office to represent employee Bob Clay, who was being investigated by Respondent. Again Homen was just outside the door when Tesoriere left Driver's office. Homen said "I'd been in there long enough with Bob Clay and to go back to work."

d. On August 16 Tesoriere filed a grievance on behalf of employee Al Palomo, and on that day Homen called Tesoriere to Driver's office for an investigatory interview of Palomo by Driver. The meeting was attended by Palomo, Driver, Homen, and Tesoriere. Palomo later left, and a second grievance hearing then was held for employee Les Davis, with the same people present. As everyone was leaving after the meeting, Homen approached Tesoriere outside the office, and appeared angry. Homen "told me we'd been in there long enough again, and it was time to get back to work."

e. On September 15 a mechanic named John Borba told Tesoriere he wanted to file a written grievance against Homen because Homen had taken tools from Borba's toolbox and was using them. Tesoriere said he first would like to discuss the matter with Homen. Later that afternoon Tesoriere approached Homen:

> A. I stopped Bill Homen in the same area, in the maintenance shop by the battery area, and I said to Bill, "Just a minute, Bill, I'd like to speak to you for a minute." And he stopped, he was on his bicycle, and he stopped. And I said, "I understand you've been using tools out of a mechanic's tool box and I'd like you to stop it." And at first he denied it. He said, "No, I wasn't working. I wasn't using anyone's tools." And he paused for a minute, and then he just came unglued and he called, he said to me, "You little mother-fucker, I'll get you, I'll get you, if it's the last thing I do. I'll get you." And he was screaming and waving his arms when he said it. And we weren't but a few feet apart. He jumped on his bicycle and he rode off in the direction of the plant.

f. On September 17 Tesoriere talked with Homen:

> A. Well, I was standing at the tool crib, at the counter there, and Bill Homen came riding up on his bicycle, stopped and just started shouting and screaming right in my face, and we were nose-to-nose, wasn't a foot apart. He said, "You little son-of-a-bitch, there you are. Just the other day you wanted to write a grievance against me and now here you are standing here." And he was just—he was waving his arms, he was very—I thought he was going to hit me at one point, because he was just moving his arms and had a fist in front of my face. And then he jumped on his bicycle, and I said all I was trying to do was first-step grievance, and I don't even know if he heard me. He jumped on his bicycle and he took off and he went back towards the shop or the curing area.

g. On Monday, October 17 he talked with Homen before going to work late, at 11 a.m. He was late because he had been attending to union business as a trustee, with an absence excuse from management:

> A. Well, I'd gone upstairs to change clothes, get into my work clothes to go to work. And Homen came up there and he stood down the edge of the aisleway and he said, "So, there you are!" He said, "You're off all day Friday, and you're off half a day today on union business, and this shit has got to stop." And that was it. He turned around and he left and he left the locker room.

Tesoriere had been absent the preceding Friday on union business as a trustee, with an absence excuse from management.

h. On October 18, shortly after 8 a.m.:

[3] Homen's supervisory status is not in dispute.

A. Well, Homen approached me that morning, cleaning his bicycle, and he had a can of—a spray bottle in his hand, of eye-glass cleaning solution. He come over to me with it, and he sprayed the air all around my head and shoulders with it, it got in my coffee, I was holding a cup of coffee, it got into my coffee, and he just started to chuckle, he said, "All right, get to work."

He got this stuff all over me, all around me, and in my coffee. I just took my coffee cup and I threw it in the waste basket that was there and I just left the area and went into work.

Homen testified relative to Borba:

A. I remember he had—Tony had stopped me that day, that morning, and he said he was going to have to turn a grievance in or I'd been using tools, and I said—I denied it, no. And I said, "I'll talk to you about it later." And I rode off.

Homen denied that he ever talked, or had a confrontation, with Tesoriere while cleaning his bicycle. He also denied spraying Tesoriere with cleaning fluid.

Discussion

Generally speaking, Tesoriere was a more convincing witness than Homen. He seemed sincere, straightforward, and candid in his testimony. His version of events is credited.

Homen not only was not convincing—he did not deny most of Tesoriere's testimony. His denials principally involved only the Borba incident and the matter of spraying the cleaning fluid.

Prima facie, in view of the number of incidents involved and the single theme of those incidents, i.e., all of them occurred directly or indirectly in relation with Tesoriere's activity on behalf of the Union, Homen was motivated by a desire to restrain, interfere with or coerce Tesoriere in his union activity. It then became Respondent's burden to prove that the incidents did not occur, or that, if they did occur, they were not related to Tesoriere's union activity. That burden was not met. There is no evidence that Tesoriere and Homen were engaged in a personal feud, or that Tesoriere had been goofing off and needed to be prodded to get him to work, or that Homen's actions against Tesoriere were motivated by anything other than a dislike of the latter's union activity. No reason was shown for such a dislike, but that fact is irrelevant. It is found that Homen's actions in all incidents were dictated by his desire to restrain, interfere with, or coerce Tesoriere in his union activity.

Possibly one or more of the incidents Tesoriere related would not constitute violations of the Act, if they were considered in a vacuum. For instance, Homen's direction to Tesoriere to get back to work because he had been in with Driver and fellow employees long enough, possibly would not, in the absence of anything else, be a violation of the Act. However, that is not this case. It is apparent that Homen seized every opportunity to threaten or harass Tesoriere because the latter was acting in behalf of grieving employees. There is a pattern of conduct, not just one or two isolated incidents. Whatever may have been Homen's reason to be annoyed by Tesoriere's activity, it is clear that the reason was related to the Union. Homen supervised Tesoriere all day every day, yet there is no evidence that his comments discussed above ever were related to any activity other than union activity.

Homen made plain to Tesoriere his views of the latter's union activity. It is not necessary to dwell on implications. On August 16 Homen told Tesoriere, after waiting outside during an interview, that Tesoriere had been in Driver's office long enough with a grievant—that he should get back to work. On August 26 he repeated that action—he waited outside the office for Tesoriere to finish the grievance interview, and again told him to get back to work. On August 30, Homen again waited outside the office until a grievance interview was over, and then told Tesoriere that he had been in the interview long enough, and to get back to work. On September 15, angered by a grievance, Homen threatened Tesoriere "I'll get you . . . if it's the last thing I do. I'll get you." On September 17 Homen swore at Tesoriere because the latter had been involved with a grievance. On October 17, Homen objected to Tesoriere's being off work on union business, and threatened that "this shit has got to stop." On October 18, Homen assaulted Tesoriere with cleaner spray. That assault, standing alone, possibly would be ambiguous. However, it does not stand alone—it followed an earlier threat by Homen to "get" Tesoriere, and a threat the day before concerning Tesoriere's union activity, "this shit has got to stop." Those actions by Homen clearly were coercive, and constituted threats and harassment in violation of the Act, as alleged in the complaint.[4]

On the basis of the foregoing findings of fact and on the entire record, I make the following

Conclusions of Law

1. Respondent The Armstrong Rubber Company, Pacific Coast Division is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Rubber, Cork, Linoleum and Plastic Workers of America, Local No. 703, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening, disparaging, and harassing a union shop steward because of the steward's activity on behalf of the Union.

The Remedy

Having found that Respondent has engaged in unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

[4] *Davis Coal Co.*, 266 NLRB 1072 (1983); *Chrysler Corp.*, 245 NLRB 554 (1979); *Grane Trucking Co.*, 241 NLRB 133 (1979); *Westinghouse Electric Corp.*, 237 NLRB 578 (1978).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent The Armstrong Rubber Company, Pacific Coast Division, Hanford, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Violating Section 8(a)(1) of the Act by threatening, disparaging and harassing a union shop steward because of the of the steward's activity on behalf of the Union.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Post at its facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT violate Section 8(a)(1) of the Act by threatening, disparaging, and harassing a union shop steward because of the steward's activity on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

THE ARMSTRONG RUBBER COMPANY, PACIFIC COAST DIVISION

---

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Eastern Telecom Corporation *and* Carole A. Snyder *and* Robert L. Wieland. Cases 6–CA–15663 and 6–CA–15803

13 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 16 June 1983 Administrative Law Judge William A. Gershuny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order[3] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Eastern Telecom Corporation, Monroeville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1:

"1. Cease and desist from

"(a) Soliciting its employees to take their grievances directly to it rather than attempting to obtain redress through the contractual grievance procedure or through other protected activities.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Add the following as paragraph 2(b):

"(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

---

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the General Counsel contends that the judge's credibility resolutions, factual findings, and legal conclusions are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the Respondent's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

In sec. III,B,(9) of his decision, the judge incorrectly stated that Charging Party Wieland "admitted making all the disparaging remarks, the threat to go to city council and telling co-employees about his litigation with a former employer." The record reveals, however, that Wieland only admitted making two of the disparaging remarks and telling other employees about his litigation with a former employer. This error in the judge's findings does not affect his conclusions, because he relied on other independent evidence as to Wieland's threat and all of the disparaging statements.

In the paragraph titled "*The sub-contractor grievance*" in sec. III,B of his decision, the judge incorrectly stated that Local Union President Peterson testified Wieland's complaints about the Respondent's subcontracting of unit work were never brought to the Respondent's attention. Although Peterson did testify that he never told the Respondent of Wieland's complaints, Peterson also testified that Wieland had complained directly to the Respondent about the subcontracting. Further, Respondent Director of Operations Gingery admitted that Wieland complained to him in May 1982 about the Respondent's use of subcontractors to do bargaining unit work, and the judge found that Wieland questioned Respondent Administrative Assistant Yocco about subcontracting in June 1982 when Yocco informed employee Smith he would be laid off. We do not rely on the judge's erroneous finding in adopting his decision. Rather, we note there is no evidence that the Respondent expressed any animus toward Wieland's subcontracting complaints or that his complaints to Gingery in May and to Yocco in June played any part in the Respondent's decision to discharge him in September.

In par. 4 of sec. III,C of his decision, the judge incorrectly stated that "help was needed due to the maternity leave of one clerk and the vacation of another." The record establishes, however, that no employee was on maternity leave when the Respondent recalled Snyder. This error in the judge's findings does not affect his conclusions, and we do not rely on it in adopting his decision. In the paragraph titled "*Wieland as steward*" in sec. III,B of his decision, the judge incorrectly stated that there were two other stewards instead of one. We therefore correct this inadvertent error.

[2] The General Counsel argues that the judge erred in concluding that the Respondent discharged Wieland for cause, pointing to evidence not addressed by the judge that on two occasions Respondent President Chiodo called Wieland "a troublemaker" and linked these comments to either a threat to get rid of Wieland or his actual discharge. Inasmuch as the record reveals that Chiodo also made similar statements about the other union steward, Grimes, but the Respondent did not discharge him and that the Respondent had fired other employees for the same conduct as it discharged Wieland, we agree with the judge that the Respondent decided to discharge Wieland solely because of his poor work performance, not because of any protected activities in which he may have participated, and that the Respondent would have made the same decision regardless of whether Wieland engaged in any protected activities. Furthermore, we note that Chiodo's vague "troublemaker" references were not in most cases specifically directed at any possibly protected activities, but rather were usually linked to Wieland's abuse of privileges or poor job performance and that the judge credited Chiodo's testimony that he considered Wieland a troublemaker because Wieland had called him names, threatened to slash his tires, and threatened to obstruct the sale of part of his business by revealing damaging information.

[3] We have modified the judge's recommended Order to add the standard language requiring the Respondent to refrain from violating the Act "in any like or related manner" and requiring the Respondent to notify the Regional Director of its compliance. We have also modified the judge's notice to conform to our Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit our employees to take their grievances directly to us, rather than attempting to obtain redress through the contractual grievance procedure or through other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

EASTERN TELECOM CORPORATION

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A consolidated hearing was held in Pittsburgh, Pennsylvania, on February 14–17 and April 11–12, 1983, on complaints alleging a number of 8(a)(1) violations, the unlawful layoff of nonbargaining unit employee Carole Snyder and the unlawful discharge of her friend, Steward Robert Wieland, on September 8, 1982.[1] A third complaint, Case 6-CA-15630, alleging a number of 8(a)(5) violations was settled on the opening day of the hearing.

On the entire record, including my observation of witness demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaints allege, the answers admit, and I find that Respondent is an employer subject to the Act.

II. LABOR ORGANIZATION INVOLVED

The complaints allege, the answers admit, and I find that Local Union 126, IBEW is a labor organization within the meaning of the Act.

III. UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a number of cable television systems in the Pittsburgh area. Its main office is in Monroeville and it has another office in Mt. Lebanon to service operations in that area.

Repsondent (and predecessors) has recognized and bargained with Local 126 since 1968 and the current contract covering technicians expires April 30, 1983. Admittedly, its relationship with the Union over the years has been good, there have been no unfair labor practice charges, all disputes have been resolved amicably without resort to arbitration, and there is no history of union animus.

B. *The Wieland Discharge on September 8, 1982*

By letter dated September 8, 1982, Robert Wieland, the Company's highest grade technician and union steward for the Mt. Lebanon operations, was discharged by Administrative Assistant and Director of Personnel Yocco. The stated grounds were numerous:

(1) The unauthorized use of company telephones for long-distance toll calls during March–May. On July 22, he was confronted with bills. Restitution was demanded and made, and he received a written warning. Other employees (including steward Grimes) received similar demands and warnings. Wieland admitted the facts. No grievance was filed.

(2) The failure to bond and ground connections to telephone lines, contrary to safe practices, company policy, and the Company's contractual obligation with the telephone company. Wieland was leader of the crew which performed the work. Wieland admitted the facts and received a reprimand on August 6, following a telephone company complaint on August 3. No grievance was filed.

(3) The failure on September 1 (and other days) to bury a cable connected to a customer's house, contrary to specific instructions and a written company policy announced August 3, and his issuance of verbal instructions to other employees not to bury cable and not to worry about it. Wieland admitted not burying cable at the time of installation, stating that the ground often was hard and he lacked proper digging equipment or the time and that other technicians similarly failed to bury cable on occasion. Once, the cable was left on a driveway.

(4) The damage of a company vehicle in January 1982, requiring repairs in the amount of $155.

(5) The inability to understand and perform work assigned on August 20 to Wieland within the scope of his superior classification, resulting in the loss of a full day of labor and necessitating performance of the work by a supervisor. He did not ask for assistance or blueprints and his wiring on the "head end" was a "mess."

(6) Two customer complaints in late August of failure to provide home service when scheduled. Wieland had marked work orders with the notation that the customer was not home, contrary to the fact.

(7) The scheduling of followup customer service, contrary to company policy which states that all service calls are to be scheduled only by office personnel who have responsibility for their coordination. Wieland admitted doing so, stating that often irate customers have to be told something.

(8) The failure to hook up a cable on September 3, as called for by a work order.

(9) The making of disparaging remarks about Company President Chiodo ("fat SOB" and "bastard") in conversations with other employees; disparaging remarks to

[1] Wieland filed, and later withdrew, a grievance over his discharge.

customers that company equipment was "outdated, obsolete, old and in need of repair"; threats to report how bad the cable system was to city council which licensed the system and was then considering an extension of the license, if he were discharged; threats to "get even" with the Company for laying off his girl friend, Charging Party Snyder; and threats to "do the same" to Respondent as he had done to a former employer who had discharged him and paid Wieland money in settlement of a claim. He admitted making all the disparaging remarks, the threat to go to city council, and telling co-employees about his litigation with a former employer. His reasons: in part, because they were true; in part, because he was angry with Respondent for having reassigned him from the Monroeville office (near his home and where his girl friend worked) to the Mt. Lebanon office where he was needed because of his classification. Significant also are statements to nonbargaining unit co-employees, after his transfer to Mt. Lebanon, that he had records and photographs to show that the system was bad, that he intended to get back at the Company because of his transfer, and Respondent's refusal to allow him (or other employees) personal use of company trucks, that he was going to "nail his ass" (referring to the company president) with those records, and that he had taken a former employer for a lot of money and was going to "take" the Company "for all he could get." Noteworthy is the fact that neither the transfer nor the truck-use policy is alleged to be unlawful.

The record evidence is overwhelming that actual cause existed for Wieland's discharge on the grounds that he was incompetent, insubordinate, careless, disloyal, and dishonest. Nor was there disparate treatment of Wieland. Another shop steward similarly was required to make payment for unauthorized toll calls and the truck-use policy applied to all. Other employees occasionally did not bury cables at time of installation, but none with the regularity of Wieland and no other employee directly disobeyed specific instructions to do so. There is evidence proffered that other employees slandered the president, but their remarks fall well afield of Wieland's. Another employee damaged a truck, but the when, where, and how are unexplained. Other employees were the subject of customer complaints, but Wieland was the subject of far more complaints and followup calls than all other employees. Indeed, another employee was similarly discharged for similar conduct.

The real issue is whether the discharge decision was also based in part on any protected concerted activity which Wieland may have engaged in. For reasons set forth below, I conclude that the decision was bottomed solely and exclusively on work performance and not on any protected activity and that Respondent would have taken the same course regardless of whether Wieland engaged in any such activity. For this reason, there is no occasion to consider whether Wieland's disparagement of the company cable system and its president was so destructive of the employment relationship as to make inappropriate the usual remedy of reinstatement.

The General Counsel's principal witness in both cases is Charging Party Wieland. Moreover, the keystone to the General Counsel's case is comprised of "admissions" of unlawful company motive allegedly made in July and August by Supervisor Turak to Wieland prior to the July 15 layoff of Snyder and the September 8 discharge of Wieland. For these reasons, the credibility of Wieland must be addressed at the outset.

In doing so, it must be said that the record in this case raises critical credibility issues, not of the run-of-the mill variety involving faulty memory, misperceived motives, misconstrued actions, and misinterpreted words. Rather, this record is strongly suggestive of evidence manufactured for purposes of this case.

It is helpful, I believe, to first consider the unusual circumstances surrounding the emergence of Turak as a source of evidence damning to Respondent. Turak was Wieland's supervisor and social friend when the latter was transferred to Mt. Lebanon in late June Wieland testified that Turak admitted (a) that he had been instructed by the Company to reprimand Wieland; (b) that the Company was watching both Wieland and his girl friend and housemate, Carole Snyder; (c) that Carole Snyder was laid off to provoke Wieland into giving Respondent grounds for discharge; (d) that he was told by the Company to deny Wieland assistance on an assignment; (e) Wieland would soon be given a difficult job in an effort to demote him; (f) that Wieland's visit to the Board offices would "cause war"; (g) that the Company was out to get Wieland; and (h) that Wieland was being watched.

These "admissions" were made by Turak to Wieland before his discharge on September 8, yet none were the subject of Wieland's charge of September 10 or the complaint which issued October 7. Presumably they were not mentioned in any of Wieland's first three affidavits given to the Board between September 10 and 21. It was not until the amended complaint of February 1, 1983, 2 weeks before the hearing, that Turak's role emerged in the form of seven allegations of violations of Section 8(a)(1). Presumably, Turak's role first was disclosed to the Board in Wieland's affidavit of January 26, 1983. This sequence of events—actual knowledge of admissions by Wieland in July and August when he was addressed by Turak; first disclosure and first allegations in early January 1983; and Turak's quitting his job in August 1982 and, by early 1983, his disappearance—raises grave suspicions as to the credibly generally of Wieland.

Of even greater importance, however, is my inability to credit Wieland based simply on my observation of him on the witness stand during his extended examination. On direct, his testimony was extensive and detailed, recounting numerous events and conversations over a 6-month period with recourse to no notes or other documents. On cross-examination, his testimony became vague vague, uncertain, exaggerated, and contradictory and he displayed a reluctance to admit to any fact which he perceived to be harmful to this case. He admitted making the basest of derogatory remarks concerning the company president and the cable system to get back at the Company for transferring him (admittedly lawfully) to another office where he was needed; he admitted that he gave conflicting evidence in an unemployment compensation hearing, in his affidavit, and at this hearing as to Respondent's knowledge of his activity regarding a

union grievance over use of subcontractors; and he admitted he similarly gave conflicting testimony as to whether he was asked by Turak about his visit to Board Offices.

In Wieland's zeal to support the allegation, it is my belief that he shut his eyes to the facts. I reject his testimony in its entirety.

This credibility finding thus disposes of paragraphs 11(a)(1)–(5) and 12(a)(1)–(7) and (b) of the complaint as amended.

The General Counsel contends that Wieland engaged in a number of activities protected under Section 7 of the Act and that each played a part in the decision to discharge Wieland.

1. The subcontractor grievance

This grievance was filed by the Union on August 27 and since has been arbitrated with the grievance being denied. According to the testimony of Local Union President Peterson, Wieland had complained to him many times about the Company's use of subcontractors to do bargaining unit work, but that Wieland's involvement never was brought to the attention of the Company. Thus, this activity could not have come within the Section 7 umbrella and could not have been a part of Respondent's decision.

2. Wieland's June 16 discussion with Yocco

On June 16, Director of Personnel Yocco informed technician Smith that he was to be laid off because of cutbacks. Present was Wieland, who was not yet a steward. Wieland asked if subcontractors were to be used; Yocco replied it was not his decision; and Wieland advised Smith to talk with the steward. The layoff decision was revoked 2 days later for unexplained reasons. Assuming, without deciding, that Wieland's fleeting involvement in the Smith layoff constitutes protected concerted activity, I am unable to find any evidence that this event played any role whatsoever in the discharge decision. Wieland's role was innocuous and there is no suggestion on this record that any ill will was generated.

3. Wieland's uniform and training discussions

Wieland, both before and after his appointment as steward, was outspoken in his opposition to a company plan that employees who make calls on private homes wear uniforms and to a company practice of providing training classes to benefit its employees who contractually are required to pass tests for advancement. The Company had heard that Wieland was circulating a petition. Local Union President Peterson advised Wieland that the issues were not covered under the contract. The uniforms were the suggestion of municipalities for security purposes. Chiodo, Respondent's president, in a conversation with Peterson, referred to Wieland as a troublemaker and the latter assumed the reference was to classes and uniforms issues. Chiodo, however, used the phrase to refer to Wieland's abusive attitude following his transfer to Mt. Lebanon and his loss of the use of company trucks for personal reasons. I credit Chiodo's testimony as it is fully consistent with the totality of events, of which Peterson was unaware and, thus, was left to speculate about Chiodo's meaning. Again, I am unable to detect any record suggestion that this series of events, which culminated on July 14, left any bitter aftertaste in the minds of Respondent's officials, despite the fact that employees originally (in June) had voted for uniforms, only to unanimously reject them on July 14. Given the other events of the same period (e.g., Wieland's disparaging remarks and his negligent work which necessitated many followup calls, all of which began in late June), I can neither find nor infer that such activities, assuming them to be protected and concerted under the Act, played any role whatsoever in the discharge decision. Simply stated, they were overshadowed and cast aside by those events which actually formed the basis for the discharge decision.

4. Wieland as steward

Wieland, at his request, was appointed steward on July 8. There were two other stewards. Chiodo admittedly was not unhappy or upset to learn of the appointment and there is no evidence of animus toward other stewards. As steward, Wieland processed no grievances, participated in no negotiations, and, to the knowledge of the Union, engaged in no other activities as steward. Another steward was required to make restitution for unauthorized toll calls and was on the receiving end of a number of remarks which are familiar subjects of 8(a)(1) allegations. No such allegations are included in the present complaint and, on the first day of the hearing, counsel for the General Counsel represented that the present case involves no allegations of harassment of Wieland because of his status as steward. There is evidence that Wieland detained co-employees from beginning their service calls in the morning, but the only evidence of subject matter relates, on one occasion, to an upcoming union meeting. There is no evidence that Respondent was aware of the subject matter of this discussion and, in any event, no protected activities are involved.

I find and conclude that the discharge of Wieland was not unlawful.

C. *The Layoff of Carole Snyder*

Carole Snyder, a girl friend and housemate of Wieland, was laid off on July 15.[2] The General Counsel's case as to Snyder is a derivative one. It is not based on any protected concerted activity on her part—indeed, there was none. Rather, it is the General Counsel's theory that she was a pawn in Respondent's efforts to retaliate against Wieland for his protected concerted activities.

[2] By Order of March 24, 1983, the Board granted the General Counsel's special appeal and directed that the General Counsel be permitted to amend the complaint in the middle of Respondent's case, to allege that Snyder also was unlawfully laid off on November 12, 1983, following a 2-week temporary recall. At the hearing, the General Counsel conceded that this November 12 layoff was not intended to allege an independent violation, but was simply evidentiary in nature, relevant to the issue of Respondent's motive for the original layoff.

Because Wieland's discharge was not unlawful, and for the further reason that the layoff of Snyder was motivated solely and exclusively by economic factors, these allegations must be dismissed.

It is undisputed that Snyder was at all relevant times a good and able employee in Respondent's Monroeville office. In 1982, the clerical work was divided among four clerks: Snyder and Carr handled the Plum cable system; and Keebler yet another. Of the four, Carr was most senior. Although Snyder had worked exclusively with the Plum system, she could have (and, indeed, did) worked on the other systems with minimal on-the-job training.

On July 15, she was abruptly laid off in the middle of the day for economic reasons. No replacement was hired and no other clerk was transferred into the position, except that, from time to time, the receptionist gave limited assistance to Carr. It is uncontroverted that other cutbacks were made, other employees were laid off, and Respondent lost money in 1982. The decision was based on Director of Personnel Yocco's determination that only one clerk was necessary to handle the Plum system. Snyder was chosen because she was single and less senior to Carr, the other clerk working on the Plum system, and because Carr was an unmarried mother. No consideration was given to the layoff of clerks working on other systems and the transfer of Snyder to perform work on those other systems. Thereafter, she requested and received from Chiodo a laudatory letter of recommendation which restated the reason for her layoff as the institution of a more efficient office procedure. On November 1, she was recalled for 2 weeks because, in the opinion of the office manager, help was needed due to the recent maternity leave of one clerk and the vacation of another.

I reject the testimony of Snyder (that 2 hours before her layoff, Chief Technician Flynn said to her, "I guess you know why Chiodo is upset") and that of Carr (that, at the time of the layoff, Chiodo said to her, "Snyder was involved because she was living with Wieland," who had sent certain unidentified information to the Union; and that, several weeks later, Flynn told her that he had warned Snyder "what would happen"). Carr admittedly was hysterical on July 15 and, thus, an unreliable reporter of events. Moreover, her bias was patent. Even crediting Snyder, Flynn's reference to Chiodo's upset would be nothing more than what Snyder already would have learned from Wieland himself—that Chiodo was upset by Wieland's disparaging remarks and his threats to go to city council, which could interfere with relicensing and an impending sale of the Company, involving millions of dollars. But I credit Flynn that no such statements were made. I was particularly impressed with the feelings that, despite his supervisory status, Flynn was not involved at all in the controversy and that he related events as they in fact occurred. I also credit Chiodo's denial. A big, gruff, self-made man with an amiable relationship with the Union for 15 years, Chiodo was a candid and convincing witness, based on my observation of his demeanor on the witness stand. Moreover, his testimony is consistent with the admitted facts concerning Wieland's seeking revenge for his transfer to Mt. Lebanon in late June and his loss of truck privileges based on his misuse and abuse of the privilege in the past.

For these reasons, I am convinced beyond any doubt that the decision to layoff Snyder was motivated solely by financial considerations, unrelated in whole or in part to any activities, protected or unprotected on the part of Wieland.

D. *Chiodo's July 14 Meeting With Employees*

On July 14, having heard "rumbles" concerning uniforms and training, Chiodo called a meeting of all technicians and servicemen during working hours. Admittedly, the meeting was a "gripe session," with Chiodo stating that he heard rumors of employee gripes and asking what they were. When he got no response, he asked whether they wanted uniforms. There was no response. He asked whether they wanted training classes for advancement tests. Again, there was no response. He stated that, without study, advancement tests would be harder to pass. He then aired a gripe of his own: the abuse of a prior policy concerning personal use of company trucks. He announced that that policy was being revoked[3] because of one "troublemaker" (pointing to Wieland) who "has abused it." No other mention was made of Wieland by Chiodo either during or after the meeting. Expressing his concern for employee-company relations, Chiodo invited employees to come directly to him with their problems.

The General Counsel alleges a number of 8(a)(1) violations arising out of this meeting. First, it is alleged that Chiodo denigrated and threatened to discharge employees because of their union and other protected activities. Crediting the testimony of Chiodo for the reasons set forth above, I find no factual basis for these allegations. Next, it is alleged that he informed employees that working conditions would be more onerous because they did not want to attend training classes in preparation for advancement tests. This allegation also is unfounded. Chiodo's statement tests would be more difficult to pass is simply a common sense statement of fact that, without training, any test is more difficult to pass. There is no evidence or suggestion that Respondent controls the subject of the tests which, under the contract, are under the control of the Joint Committee. Nor is there an 8(a)(5) allegation that Respondent has unilaterally altered the testing levels. Finally it is alleged that Chiodo solicited employee grievances and complaints to "interfere" with employees' Section 7 rights. This allegation is well founded. Board precedent is clear that employer solicitation of employee grievances and employer initiations to use the "open door" to air such grievances is unlawful because it has the effect, regardless of employer motive, of interfering with employee use of he contractual grievance procedure and the exercise of Section 7 rights generally. See, e.g., *Martin-Bower Co.*, 273 NLRB 194 (1982).

[3] Neither these consolidated complaints nor the one which was the subject of a settlement on February 14, 1983, alleged that revocation of this policy was unilateral and unlawful.

THE REMEDY

Having found and concluded that Respondent has violated Section 8(a)(1) of the Act, Respondent shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent Eastern Telecom Corporation Monroeville, Pennsylvania, its officers, agents, succesors, and assigns, shall

1. Cease and desist from soliciting employees to take grievances directly to their employer, rather than attempting to obtain redress under the contractual grievance procedures or through other protected activities.

2. Post at all of its locations where bargaining unit employees are assigned, copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Crown Cork de Puerto Rico, Inc. *and* Union Independiente de Trabajadores de la Crown Cork *and* S.I.U. de Puerto Rico, Caribe y Latinoamerica a/a S.I.U. of North America, AFL–CIO, Party to the Contract

S.I.U. de Puerto Rico, Caribe y Latinoamerica a/a S.I.U. of North America, AFL–CIO *and* Union Independiente de Trabajadores de la Crown Cork

Crown Cork de Puerto Rico, Inc. *and* Union Independiente de Trabajadores de la Crown Cork, Petitioner. Cases 24–CA–3787, 24–CA–3820, 24–CB–980, and 24–RC–5775

13 December 1984

SUPPLEMENTAL DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 7 February 1979 Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent Employer and the Respondent Union filed exceptions and supporting briefs, and the Charging Party Union filed further exceptions and a supporting brief. Thereafter, on 19 July 1979 the Board issued its decision[1] and remanded this case to the judge for further credibility determinations. On 31 August 1979 Administrative Law Judge Socoloff issued the attached supplemental decision. The Respondent Employer filed further exceptions and a supporting brief, and counsel for the General Counsel filed a brief in support of the supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Supplemental Decision and Order.

In the underlying decision, the judge was presented in part with the question whether Respondent Crown Cork de Puerto Rico, Inc. (hereafter Crown Cork or the Respondent Employer), and Respondent S.I.U. de Puerto Rico, Caribe y Latinoamerica a/a S.I.U. of North America, AFL–CIO (hereafter SIU or the Respondent Union), engaged in unlawful conduct when they negotiated and executed a collective-bargaining agreement on 12 August 1976,[4] and thereafter maintained and enforced this agreement. It has been the General Counsel's and the Charging Party's position that this conduct violated the Act because it occurred at a time when a competing labor organization, Union Independiente de Trabajadores de la Crown Cork (Union Independiente), had filed a representation petition and was seeking to represent Crown Cork's production and maintenance employees who theretofore had been represented by SIU. Crown Cork and SIU have contended that the agreement executed on 12 August was merely an interim extension agreement to succeed the expiring contract between them, that it did not provide for any additional benefits for covered employees, and that its execution and maintenance was lawful under *G & H Towing Co.*, 168 NLRB 589 (1967). The judge rejected the Respondents' contentions, finding that the Respondents' 12 August agreement was designed to favor the incumbent SIU, increased employer contributions to a SIU medical plan, and violated the Respondents' duty to maintain strict neutrality in the face of competing representational claims by the incumbent SIU and by Union Independiente. In finding these violations, the judge in effect relied on *Shea Chemical Corp.*, 121 NLRB 1027 (1958), which held that an employer must remain neutral and refrain from further negotiations when an incumbent bargaining representative's status is contested by a valid question concerning representation raised in support of a rival labor organization.

Subsequent to the issuance of the judge's initial decision, the Board overruled *Shea Chemical* in *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), holding that "the mere filing of a representation peti-

[1] 243 NLRB 569.

[2] The Respondent Employer asserts that the judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In the absence of exceptions, we adopt the judge's dismissal of the complaint allegations that the Respondent Employer violated Sec. 8(a)(1) of the Act by pointing a camera at striking employees who were waiting to vote in a representation election.

Chairman Dotson does not adopt the judge's finding that the Respondent Employer's statements to employees Fernandez and Rivera created the impression of surveillance in violation of Sec. 8(a)(1). In identifying supporters of the Charging Party Union, the Respondent made no reference to the method by which it learned of these employees' union activities and the record provides no basis for finding that such knowledge was unlawfully obtained.

[4] Unless otherwise indicated, all dates are in 1976.

tion by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. . . ."[5] In view of the Board's decision in *RCA Del Caribe*, there no longer is any basis for finding that Crown Cork's negotiation and execution of the extension agreement on 12 August unlawfully assisted the incumbent SIU.[6] Accordingly, we shall dismiss the allegations that Crown Cork violated Section 8(a)(2) and (3) of the Act by executing and maintaining this agreement. Likewise, we shall dismiss the related allegations that SIU's conduct violated Section 8(b)(2) and (1)(A).

In view of the above, we shall modify the judge's conclusions of law to the extent that the violations found by him are based on the execution and enforcement of the 12 August agreement. Specifically, we shall dismiss the allegations that Crown Cork violated Section 8(a)(2) of the Act when it acted in furtherance of its bargaining relationship with the incumbent SIU, when it informed employees that SIU was their representative, and when it instructed its employees to attend a meeting conducted by SIU at the plant during working hours.

However, we shall not disturb the judge's finding that the strike which commenced on 24 September was an unfair labor practice strike from its inception. In finding that the strike was caused in part by unfair labor practices, we rely on the existence of numerous acts of misconduct which preceded the commencement of the strike, including violations of Section 8(a)(1) and (3). Such misconduct was directed at the most prominent supporters of Union Independiente including incidents occurring in May or June, July, August, and September and culminated in the discriminatory discharge of employee Heriberto Padua, vice president of Union Independiente, on 24 September. Accordingly, the record supports the judge's finding that the strike was an unfair labor practice strike, notwithstanding that the strike additionally was based on the lawful execution of the extension agreement.

We also shall not disturb the judge's finding that Crown Cork violated Section 8(a)(1) of the Act on 25 September, the day after the strike began, when it threatened to discharge the striking employees. The discharge threat was premised on these employees' purported breach of the no-strike provision under the extension agreement.[7] The strike was based on unfair labor practices which were not subject to resolution by the applicable grievance provision.[8] Moreover, the strike was just one aspect of the ongoing, underlying dispute with respect to the representative status of SIU and Union Independiente's efforts to replace it. Accordingly, Crown Cork's threat to discharge employees pursuant to the no-strike provision was at its core an attempt to restrict the unit employees' selection of a bargaining representative. See generally *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974), rehearing denied 416 U.S. 952 (1974). See also *Servair, Inc.*, 265 NLRB 181 (1982), enfd. 726 F.2d 1435 (9th Cir. 1984). Accordingly we agree with the judge that this threat coerced employees' exercise of Section 7 rights in violation of Section 8(a)(1).[9]

In his decision, the judge also found that Crown Cork violated Section 8(a)(3) on 21 June when it transferred employee Esteban Arroyo from the first to the third shift. The judge supported this finding solely on the basis that the Respondent Employer's president, Arturo Diaz, conducted a meeting in August with members of Union Independiente at which they complained of alleged acts of discrimination. At the meeting, Diaz requested the opportunity to "fix everything up" and "put everything back to normal." The judge found that Diaz' statements during this meeting, and the subsequent reassignment of Arroyo back to the first shift, evidenced that the original transfer was discriminatory. In effect the judge has used employee complaints regarding shift changes, pay reductions, and job reclassifications, which employees had claimed were discriminatory, and the Respondent Employer's subsequent efforts to resolve these disputes as

[5] *RCA Del Caribe*, supra at 965.

[6] Chairman Dotson and Member Dennis did not participate in *RCA Del Caribe* and express no view here on whether that case was correctly decided. Absent a majority to overrule *RCA Del Caribe*, Chairman Dotson and Member Dennis consider themselves institutionally bound to apply that precedent in this case.

In view of our holding herein, it is immaterial whether the 12 August agreement was merely an extension of the expiring agreement without modification of benefits, as contended by the Respondents, or also served to increase benefits under the medical plan.

[7] This provision states as follows:

> During the life of this Agreement, the Company shall not order lockouts. During the life of this Agreement, the Union shall not cause or permit its members to cause, nor shall the Union members for any reason participate in a strike, nor a slowdown, nor a sitdown or permanent strike within the plant, nor any other type of interference with the Company's production. The employees involved in any conduct prohibited by this Article shall be submitted to disciplinary measures up to and including discharge.

[8] The scope of the bargaining agreement's grievance provision is limited to cover only disputes over the application or interpretation of the terms of the contract.

[9] Member Dennis concurs in the majority's finding that the 24 September strike was a protected unfair labor practice strike despite the contractual no-strike clause. Under *Arlan's Department Store of Michigan*, 133 NLRB 802, 807 (1961), "only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses." In Member Dennis' view, the Company's unfair labor practices were "serious" within the meaning of *Arlan's*. In addition to discharging employee Padua, vice president of the rival union, the Company engaged in numerous other acts in violation of Sec. 8(a)(1) and (3), all designed to prevent its employees from exercising their fundamental Sec. 7 right to select the rival union as their bargaining representative.

an admission by the Respondent Employer that its earlier actions were discriminatory. These settlement efforts however were primarily designed to prevent an anticipated strike by the unit employees, and were not admissions of misconduct for the Respondent Employer's earlier actions with respect to Arroyo. On the contrary, the evidence supports Crown Cork's claim that Arroyo's initial transfer, one of several such transfers which occurred on 21 June, was based on the need to train certain employees as a result of the recent introduction of a third shift during the previous month.[10]

In his decision, the judge also found that Crown Cork violated Section 8(a)(3) of the Act when it "terminated" Miguel Carrasquillo as leadman on 19 July and reduced his pay 25 cents per hour. We agree. However, as a remedy for this violation the judge recommended only that Carrasquillo be made whole for lost wages as a result of this incident. In adopting the judge's decision in this regard, we shall modify his remedy with respect to Carrasquillo's demotion and in addition shall require Crown Cork to reinstate Carrasquillo to his former leadman position or, if that position no longer exists, to a substantially equivalent position. *Walker Electric Co.*, 219 NLRB 481 (1975).

Finally, in light of our agreement with the judge that the strike herein was an unfair labor practice strike, and that the strikers had offered to return to work prior to the representation election conducted on 29 October 1976,[11] we adopt his finding that unfair labor practice striker replacements were ineligible to vote, that on this basis 190 challenged ballots be sustained, and that the remaining challenged ballots are not determinative. Accordingly, we adopt his finding that a majority of the valid ballots have been cast for Union Independiente, and that it should be certified as the collective-bargaining representative in the appropriate unit.

[10] Although the judge used the same rationale as that noted above in finding that the transfer of employee Guadalupe Rivera on 19 July from the first to the third shift also violated Sec. 8(a)(3), we agree with the judge's ultimate conclusion that this transfer was discriminatorily motivated. To support this conclusion, we rely on evidence that on 19 July Crown Cork engaged in a number of adverse changes affecting job assignments and wage rates which were found to have violated Sec. 8(a)(3) of the Act. Further, although other employees were reassigned shifts on 19 July, the conclusion that Rivera's transfer was discriminatory is additionally supported by our adoption of other concurrent acts of discrimination against Rivera whereby Crown Cork departed from its longstanding practice of allowing Rivera to work during his vacation period, and by its belated decision to eliminate his leadman's pay, notwithstanding his demotion from that position had occurred 16 months before.

[11] The election was conducted pursuant to a Decision and Direction of Election. The tally was 118 for Union Independiente and 15 for SIU; there were 213 challenged ballots, a sufficient number to affect the results of the election.

ORDER

The National Labor Relations Board orders that the Respondent, Crown Cork de Puerto Rico, Inc., Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or changing the rates of pay, classifications, shifts, and other terms and conditions of employment of its employees because of their union activities and sympathies.

(b) Refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work.

(c) Threatening summarily to discharge unfair labor practice strikers.

(d) Threatening to discharge employees because of their union activities and sympathies.

(e) Creating the impression of surveillance of the union activities of its employees.

(f) Soliciting employees to encourage other employees to support SIU.

(g) Prohibiting in-plant meetings of Union Independiente while permitting such meetings of SIU.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act to engage in concerted activities for their mutual aid and protection, or to refrain from such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Heriberto Padua and all the employees who engaged in a concerted work stoppage and strike commencing 24 September 1976, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights and privileges previously enjoyed, discharging, if necessary, other employees who have been hired in their places.

(b) Make Heriberto Padua whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination, in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less his net earnings during such period, with interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

(c) Make whole all the employees who engaged in a concerted work stoppage and strike commencing 24 September 1976, for any losses they may have suffered by reason of the failure and refusal to reinstate them to their former jobs, or to substantially equivalent positions, upon their unconditional

offer to return to work, by payment to each of them of a sum of money equal to that which that employee normally would have earned as wages from the date of the discrimination to the date of the Respondent's offer of reinstatement in the manner set forth in paragraph (b) above.

(d) Make Guadalupe Rivera, Rigoberto Febres, Miguel Carrasquillo, and Luis Nigaglioni whole for the losses they suffered as a result of the unlawful reductions in their rates of pay in the manner set forth in paragraph (b) above.

(e) Make Guadalupe Rivera whole for any loss of pay he may have suffered as a result of the refusal to allow him to work during his scheduled vacation in 1976 in the manner set forth in paragraph (b) above.

(f) Offer Miguel Carrasquillo immediate and full reinstatement to his former position as leadman, with all duties and functions or, if that position no longer exists, to a substantially equivalent position.

(g) Remove from its files any reference to the unlawful discharge of Heriberto Padua and notify him in writing that this has been done and that the discharge will not be used as action against him in any way.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its Carolina, Puerto Rico facility copies of the attached notice marked "Appendix."[12] Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint filed against the Respondent S.I.U. de Puerto Rico, Caribe y Latinoamerica a/a S.I.U. of North America, AFL–CIO is dismissed in its entirety.

IT IS FURTHER ORDERED that the challenges to the ballots of the 190 strike replacements in Case 24–RC–5775 are sustained and that Case 24–RC–5775 is severed from the unfair labor practice proceeding.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots in Case 24–RC–5775 have been cast for Union Independiente de Trabajadores de la Crown Cork and that it is the exclusive collective-bargaining representative in the following appropriate unit:

> All production and maintenance employees employed by Crown Cork de Puerto Rico, Inc. at its factory located in Carolina, Puerto Rico, but excluding all office clerical employees, sales personnel, professional employees, drivers, guards and supervisors as defined in the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or change the rates of pay, classifications, shifts, and other terms and conditions of employment of employees because of their union activities and sympathies.

WE WILL NOT threaten summarily to discharge unfair labor practice strikers and WE WILL NOT refuse to reinstate them upon their unconditional offer to return to work.

WE WILL NOT threaten to discharge employees because of their union activities and sympathies.

WE WILL NOT create the impression of surveillance of the union activities of employees.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT solicit employees to encourage other employees to support SIU.

WE WILL NOT prohibit in-plant meetings of Union Independiente while permitting such meetings of SIU.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights under the National Labor Relations Act.

We will offer Heriberto Padua, and all the employees who engaged in a strike commencing 24 September 1976, and who offered, unconditionally, to return to work on 22 October 1976, immediate and full reinstatement to their former or equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, other employees who have been hired in their places.

WE WILL make Heriberto Padua, and the striking employees, whole for any loss of earnings because of the discrimination against them, plus interest.

WE WILL expunge from our files any reference to the discharge of Heriberto Padua and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future action against him.

WE WILL make Guadalupe Rivera whole for any loss of pay as a result of our refusal to allow him to work during his scheduled vacation in 1976, and WE WILL make Guadalupe Rivera, Rigoberto Febres, Miguel Carrasquillo, and Luis Nigaglioni whole for the reductions in their rates of pay, plus interest.

WE WILL reinstate Miguel Carrasquillo to his position as leadman or, if that postion no longer exists, to a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed.

CROWN CORK DE PUERTO RICO, INC.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges filed October 29 and December 27, 1976, and February 17, 1977, by Union Independiente de Trabajadores de la Crown Cork (the Independent Union), against Crown Cork de Puerto Rico, Inc. and S.I.U. de Puerto Rico, Caribe y Latinoamerica a/a S.I.U. of North America, AFL–CIO (Respondent Employer and Respondent Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 24, issued a consolidated complaint dated March 23, 1977, alleging violations by the Respondents of Section 8(a)(1), (2), and (3), Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the National Labor Relations Act. Respondents, by their answers, denied the commission of any unfair labor practices. On March 24, 1977, the Regional Director Ordered that Case 24–RC–5775 be consolidated with the above-referenced unfair labor practice cases for purposes of hearing and decision with respect to the issues raised by the Petitioner's objections to conduct affecting the results of the election in that case, as well as disposition of 213 challenged ballots.

Pursuant to notice, a trial was held before me in Hato Rey, Puerto Rico, on April 25 and May 16 through May 26, 1977, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Crown Cork de Puerto Rico, Inc. is a Delaware corporation engaged in the manufacture, sale, and distribution of metal cans, bottle caps, and related products at its plant located in the city of Carolina, Commonwealth of Puerto Rico. During the year preceding issuance of the complaint, a representative period, Respondent Employer purchased goods and materials valued in excess of $50,000 which were transported and delivered to its plant directly from points in the United States located outside the Commonwealth of Puerto Rico. I find that Crown Cork de Puerto Rico, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

S.I.U. Puerto Rico, Caribe y Latinomerica a/a S.I.U. of North America, AFL–CIO and Union Independiente de Trabajadores de la Crown Cork are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent Union S.I.U. was certified on August 17, 1973, as the collective-bargaining representative of the Crown Cork production and maintenance employees working at the Carolina, Puerto Rico plant. Thereafter, Crown Cork and S.I.U. entered into a collective-bargaining agreement, containing union-security and checkoff provisions, which was to expire on August 12, 1976. In May 1976, certain employees formed the Independent Union and on May 17 that union filed a representation petition seeking an election among the unit employees (Case 24–RC–5775). On August 2, the Regional Director issued a Decision and Direction of Election in the contractual unit.

Immediately preceding the scheduled expiration of their contract, on August 12, Respondent Employer and Respondent Union executed a "Stipulation" whereby they agreed to extend the contract, including the union-

security and checkoff provisions, until such time as the representation proceedings before the Board were resolved "in a final and binding manner." The stipulation further provided for increased payments by Crown Cork to the contractual "Welfare Plan," from $6.50 per week per employee to $55 per month per employee, because of "the substantial increase there has been in the cost of medical-hospital expenses."

In this proceeding, the General Counsel contends that, by the execution and maintenance of the contract extension, including its union-security and checkoff provisions, notwithstanding the existence of a real question concerning representation, the Respondents violated Section 8(a)(3) and (2) and Section 8(b)(2) and (1)(A) of the Act. In addition, the General Counsel asserts that Respondent Employer engaged in unfair labor practice conduct by making coercive statements to employees; creating the impression of surveillance of employees' union activities; engaging in acts of assistance to the S.I.U. and changing employee shifts, rates of pay, job classifications, benefits and working conditions in order to encourage support for the S.I.U. and discourage support for the Independent Union.

On September 24, 1976, Respondent Employer discharged employee Heriberto Padua, an officer of the Independent Union. Thereafter, the great majority of the unit employees engaged in a strike. The General Counsel contends that Padua was discharged in violation of Section 8(a)(3) of the Act and that the ensuing strike, in protest of the discharge and other unlawful acts of Crown Cork, was an unfair labor practice strike. Respondent Employer claims that Padua was discharged for cause and that the strike was economic in nature. Also at issue is whether Crown Cork violated the Act by threatening to discharge the strikers and by refusing to reinstate them on their unconditional offer to return to work.

An election was conducted on October 29, 1976. The Independent Union's objections to conduct affecting the results thereof are based, principally, on the alleged unfair labor practices summarized above. Resolution of the challenged ballot issues revolves almost entirely about a determination of the eligibility to vote of strike replacements.

B. *Facts and Conclusions*

1. Formation of the Independent Union and Respondent Employer's knowledge thereof

In early May 1976, at a meeting attended by 90 to 100 individuals (of the 130 to 140 unit employees then working for Respondent Employer), the Independent Union was formed. The following employees were elected as members of the board of directors:

Luis Nigaglioni	President
Heriberto Padua Soto	Vice President
Rigoberto Febres	Secretary
Miguel A. Carrasquillo	Treasurer
Pedro Diaz	Sub-Secretary
Esteban Arroyo	Sub-Treasurer
Ruben Feliciano	Member-at-large
Armando Vegerano	Member-at-large
Francisco Fernandez	Member-at-large

Two days later, Nigaglioni and Fernandez met with Respondent Employer's supervisor, Personnel Manager Ana Aponte, and advised her of the formation of the Independent Union and the identity of the members of the board of directors. Nigaglioni stated that the new union was formed because of a lack of service by the S.I.U. and employee dissatisfaction with the contractual medical plan. Aponte said that she would forward the information to the Crown Cork president, Arturo Diaz Cataldo.

As noted, the newly formed union filed a representation petition with the Board on May 17, 1976. Some 2 weeks later, President Diaz initiated a meeting with the members of the board of directors and assured them that he, Diaz, would work with whichever union won the election. In June, Diaz again met with the directors to express his anger about certain machinery breakage which, Diaz believed, had been caused by intentional acts.

2. Coercive statements; acts of assistance; discriminatory conduct

Employee Francisco Fernandez, a member of the board of directors of the Independent Union, testified that, in late May or early June, President Diaz approached him outside the plant and told him that there were some 15 or 20 workers who were "harming the plant." Diaz stated that those individuals, who he named, desired to remove the S.I.U. as bargaining representative despite the fact that that union was "working all right," and, therefore, he, Diaz, wanted to get those employees out of the plant. Diaz further stated that, in particular, he wanted to remove Independent Union President Nigaglioni from the plant. Fernandez also testified that, in late August, at the request of Supervisor Bernardo Matos, Fernandez met Diaz and Matos at a local restaurant. At that time, Fernandez asked Diaz why he, Fernandez, had been reassigned to the night shift. Diaz replied that Fernandez was one of the most important leaders at the plant and that the other workers would listen to him. Therefore, Diaz wanted Fernandez to encourage the night-shift employees to retain the S.I.U. When Fernandez said that, as a member of the Independent Union, he could not campaign for the S.I.U., Diaz stated that the newly formed union was "a bunch of Communists" and that Diaz' primary goal was "to get Nigaglioni out of the plant" because that employee had the entire plant in turmoil.

Respondent Employer's witnesses, Diaz and Matos, contradicted each other with respect to the foregoing incidents. Thus, Diaz denied that he had had any meetings outside the plant with Fernandez since 1974. Matos, an entirely confused and unreliable witness, confirmed the fact of the August meeting but claimed that no conversation occurred since, according to Matos, Fernandez left the meeting immediately after he arrived. Fernandez impressed me as a credible witness and I find that the conversations with Diaz occurred substantially as he testi-

fied. I conclude that Respondent Employer, through President Diaz, violated Section 8(a)(1) of the Act by creating the impression of surveillance of employee-union activities and by threatening to discharge employees because of their support for the Independent Union. Crown Cork violated Section 8(a)(2) and (1) of the Act by soliciting an employee to encourage other employees to support the S.I.U. rather than the Independent Union.

Fernandez further testified that, during the month of August, Plant Superintendent Francisco Gonzales summoned Fernandez from his home to the plant in order to receive a telephone call in Gonzales' office. The caller was Respondent Union's executive secretary, Suarez Lazu, who asked Fernandez to meet with the Union's president, Keith Terpe, at the S.I.U. officer. After completing the telephone conversation, Fernandez was informed by Gonzales that "it was all right, that he knew and Mr. Arturo Diaz Cataldo knew about this meeting and that I should go, that they would pay my day even if I was absent." Gonzales further stated that he and Diaz wanted Fernandez to help them "so that they do not get the S.I.U. out" and Gonzales reminded the employee that he, Fernandez, had been the spokesman for the S.I.U. in 1973, when that union was challenged by the Teamsters. Finally, Gonzales told Fernandez "that as long as I would help them, I was all right at the plant." Gonzales, in his testimony, denied that the above-related incident occurred.

Gonzales was not, in my judgment, a reliable witness. His testimony was, in certain instances, self-contradictory and inconsistent with his prehearing affidavit. Based on those factors, as well as demeanor impressions, I have assigned little weight to his testimony. I find, based on Fernandez' testimony, that Respondent Employer, by its plant superintendent, Gonzales, unlawfully assisted Respondent Union by encouraging Fernandez to visit the S.I.U. offices during working hours and without loss of pay.

Guadalupe Rivera was hired by Respondent Employer in 1967 as a first-shift fingerlift operator. In February 1974, he was promoted to the position of first-shift leadman and, as a result, was granted a 25-cent-per-hour wage increase. In March 1975, Rivera was reassigned to his former fingerlift operator position but, nonetheless, he continued to be paid at the leadman rate although he no longer performed those duties. On July 19, 1976, Rivera was suddenly transferred to the third shift (the night shift) and he ceased receiving leadpay (the 25 per cent per hour). About the same time, Respondent, contrary to its past practice of permitting Rivera to work during his scheduled vacation periods, and thereby earn double pay for those weeks, informed Rivera that he would be required to take a vacation. Rivera testified that when he saw Diaz about the vacation matter, in August, Diaz stated that "the law now required it." Diaz then handed Rivera a $100 check, as a loan, and stated that he knew that Rivera was "in sympathy" with the Independent Union. According to Rivera, Diaz further stated that the employees "should be careful, we should think it over carefully, not to let ourselves be led by bad leaders who could lead us down wrong paths . . . and that we were being advised by a Communist law firm; that he knew Mr. Escrebano and that that's why he was telling me this."[1] Diaz testified that he could not recall making the statements attributed to him by Rivera.

Based on Rivera's credited testimony, I find and conclude, as alleged in the complaint, that, in August 1976, Respondent Employer, through President Diaz, violated Section 8(a)(1) of the Act by creating the impression of surveillance of the union activities of its employees. In addition, I reject Respondent's argument that its 1976 refusal to allow Rivera to work during his scheduled vacation period was based on the requirements of local law. Rivera was permitted to work during such periods in 1974 and in 1975 when the same law was in effect and, under its provision, allowing an employee to obtain an exemption from the law's requirements through the Puerto Rico Department of Labor. When Rivera saw Diaz about the matter, Diaz clearly related his position concerning the supposed requirements of the law to his claimed knowledge of Rivera's union sympathies. In light of that factor, and the absence of satisfactory explanation for Respondent's sudden change of its practice of permitting Rivera to work during scheduled vacation periods, I find and conclude that Respondent Employer, in violation of Section 8(a)(3) of the Act, refused to allow Rivera to do so in 1976, and thereby earn double pay for that period, because of his Independent Union sympathies.

The General Counsel also contends that Respondent Employer violated Section 8(a)(3) of the Act when it transferred Rivera to the third shift and ceased paying him 25 cents per hour leadpay. Likewise, it is asserted that when, on June 21, 1976, Respondent transferred employee Esteban Arroyo, a member of the board of directors of the Independent Union, from the first shift (where he had worked since the date of his hire, March 16, 1972) to the third shift, it did so for discriminatory reasons. It is also alleged that, on July 19, 1976, Respondent unlawfully reclassified and reduced the pay of Rigoberto Febres, the secretary of the Independent Union, and Miguel Carrasquillo, the treasurer.

For the 5-1/2-year period preceding July 1976, Febres worked for Respondent as a shipping and receiving clerk. On July 15, he received a letter from Personnel Manager Aponte, stating:

> As you are aware, the position of "Shipping & Receiving Clerk" is not negotiated by the collective bargaining agreement, this being a position of a confidential nature and which belongs to the office personnel.
>
> Our management is not interested in unionizing this position in a new contract and you being the person who for years have performed this position, you being a union member, we give you preference in case you want to become part of our office personnel.
>
> If you agree, we shall be pleased to give you the opportunity, otherwise, we shall be forced to give

[1] Escrebano was one of the lawyers representing the Independent Union.

> you a new classification within the unionized positions which you are prepared to perform.
>
> We hope that you may see what is best for you and give us your answer, in writing, tomorrow, July 16, 1976, in the morning hours.
>
> If we don't receive a reply from you, we shall believe that you are not interested and we shall immediately proceed to reclassify you.

After reading the letter, Febres told Aponte, "I knew this was going to happen." Aponte replied, "This is the way they work over here." Febres requested additional time to consider the matter and that request was denied. When he then refused a changed status, he was, on July 19, assigned to the position of fingerlift driver and his pay was reduced by 25 cents per hour. Despite the assigned reason for Respondent's action with respect to Febres, he was, shortly after his reclassification, replaced as shipping and receiving clerk by a bargaining unit employee who was not required to terminate his union membership. I find and conclude that Febres' reclassification, and the pay reduction which he suffered, were in patent violation of Section 8(a)(3) of the Act.

Also on July 19, Miguel Carrasquillo was "terminated" as a leadman, and reduced in pay by 25 cents per hour. According to the notice furnished to Carrasquillo by Respondent Employer, the reason for the action was a "change in company policy." When Carrasquillo questioned his supervisor, Les Inwood, about the matter, he was told that "it was because the company no longer trusted me." Inwood refused Carrasquillo's request for greater specificity. At the hearing, Gonzales testified that he decided to reclassify Carrasquillo, and reduce his pay, because of customer complaints about the cans produced on the third shift. However, Carrasquillo worked as a leadman on the first shift. In light of Respondent's knowledge of Carrasquillo's position as an officer of the Independent Union; its demonstrated animus; the shifting and pretextual reasons which it has advanced to explain the demotion of that employee and the timing of the action, I find and conclude that Carrasquillo's reclassification and pay reduction were accomplished in violation of the Act.

Luis Nigaglioni was hired by Crown Cork in May 1973, as a general worker. Beginning November 1975, he was paid at the rate of $4.30 per hour. On May 17, 1976, following his election as president of the Independent Union, Nigaglioni was reclassified from "general worker" to "production worker," an action which is described in Respondent Employer's personnel files as a "promotion." However, Nigaglioni testified that, despite the classification change, his duties remained the same. When Nigaglioni received his paycheck on August 15, he discovered that his hourly rate had been reduced to $4.05. Nigaglioni then approached Gonzales about the matter and was told that his pay was reduced by order of Diaz. Gonzales further told Nigaglioni: "Luis, so that no more problems arise, I don't want any more meetings at the plant because Mr. Arturo doesn't want them." Nigaglioni then asked if his pay had been reduced because of the Independent Union and Gonzales replied that he did not want any more problems at the plant, and he would not allow any more meetings of the Independent Union there.

Gonzales, in his testimony, attributed the August pay reduction of Nigaglioni to a change of duties which allegedly occurred on May 17, when Nigaglioni was, as noted, reclassified. Since Nigaglioni credibly testified that the May 17 "promotion" did not result in any change of duties, I find that the assigned reason for the pay reduction does not explain that action. Rather, in all the circumstances, including Diaz' statement to Fernandez that he, Diaz, wanted to "get Nigaglioni out of the plant" because of his activities on behalf of the Independent Union, I find and conclude that Respondent Employer reduced Nigaglioni's rate of pay in violation of Section 8(a)(3) of the Act. I further conclude that Gonzales, in orally promulgating a rule prohibiting in-plant union meetings which, as stated, applied only to the Independent Union, acted in violation of Section 8(a)(2).

In late May or early June, Francisco Fernandez, a member of the Independent Union's board of directors, was transferred from the first shift to the second shift. According to Gonzales' uncontradicted testimony, the transfer occurred at the request of the employee. I thus conclude that the allegation of a discriminatory transfer of Fernandez has not been sustained. In August, Fernandez, then in charge of the storeroom, was assigned an additional duty, to mop the storeroom floor. Previously, that task, among others, was performed by unit employees, on an optional basis, on Saturdays, at a time-and-a-half rate. The record evidence suggests that Fernandez' work activities were not materially changed by the additional assignment and, on that basis, I find no violation of the Act in that regard.

In early August, Harold Abrams, director of industrial relations of Crown Cork and Seal Co., Respondent Employer's parent corporation located in Philadelphia, Pennsylvania, arrived in Puerto Rico in order to verify rumors that the unit employees would strike upon the expiration of the contract. On August 4, Abrams and Diaz met with the members of the board of directors of the Independent Union and Abrams began the meeting by asking the employees if there would be a strike. Febres stated that there would not be a strike if "the discrimination" against the supporters of the Independent Union, including shift changes, pay reductions, and job reclassifications, stopped. Diaz assured the directors that, if given 2 weeks time, he would "fix everything up" and "put everything back to normal." Upon receiving that representation, the directors agreed not to strike.

On August 16, Esteban Arroyo was returned to the first shift. At the hearing, Diaz testified that that action was taken, "absolutely, as a result of the agreements reached at the August 4 meeting. On the other hand, Gonzales testified that he alone was responsible for the original transfers of Arroyo and Guadalupe Rivera, from the first shift to the third shift, and that the purpose was to place experienced employees on the third shift while new hires were trained on the first shift. According to Gonzales, when the training period was completed, he, Gonzales, without consulting Diaz, returned Arroyo and

Rivera to the first shift. I think it more likely, consistent with Diaz' testimony, that those employees were returned to the first shift in compliance with Diaz' agreement with the Independent Union to end "the discrimination" and "put everything back to normal." I find and conclude that the original transfers of Arroyo and Rivera, from the first shift to the third shift, were in violation of Section 8(a)(3) of the Act. I also conclude that Rivera's loss of leadpay at the time of his unlawful transfer to the third shift, and fully 16 months after he ceased performing the duties of a leadman, was accomplished for discriminatory reasons.[2]

3. The contract extension

In the weeks preceding the August 12 execution of the contract extension, Diaz met with Respondent Union's executive secretary, Suarez Lazu, on some three occasions. According to Lazu's testimony, he insisted, at those meetings, on increased Crown Cork contributions to the medical plan as a condition to signing the "Stipulation." Thus, Lazu testified that larger contributions were needed in order to meet the increased costs of maintaining the plan. Lazu later testified that such increased contributions were sought from all participating employers in order to improve the plan and eliminate problems. In any event, after initially resisting the substantially increased payments sought by the S.I.U., Respondent Employer relented.

There is considerable record evidence that, indeed, at least some increase in the size of employer payments to the plan was necessary in order to maintain then existing levels of medical service. While I accept Respondents' arguments in that regard, I find them nondeterminative of the issue before me.

On August 13, Respondent Employer posted on its bulletin board a letter, signed by President Diaz, which stated, inter alia:

> Yesterday morning, I was asked by my superiors to sign a STIPULATION extending the duration of the AGREEMENT between the COMPANY and the UNION until such date as the National Labor Relations Board resolved in a binding manner the cases pending consideration.
>
> The main reason for this decision was maintaining in effect for the membership the protection that the agreement gives them and particularly the Medical Plan, for which *the Company agreed to pay a big increase, so that the service could be amplified.* [Emphasis added.]

Also on August 13, Diaz met with Febres and Fernandez and showed them a copy of the "Stipulation." Febres stated that the members of the Independent Union would not accept it and he demanded that the "Stipulation" not be used as a basis for continuing the deduction of dues in favor of Respondent Union. Diaz shrugged and walked out.[3]

On August 27, Respondent Union circulated a leaflet among the unit employees, signed by Suarez Lazu, which stated, inter alia:

> Hereby we are informing all employees of Crown Cork as well as their relatives, that the Medical Plan of the S.I.U. continues to cover everyone like before. Moreover, we are making great efforts to improve the plan at all places where the employees of Crown Cork go to receive services.

The General Counsel contends that Respondents, by negotiating and executing the "Stipulation" and, thereafter, enforcing and administering the collective-bargaining agreement, including its union-security and check-off provisions, at a time when a valid question concerning representation had been raised, violated the neutrality requirements mandated by the Board's holding in *Shea Chemical Corp.*, 121 NLRB 1027 (1958). Respondents assert that their actions were privileged under an exception to *Shea Chemical*, enunciated by the Board in *G&H Towing Co.*, 168 NLRB 589 (1967). There, the Board held:

> Unlike the situation in *Shea Chemical Corporation*, relied on by the General Counsel, where the employer and a union with a claimed card majority negotiated a "complete two-year collective bargaining agreement," the parties here only extended the termination date of their existing contract from time to time so as to avoid a lapse in contractual relations while awaiting resolution of the representation question. No changes were made in wages or any other contractual terms during this period. There is no evidence that the parties engaged in any bargaining, or even introduced preliminary proposals. Thus, consistent with what we said in *Shea*, G&H pursued a neutral course by neither "bargaining collectively with the incumbent or any other union" nor "refusing to permit the incumbent union to continue administering its contract. . . ." We find no violation in the extensions of G&H's contract with the Seafarers.

Contrary to Respondents' contentions, I conclude that the instant matter does not present a *G&H Towing* type case. Here, preceding and following the execution of the contract extension, Respondent Employer engaged in numerous acts of support and assistance to Respondent Union, in violation of Section 8(a)(2), and acts of coercion and discrimination, in violation of Section 8(a)(1) and (3) of the statute. The extension of the contract with the favored union occurred in that context, and, thus, cannot be viewed as a neutral act designed to avoid a lapse in contractual relations. Moreover, Respondent Employer and Respondent Union, at a time when both knew that employee dissatisfaction with the medical plan

[2] Gonzales testified that he reduced Rivera's pay pursuant to a memorandum he received from Comptroller Jose Laureano. However, that memorandum, dated 2 days after the pay reduction, does not even address the subject of leadpay.

[3] One week later, Febres complained to Aponte about the continuation of dues deductions. She replied, "I got orders from upstairs."

was one of the primary reasons for the formation of the Independent Union, agreed to a doubling of Employer contributions to that plan and then informed the employees that the increased payments would permit improvement of the plan and amplified service. I thus conclude, regardless of the then existing financial needs of the welfare plan, that the contract extension, including the agreed-upon change in contractual terms, was designed to assist the S.I.U. By extending and enforcing the contract, as modified, beyond August 12, 1976, Respondents violated Section 8(a)(3), (2), and (1) and Section 8(b)(2) and (1)(A) of the Act.

4. The Padua discharge

Heriberto Padua was employed by Crown Cork as a quality control inspector from November 11, 1970, until he was discharged on September 24, 1976. In May 1976 he was elected vice president of the Independent Union. In late July or early August Padua posted a notice of an out-of-plant Independent Union meeting on the plant bulletin board. That notice was removed by Supervisor J. A. La Santa who told Padua that, by order of Diaz, employees were not permitted to post notices at the plant. Thereafter, La Santa filed a written report of the incident.

Respondent Employer asserts that Padua was discharged on September 24, due to "insubordination," a "lack of respect toward a superior," and a "threat of physical harm to a superior" arising out of an incident between Padua and Supervisor Jose David Carrasquillo which occurred on September 23. For the reasons stated below, I find and conclude that Respondent Employer discharged Padua because of his Independent Union activities, in violation of Section 8(a)(3) of the Act.

About 5:30 a.m. on September 23, as Padua was walking toward production line 1, a "jam" developed at line 2. Supervisor Carrasquillo yelled at Padua to go to line 2. According to Padua's credited, corroborated testimony he then told Carrasquillo that "there is no reason for him to shout at me like that. If he knew anything about cans he would have realized that that was mechanics' work and not of the inspector. And I told him, if you want me to help you, I can help you so that you will know about cans. I've been doing this work for 6 years and I can help you. But since you show a negative attitude, there is no way to help you do a better job." Carrasquillo accused Padua of insulting him and Padua responded, "Well, I'm telling you the truth, that you do not know anything about cans. I know about cans. If you feel insulted, that's the truth, that you don't know about cans." Carrasquillo told Padua that if he, Padua, persisted in telling Carrasquillo that, Carrasquillo would report him. Padua then said to Carrasquillo that "if the truth hurt him, to go ahead and make a report."[4] Later, Carrasquillo instructed Padua to report to Gonzales' office at 2 p.m. on the same day. When Padua did so, he was told by Gonzales that "he did not have my case, that Arturo Diaz Cataldo had my case . . . and he had nothing to do with it." Padua was then instructed to report at 11 a.m., the next day, to see Diaz.

Padua arrived at the plant at 11 a.m. on September 24 but was told by the security guard to wait outside. At 1 p.m., Supervisor Carrasquillo appeared and attempted to hand an envelope to Padua. Padua said that he would not accept it before seeing Gonzales. Carrasquillo and Padua then went to Gonzales' office, where "almost all the supervisors of the plant" had been gathered, and Gonzales read, and then handed to Padua, a discharge letter, stating:

> We have studied the report of Supervisor Carrasquillo to Mr. Francisco Gonzales, Superintendent of this Plant, in relation to your behavior during your work shift that ended the 23rd of September 1976.
>
> We have found that at 5:30 in the morning of that day, you engaged in three violations to the Rules of Conduct of this company, namely:
>
> 1) Insubordination
> 2) Lack of respect toward a superior
> 3) Threat of physical harm to a superior
>
> For the above reasons, I must notify you that we have decided to terminate you immediately from your employment at this company.
>
> Enclosed is your discharge check covering all your earnings with this company.[5]

When Padua asked Gonzales for an opportunity to explain what had happened, Gonzales refused and told Padua that Carrasquillo was a respectable man and Respondent Employer believed him, and believed the version of events contained in his report. Padua again asked for an opportunity to explain and was told by Gonzales that "There is nothing to explain. Just hand in your identification card and go out of the plant as soon as possible."

Although initially denied by Gonzales, the record evidence clearly reflects that Respondent Employer conducted no investigation of the Padua-Carrasquillo incident beyond a reading of the report submitted by Carrasquillo. Yet, there were many witnesses to that altercation. Diaz testified that he decided to discharge Padua pursuant to Crown Cork's July 22, 1975 rule providing for immediate dismissal of an employee who is disrespectful to a supervisor. However, in the past, first offense infractions of that rule have resulted in warning letters, not discharge, and then only after full investigation.

In light of Respondent Employer's knowledge of Padua's leading role in the formation and activities of the Independent Union; its demonstrated animus; its contemporaneous discrimination against other supporters of the Independent Union; the absence, contrary to past practice, of an investigation of the incident relied on to support the discharge and the refusal to permit Padua to explain his version of events, I conclude that Respondent

[4] At the time of the incident, Carrasquillo was a newly hired supervisor. Thereafter, according to Diaz, he was discharged for "failing to make the grade."

[5] The report filed by Carrasquillo with Gonzales stated that Padua had threatened to tear Carrasquillo's head off if he, Carrasquillo, filed a report.

seized upon the Carrasquillo-Padua incident as a pretext to justify a discharge motivated solely by union considerations and, thus, violated Section 8(a)(3) of the Act.

5. The strike

On August 1, 1976, at a membership meeting of the Independent Union, the board of directors was authorized to call a strike if Respondent Employer continued to engage in discriminatory conduct. Among the specific cases of discrimination discussed at that meeting were those of Arroyo, Febres, Rivera, anc Carrasquillo.

On September 24, immediately after the Padua discharge, the strike began. Fernandez testified:

> When they came out, part of the protest was the discharging of Padua and the discrimination that was going on in the plant and the extension of the contract that they had done.

The following legends appeared on the picket signs carried by the strikers:

> We Do Not Want the SIU
> For a Repressive Employer, a Combative Employee
> Employer Breaks the Law—Violates the Law
> United Workers May Never Be Vanquished
> Angel, Padua, Nigaglioni—We Are With You

One day after the strike began, on September 25, Crown Cork sent telegrams to all striking employees stating that unless they immediately returned to work, they were subject to summary discharge for violation of the no-strike clause of Respondent Employer's contract with the S.I.U., as extended and modified by the "Stipulation."

On October 22, Nigaglioni delivered to Crown Cork the following application for reinstatement on behalf of all striking employees:

> Union Independiente de Trabajadores de Crown Cork, on behalf of all the employees presently on strike due to the unfair labor practices engaged in by the Company you preside, offers the immediate return to work of all its members presently on strike.
>
> UITCC guarantees the security of all the facilities, equipment and personnel of the Company from any intentional acts engaged in by its members.
>
> If our offer is not accepted, the strike will continue to all effects.

Some 27 strikers received telegrams from the employer, in February 1977, and thereafter, advising them to report to work. The remaining 105 strikers have not been offered reinstatement.

I find and conclude that the strike was, from its inception, an unfair labor practice strike. By threatening summarily to discharge unfair labor practice strikers, Respondent Employer violated Section 8(a)(1) of the Act. By refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work, Crown Cork violated Section 8(a)(3) of the Act.[6]

6. The election

It is undisputed that, on October 29, the day of the election, Respondent Employer placed a camera in the area of its second floor administrative offices, pointed at and visible to a group of peacefully striking employees who were waiting in line to vote. The General Counsel contends that such a photographing of peacefully striking employees, absent a showing of justification, is unlawful (citing *Gopher Aviation*, 160 NLRB 1698 (1966)).

In *Gopher*, the Board held that the photographing of pickets is unlawful when undertaken for purposes of surveillance, but not when it is designed to serve a legitimate end. In the instant case, during the period between the formation of the Independent Union and the onset of the strike, Crown Cork experienced an unusual amount of breakage of parts and machinery vital to its production operations. Its industrial engineer, Vincent Dumbrowsky, credibly testified that those occurrences were not due to normal wear and tear but, apparently, were caused by intentional acts. Shortly after the strike began, Crown Cork's director of security, Edward Freskin, found an unfinished silencer for a 38 caliber weapon "jammed" into a lathe. In these circumstances, I find that Respondent Employer has demonstrated justification for use of its camera as a security measure. Accordingly, I find no violation of the Act in that regard.

7. Postelection assistance

On February 17, 1977, Respondent Employer reinstated 25 of the 132 striking employees.[7] On that day, the returning strikers were sent to the cafeteria where they were addressed by Gonzales, Plant Manager Pino and Respondent Union's agent, Delegate Enrique Rivera. Employees Eduardo Barreto and Angel Luis Andino testified that, at the meeting, Pino told the group that he was interested in production and not unions. Further, that while he, Pino, knew that the gathered employees belonged to the Independent Union, "the Union in the plant" was the S.I.U. Pino then introduced Rivera as the S.I.U. delegate and the latter spoke about the S.I.U. medical plan. One week later, Andino asked Pino why union dues were being deducted from his paycheck. Pino replied that the incumbent union was the S.I.U. and "in order to be able to work at Crown Cork, one had to belong to that union or be a part of management."

Neither Pino nor Rivera were called to testify about the events of February 17. Gonzales, in his testimony, could not recall being present at the meeting. Based on the testimony of Barreto and Andino, I find and conclude that, on February 17, Respondent Employer violated Section 8(a)(2) of the Act by informing the returning strikers that Respondent Union was their representative.

[6] Respondent Employer contends that the October 22 application for reinstatement was not unconditional. I find nothing in the wording of the application which would support that position. Nor were there contemporaneous acts or statements by the strikers at odds with the unconditional nature of their offer to return to work.

[7] On April 22, two more strikers were recalled.

Crown Cork again violated Section 8(a)(2) when, 1 week later, Pino repeated that assertion to Andino.

On May 10, 1977, Respondent Employer made a loudspeaker announcement directing all of its first-shift employees to attend a meeting in the cafeteria at 2 p.m. The employees were further instructed not to punch out their timecards until the meeting ended. At the ensuing meeting, attended by all the first-shift employees, the group was addressed by Supervisor Victor Morales, Delegate Enrique Rivera, and Guillermo Ryan, an employee of the Human Resources Development Institute.[8] Barreto and Andino testified that Morales and Ryan admonished the employees about absences. Then, Rivera distributed certain cards, bearing the S.I.U. name, which Ryan described as entitling the bearer to obtain medical services and, at certain stores, make discount purchases.

Morales, Ryan, and Rivera were not called as witnesses. Based on the testimony of Barreto and Andino, I find and conclude that, on May 10, 1977, Respondent Employer violated Section 8(a)(2) of the Act by instructing its employees to attend a meeting of Respondent Union, held at the plant during working hours, at which, in the presence of Crown Cork representatives, the S.I.U. announced the availability of additional benefits.

8. The objections

The Independent Union's objections 5 and 6 to conduct affecting the results of the election held on October 29, 1976, rely upon the unfair labor practice conduct found hereinabove to have occurred between the date the petition was filed and the date of the election. Since, during the critical period preceding the election, the Employer and the Intervenor engaged in unfair labor practice conduct in violation of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, I conclude that there is merit to the objections. If a majority of valid ballots had not been cast for the Petitioner, as determined, infra, the election would properly be set aside.

9. The challenges

The tally of ballots served on the parties after the election showed that 346 ballots were cast, of which 118 were for the Independent Union, 15 for the S.I.U. and there were 213 challenged ballots, a sufficient number to affect the results of the election. There were 190 challenges by the Petitioner on the ground, inter alia, that the voter was an unfair labor practice strike replacement and, therefore, ineligible to vote. Since it is undisputed that those voters were hired after the commencement of the September 24 strike as replacements for the strikers, and since I have found that the strike was an unfair labor practice strike, I conclude that the challenges to their ballots should be sustained. The remaining 23 challenged ballots are not determinative of the results of the election.[9] Since a majority of the valid ballots have been cast for the Independent Union, it should be certified as the collective-bargaining representative in the unit described in the Decision and Direction of Election.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of Respondents set forth in section III above, occurring in connection with Respondent Employer's operations described in section 1 above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in unfair labor practices in violation of Section 8(a)(3), (2), and (1) and Section 8(b)(2) and (1)(A) of the Act, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Crown Cork de Puerto Rico, Inc. is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. Union Independiente de Trabajadores de la Crown Cork, and S.I.U. de Puerto Rico, Caribe Y Latinoamerica a/a S.I.U. of North America, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. By negotiating, executing, maintaining, and enforcing an extension and modification of their collective-bargaining contract beyond August 12, 1976, including union-security provisions, notwithstanding the existence of a real question concerning representation, Respondents violated Section 8(a)(3), (2), and (1) and Section 8(b)(2) and (1)(A) of the Act.

4. By discharging Heriberto Padua; reducing the wage rates of Guadalupe Rivera, Rigoberto Febres, Miguel Carrasquillo, and Luis Nigaglioni; changing the work shifts of Guadalupe Rivera and Esteban Arroyo; reclassifying Rigoberto Febres and Miguel Carrasquillo; refusing to permit Guadalupe Rivera to work during his scheduled vacation in August 1976, and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work, Respondent Employer violated Section 8(a)(3) of the Act.

5. By soliciting an employee to encourage other employees to support Respondent Union rather than the Independent Union; encouraging an employee to visit Respondent Union's offices during working hours and without loss of pay; orally promulgating a rule prohibiting in-

---

[8] That organization, which "works with" the AFL–CIO, referred to Respondent Employer, in September and October 1976 strike replacements. Before and during the strike, Ryan was frequently seen at the plant attending to S.I.U. business.

[9] Respondents contend that at an October 14 meeting of the parties at the Board's offices in Hato Rey, the Independent Union, by oral agreement with the other parties and the Board agent, waived its right to challenge the ballots of strike replacements hired on or before October 8. Based on the testimony of Paul Schactor, an attorney for the Independent Union, I find that, at that meeting, the Independent Union maintained its position that the strike replacements were not eligible to vote. It agreed only that if those replacements were found eligible to vote at all, October 8 was the eligibility cutoff date.

plant union meetings which, as stated, applied only to the Independent Union; informing its employees that Respondent Union was their representative and instructing its employees to attend a meeting of Respondent Union, held at the plant during working hours, Respondent Employer violated Section 8(a)(2) of the Act.

6. By creating the impression of surveillance of the union activities of its employees; threatening to discharge employees because of their support for the Independent Union and threatening summarily to discharge unfair labor practice strikers, Respondent Employer violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

IRWIN H. SOCOLOFF, Administrative Law Judge. On February 7, 1979, I issued my decision in this proceeding, finding that Respondent Employer and Respondent Union had engaged in activities violative of the National Labor Relations Act. Included among the statutory violations found to have been committed by Respondent Employer was its discharge on September 24, 1976, of Heriberto Padua, the vice president of the Independent Union. Thereafter, on July 19, 1979, the Board issued its Decision and Order Remanding "for credibility findings with respect to the Padua-Carrasquillo incident on September 23," which preceded the discharge.

As noted at page 13, lines 36–37 of my initial decision, my findings concerning the September 23, 1976 incident, between Padua and his immediate supervisor, Jose David Carrasquillo, were based on the "credited, corroborated testimony of Padua." Thus, Padua impressed me as an entirely forthright and honest witness and, in reliance on his testimony, as corroborated by Luis Pomar and Miguel Carrasquillo, observers of the event in question, I find that the September 23 incident transpired as reported in my initial decision. More particularly, I find that Padua did not use obscene language or threaten to tear the supervisor's head off. Jose David Carrasquillo's testimony to the contrary is not credited as I found Carrasquillo a confused witness who exhibited an uncertain memory of the events of September 23. I thus conclude that the later report filed by Carrasquillo with the plant superintendent, Francisco Gonzales, concerning the foregoing incident, contained, in part, false accusations against Padua. As Carrasquillo was, at the time, a statutory supervisor, knowledge of the falsity of those accusations is attributable to Respondent. In light of that factor, and for the reasons stated at page 15 of my initial decision, I again conclude that the Padua discharge was in violation of Section 8(a)(3) of the Act.[1]

[Recommended Order omitted from publication.]

[1] At fn. 4 of its decision, the Board observed that Plant Superintendent Francisco Gonzales testified that, after receiving the report from Carrasquillo, he attempted to investigate the matter by questioning employee Roberto or Gilberto Rodriquez about the exchange between Carrasquillo and Padua. Rodriquez did not testify at the hearing. For the reasons stated at p. 6, ll. 25–28 of my initial decision, I did not find Gonzales a credible witness. Moreover, with respect to this particular testimony, it must be noted that, in his pretrial affidavit, Gonzales claimed to have questioned an employee named Isandre, and no one else, about the Padua-Carrasquillo incident. Likewise, Gonzales' testimony at the hearing that, after receiving the report from Carrasquillo, he asked that supervisor for the names of witnesses to the incident, is inconsidtent with Gonzales' admission in his affidavit that he did not do so. Accordingly, I discredit Gonzales' contrary testimony and I again conclude that Respondent Employer conducted no investigation of the Padua-Carrasquillo incident beyond a reading of the report submitted by Carrasquillo.

EMR Photoelectric, a Division of Sangamo Weston Inc. *and* International Union of Electrical, Radio & Machine Workers, AFL–CIO–CLC.
Case 22–CA–8121

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 27 August 1980 the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] On 26 January 1981 the Board issued an unpublished Order Denying Motion and Amending Decision and Order, in which it amended footnote 1 of the original Decision and Order to clarify the basis on which it affirmed the administrative law judge's credibility findings,[2] but denied the Respondent's motion for reconsideration in all other respects.

Thereafter, the Respondent filed a petition for review of the Board's Decision and Order in the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement. Subsequently, the Board filed a motion in the Seventh Circuit Court of Appeals requesting permission to withdraw the record so that it could reconsider its Decision and Order in light of that court's decision in *Red Oaks Nursing Home v. NLRB*, 633 F.2d 503 (1980), and its order in *Edward A. Utlaut Foundation v. NLRB*, 657 F.2d 272 (No. 80–1903 May 27, 1981), and to address certain other matters. On 9 November 1981 the court granted the Board's motion, and by letter dated 30 November 1981 the Board invited the parties to submit statements of position. The Respondent filed a statement of position and a motion to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record as a whole in light of the Respondent's statement of position, its motion to reopen the record,[3] and the applicable decisions of the Seventh Circuit Court of Appeals and makes the following findings.

As fully set forth in the judge's decision, which the Board adopted in its initial Decision and Order, the Union began an organizational campaign among the Respondent's employees in May 1977. By 18 May the Union had obtained at least 30 valid authorization cards among the 47 employees in the unit found appropriate. On that date the Union requested recognition from the Respondent and filed a petition with the Board for a representation election. By 6 June the Union had obtained and submitted to the Respondent a petition signed by 46 unit employees requesting the Respondent to recognize the Union as their bargaining representative. The election was held 5 August and resulted in 13 votes for and 31 against the Union. Between 22 June and the date of the election both the Respondent and the Union engaged in certain misconduct.

The Board found that the Respondent's misconduct constituted unfair labor practices which were so serious as to warrant the issuance of a bargaining order. It also found that the Union's misconduct did not affect the propriety of a bargaining order. On further consideration we are persuaded that some of the unfair labor practice findings were erroneous and that the remedial bargaining order was improvidently granted.

1. The Board affirmed the judge's finding that through a series of letters and oral statements to employees the Respondent engaged in "thinly veiled threats that because of unionization the Respondent would take action [consisting of plant closure, job loss, and other reprisals] to the detriment of the workers' employment." 251 NLRB at 1608. The theme of the letters was that the Union had a record of strikes and violence and could make no positive contribution to the employees or the Company. Although emphasizing the possibility of strikes and their doleful consequences at other plants, the Respondent's letters frankly admitted that despite the Union's past participation in strikes the Company did not know whether the Union would strike at this plant. In depicting the results of strikes at other companies, the Respondent cited

[1] 251 NLRB 1597.

[2] Although the unpublished Order directed that the initial Decision and Order be printed as amended, the amendment was omitted from the Board volume in which the Decision and Order subsequently was printed. Therefore, we hereby publish the footnote to be substituted for fn. 1: "The Respondent has exceptd to certain credibility findings made by the judge. Administrative Law Judge John F. Corbley died 7 November 1978, after the hearing in the instant case had closed before him, but before the issuance of a decision. Thereafter Chief Administrative Law Judge Thomas N. Kessel designated Administrative Law Judge Sidney J. Barban to prepare and issue a decision based on the record made before Judge Corbley. It is the Board's established policy to attach great weight to an administrative law judge's credibility findings insofar as they are based on demeanor. However, in contested cases the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the administrative law judge's findings of facts, but bases its findings on a de novo review of the entire record. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Judge Barban's credibility findings are based on factors other than demeanor, and, in consonance with the Board's policy set forth in *Standard Dry Wall Products*, supra, we have independently examined the record in this case. We find that there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon."

[3] Because of our reconsideration of the existing record below, we find it unnecessary to conduct a further hearing.

instances in which the strikes ended with little or no economic gain to the employees and other instances in which the plants closed or production lines moved to other locations. However, reasons other than unionization or strikes were presented to explain the loss of jobs. Thus, the judge credited testimony that Executive Vice President Lee told employees that a sister company had moved to Puerto Rico after a strike which had resulted in the company's loss of government contracts. He told employees that he hoped such a loss of government contracts would not make the Respondent move to Texas.

We are often called on to determine whether statements warning employees of the adverse consequences of unionization are lawful predictions or unlawful threats. The statements made here were by and large neither. They were factual statements showing that there were possible harmful results from unionzation to be weighed against the possible benefits to employees. The Respondent informed the employees that the Union had taken employees out on strike at other companies and that certain adverse consequences had ensued; that strikers received no pay or benefits during a strike and could be permanently replaced; and that should the Union win the election and make unreasonable bargaining demands it would either have to drop those demands or strike. The Respondent did not tell employees if they selected the Union it would close the plant or take other reprisals. Instead, the Respondent specifically reassured employees it would bargain in good faith with the Union if it won the election and would take no reprisals in that event. We therefore find that in its overall preelection campaign the Respondent properly avoided threatening reprisals. See *J. J. Cassone Bakery*, 247 NLRB 220, 221–222 (1980).

However, the Respondent departed from the overall pattern in one instance and communicated to some employees what they reasonably might have regarded as a threat. This occurred when Production Manager Autera told employees that if the Union came in and a strike ensued the Respondent might move to Texas. These comments crossed the line of permissible persuasion as to the consequences of unionization because they were unaccompanied by any statement of objective facts that conveyed the Respondent's belief that such consequences were beyond its control. *Ann's Laundry & Dry Cleaners*, 268 NLRB 1013, 1016 (1984).[4]

Respondent also unlawfully solicited employees' grievances, promised them that without the Union their problems would be rectified within 9 months, and coercively interrogated two employees. These few 8(a)(1) violations, however, do not warrant imposing a bargaining order in the circumstances presented here.

The question which must be faced here, as in all cases in which an employer has rejected a union's valid majority showing by way of authorization cards and committed unfair labor practices, is whether "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–615 (1969). This question must be answered in light of the facts of each case and with due regard for the principle that generally a secret-ballot Board-conducted election is the preferred method of ascertaining employee choice. Id. at 602. Therefore, we look not only to the seriousness of the unfair labor practices, but also to their extensiveness "in terms of their past effect on election conditions and the likelihood of their recurrence in the future." Id. at 614.[5]

Here, ascertainment of the causal relationship between the Respondent's unfair labor practices and the Union's election loss is difficult. For the preelection campaign was characterized not only by certain coercive statements by the Respondent but also by an extensive lawful campaign by the Respondent and by a countervailing campaign by the Union that included both permissible and impermissible tactics. The Union's misconduct consisted of the following threats to employees: (1) that if the Union lost the election it would file charges and hold up the proceedings indefinitely, impliedly with the aid of Members of this Board and Congressmen whom it "could control"; (2) that "nothing would get across" a union picket line and any male employee who attempted to cross might never see his wife again; (3) that if certain employees campaigned for the Respondent "there will be no holds barred" and "when the [Union] got in, positive, [those employees] were gone"; and (4) that another employee who said he would not vote

[4] Chairman Dotson would not view Autera's statements in isolation from the general tenor of the Respondent's message to employees—the truthful information that adverse consequences such as a plant relocation could follow a strike. Therefore, he would not find that Autera's comments constituted a thrat. See *NLRB v. Shenanigans*, 723 F.2d 1360, 1367–1368 (7th Cir. 1983).

[5] Although the Board's concern at the time it withdrew this case from the Seventh Circuit was the inadequacy of its articulated analysis of the need for a bargaining order under that court's holdings in *Red Oak Nursing Home and Utlaut Foundation*, supra, we cannot fail to take cognizance of the Seventh Circuit's recent decision in *NLRB v. Shenanigans*, 723 F.2d 1360 at 1370–1372, in which it vigorously reaffirmed those principles cited in the text above that dictate caution against too freely dispensing with elections.

for the Union would find it difficult to continue working for the Respondent no matter how the vote went and the Union would blacklist him and had other "ways of dealing" with him. These threats could have backfired on the Union and caused employees to want to have nothing further to do with it.[6] To the extent that employees were not adversely influenced by the Union's misconduct, they may have been influenced by the Respondent's legitimate arguments concerning the possible adverse effects of voting the Union in as bargaining representative. With all these factors operating on the employees' choice, it would be little more than speculation to conclude that the Respondent's unfair labor practices were the factor that decisively tipped the scales.[7]

The unfair labor practices were not extensive when considered as part of the general preelection atmosphere created in part by the parties' campaigning. Their precise effect on the election being uncertain, still less confidently could we predict from the nature of the violation that they are likely to recur.[8] The interrogations and the single implied threat of plant relocation were committed by individuals relatively low in the Respondent's management hierarchy.[9] Although their conduct is imputable to the Respondent in that employees reasonably may have believed that it was authorized by management, there is no evidence that what they did or said had specific authorization from higher levels. Those involved in unlawfully soliciting grievances and promising benefits were high management officials, the Respondent's vice president and an executive vice president of Sangamo Weston Inc., of which the Respondent is a division. Thus, their conduct may be presumed to be a calculated company tactic. However, neither the Respondent nor Sangamo Weston Inc. (which has been involved in many union organizing campaigns and in collective bargaining) has been found to have committed any unfair labor practices other than in the instant case. Given its history of apparent willingness to abide by the requirements of the Act although presented with opportunities to do otherwise, we see no indication that the Company will become a recidivist.

Finally, we note that the Respondent committed but one "hallmark" violation (Production Manager Autera's threat of plant removal to some employees) and relatively few "non-hallmark" violations (soliciting grievances, promise of benefit, and coercive interrogations). See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980). Accordingly, and for all of the above reasons, we find that the General Counsel has failed to establish that the Respondent unlawfully refused to recognize and bargain with the Union. We further find that the General Counsel has failed to establish that the Board's traditional remedies are inadequate to erase the effects of the Respondent's few unfair labor practices and ensure a fair election.[10] For similar reasons we find that the Respondent's unfair labor practices do not warrant a broad cease-and-desist order. *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, we shall rescind our previous Order and substitute one that conforms to the findings and conclusions set forth above.

ORDER

The National Labor Relations Board orders that the Respondent, EMR Photoelectric, a Division of Sangamo Weston Inc., Princeton Junction, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to move its operations because its employees engage in activities on behalf of a labor organization or support a labor organization.

(b) Directly or indirectly promising employees benefits or improvement in their working conditions for the purpose of inducing employees not to join, remain members of, or otherwise support a labor organization.

(c) Soliciting employee grievances or complaints with an implied promise of in proving employee working conditions or granting benefits for the purpose of inducing employees not to join, remain

[6] Chairman Dotson would find that the Union's outrageous conduct was far more serious than that allegedly engaged in by the Respondent and in and of itself precludes granting a bargaining order.

[7] On objections filed by the Union, the Regional Director set aside the election and the Board affirmed his findings and recommendations directing a second election. However, the Regional Director dismissed the petition in the representation proceeding on issuance of the complaint in the instant case. Our observations concerning the actual effect of the unfair labor practices on the election outcome do not contradict the Board's finding in the representation case that the Company's conduct reasonably tended to interfere with the employees' freedom of choice in the election.

[8] We attempt to ascertain the likelihood of recurrence from the circumstances surrounding the original unfair labor practices and such other events as may have probative value. The Respondent's restraint from additional unfair labor practices during the pendency of this case tells us little about its likelihood to commit new unfair labor practices in the future.

[9] Ronald Klukososki, a leadman in the Respondent's employ who interrogated two employees, was not found to be a supervisor but to be an agent with apparent authority to speak for management. Production Manager Tony Autera, who made the remarks about possibly moving to Texas, was a subordinate to the general manager of the plant involved here. His supervisory status after January 1978 is in doubt.

[10] We therefore find it unnecessary to reach the Respondent's contentions that a bargaining order should be denied due to employee turnover and changes in managment, and we deny the Respondent's motion to reopen the record as moot. See fn. 3, above.

In concurring in the denial of the bargaining order remedy, Member Dennis relies solely on the reasoning set forth in the paragraph to which this footnote is appended and not on any reasons set forth earlier in this decision.

members of, or otherwise support a labor organization.

(d) Coercively interrogating employees concerning their union membership, sympathies, or activities or those of other employees.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Post at its operations in Princeton Junction, New Jersey, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed as to alleged violations of the Act not found hereinabove in this decision.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to move our operations because our employees engage in activities on behalf of or support International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, or any other labor organization.

WE WILL NOT directly or indirectly promise employees benefits or improvement of working conditions for the purpose of inducing employees not to join, remain members of, or otherwise support a labor organization.

WE WILL NOT solicit employee grievances or complaints with an implied promise of improving working conditions or grant benefits for the purpose of inducing employees not to join, remain members of, or otherwise support a labor organization.

WE WILL NOT coercively interrogate employees concerning their union membership, sympathies, or activities or those of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

EMR PHOTOELECTRIC, A DIVISION
OF SANGAMO WESTON INC.

Ironworkers District Council of the Pacific Northwest and International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO, Local 751 *and* Hoffman Construction Company and Contract Glass, Inc. and International Brotherhood of Painters and Allied Trades, AFL–CIO, Local 1140. Case 19–CD–434

14 December 1984

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The charge in this Section 10(k) proceeding was filed 17 July 1984 by Hoffman Construction Company (Hoffman), alleging that the Respondent District Council and Respondent Local 751 violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing or requiring Hoffman and Contract Glass, Inc. (Contract) to assign certain work to employees it represents rather than to employees represented by International Brotherhood of Painters and Allied Trades, AFL–CIO, Local 1140 (the Glaziers). The hearing was held 5 September 1984 before Hearing Officer John W. Cunningham.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Hoffman, an Oregon corporation, is engaged as a general contractor at its facility in Portland, Oregon, and at various jobsites in several States, where it annually purchases and receives goods and materials valued in excess of $50,000 which are shipped to it directly from States other than Oregon. Based on the foregoing, we find that Hoffman is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Contract, a Washington corporation, is engaged at its Redmond, Washington facility and various jobsites in the States of Washington and Alaska as a glazing contractor on commercial jobs. During the past year Contract has provided services valued in excess of $50,000 directly to customers located outside the State of Washington. From the foregoing, we find that Contract is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is not disputed, and we find, that Glaziers is a labor organization within the meaning of Section 2(5) of the Act.

A collective-bargaining agreement between International Association of Bridge, Structural and Ornamental Ironworkers and the National Contractors Association (NCA), of which Hoffman is a member, states that "[t]he Employer recognizes the Association as the sole and exclusive bargaining representative for all employees employed on . . . work coming under the jurisdiction of the Association." It contains a union-security clause and a grievance and arbitration procedure, as well as provisions regarding wages, hours, and other terms and conditions of employment and both Respondents District Council and Local 751 pursued claims based on the contract. We find that Respondent District Council and Respondent Local 751 are labor organizations within the meaning of Section 2(5) of the Act. *Mac Towing, Inc.*, 262 NLRB 1331 (1982).

II. THE DISPUTE

A. *Background and Facts of Dispute*

Hoffman is the general contractor on the SOHIO Petroleum building in Anchorage, Alaska. It subcontracted the installation of glazed aluminum window frames, aluminum window walls, entrance doors, and miscellaneous metal work to Contract. Contract, using a system of its own design, prefabricated the glazed windows, pre-cut the compensating channels (that portion of the window assembly directly attached to the building), and had the material shipped to the jobsite. The job superintendant for Contract arrived at the job on 1 March 1984 and work on Contract's portion of the job began on 12 March or shortly thereafter.

As noted above, Hoffman, through its membership in NCA, has a collective-bargaining agreement with the Ironworkers International. Contract has a collective-bargaining agreement with Local 118 of the Painters and Allied Trades Union, but entered into a prehire agreement with Glaziers prior to the commencement of this job. Contract began its work with two employees from its home location and with persons hired through the Glaziers' hall. At times as many as seven glaziers were used on the job. By the time of the hearing the installation of the aluminum frames was over 99 percent complete.

[1] All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. The attorney for Respondents District Council and Local 751 stated that he was appearing specially, therefore he did not join in any of the normal stipulations; however, he did participate in the hearing, presenting a witness and cross-examining others. Hoffman filed a brief.

Around 12 March, when the material for the job arrived at the jobsite, Ernie Niece, Contract's job superintendent, was approached by a person later identified to him as the Ironworkers' steward on the job and asked if the metal belonged to Contract. When Niece replied that it did, the steward asked if Contract employees were going to install the metal. When Niece replied in the affirmative, the steward said that it was Ironworkers' work. When Niece countered that it was Glaziers' work, the steward said that he was going to see his business agents. Niece said, "Go ahead, do what you want" to which the steward replied, "Well, we could throw a sign on you."

About this time, Wayne Thomas, labor relations manager for Hoffman, received a telephone call from John Abshire, business manager of Respondent Local 751, expressing his concern about glaziers performing ironworkers' work. On 14 March a telegram was sent to Thomas stating, inter alia, that several requests for a meeting with Contract had failed and that Hoffman should take immediate action to resolve the issue before work began on 15 March.

Sometime after that LeRoy E. Worley, general organizer and president of Respondent District Council, called Thomas. The conversation was in the same vein as the earlier conversation between Abshire and Thomas. Shortly after this conversation Thomas received a letter from Worley dated 30 March which made a formal request for a copy of Hoffman's subcontract with Contract, asserting the request was necessary because of Hoffman's subcontracting of work which the District Council claimed was within its jurisdiction.

On the same date Worley also sent a letter to Thomas stating that he was instituting the grievance procedure concerning the subcontracting to Contract. Worley alleged the basis of the grievance was "the flagorant [sic] method of subcontracting this work in such a manner that the Ironworkers will not have an opportunity to perform their traditional work."

On 3 April Thomas replied to Worley with a letter asserting that Contract, the independent employer who had made the assignment of work, was not a party to the District Council's contract and, therefore, Hoffman questioned whether an arbitration to which Contract was not a party would be dispositive of the District Council's claim. Thomas went on to suggest that Worley contact the Glaziers to see if they would be willing to comply with past decisions of the Jurisdictional Disputes Board referred to in the District Council's contract.

On 15 May the following telephone message was received in Thomas' office in his absence:

> Will picket Thurs AM 17th all N.W. sites with Ironworkers. Pickets will say "Failure to process grievances of Ironworkers."

The next day Thomas called Worley who confirmed that he had made the call and said that he just wanted to get Thomas' attention.

Although Hoffman contested the arbitrability of the grievance, the grievance machinery proceeded and a hearing was set for 23 July. On 17 July Hoffman filed the instant charge. On 24 July the attorney for the Respondents sent a letter to the attorney for Hoffman asserting that no jurisdictional dispute was involved, but rather a dispute concerning the interpretation and application of the subcontracting clause of the agreement between Hoffman and the District Council, which should be arbitrated.

A hearing was held on the grievance in late August at which Hoffman raised the issue of arbitrability and asked the arbitrator to defer to the Board's processes. Briefs on the arbitration were not due until 3 weeks after the hearing herein.

Contract continued to perform the work with employees represented by the Glaziers and has not employed any employees represented by the Respondents on this project.

B. *Work in Dispute*

The disputed work involves the construction, installation, and preparation of certain metal frames for glass and the installation of glass into the metal frames at the SOHIO Alaska Petroleum Company headquarters building in Anchorage, Alaska.

C. *Contentions of the Parties*

Hoffman, the only party to submit a brief, contends that the work in dispute should be awarded to employees represented by the Glaziers, citing employer preference, industry practice, economy and efficiency of operation, the past practice of Contract, and the skills of the glaziers.

The Glaziers contends that the work in dispute should be awarded to employees it represents because of their skills, area practice, employer preference, and economy and efficiency of operation.

Contract contends that the work in dispute should be awarded to employees represented by the Glaziers because of the glaziers' skills, economy and efficiency of operation, practice in the Anchorage area, and its collective-bargaining agreements with Glaziers and with other locals of International Brotherhood of Painters and Allied Trades, AFL–CIO.

District Council and Local 751, although denying the jurisdiction of the Board on unspecified constitutional and due process grounds, appeared specially at the hearing and urged (1) mootness because the work in dispute is "99.9%" finished, (2) the nonexistence of a jurisdictional dispute because District Council and Local 751 never made a demand on Contract for the work in dispute, (3) the appropriateness of deferral to an arbitrator's decision on a grievance by the Respondents against Hoffman claiming a violation of a subcontracting clause in the collective-bargaining agreement between Ironworkers and NCA which binds Hoffman and the Respondents, and (4) the lack of any threats concerning the assignment of the work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

There is no contention here that there is an agreed-on method for the voluntary resolution of the dispute inasmuch as the Respondents deny the existence of any dispute with Contract. In any event, Contract has not agreed to be bound by the revised Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The Respondents do claim that the Board should defer to the grievance-arbitration procedure on their claim of a violation by Hoffman of a subcontracting clause in their agreement. Inasmuch as Contract is not a party to the collective-bargaining agreement between Ironworkers and Hoffman, and has not agreed to be bound by it, we find that there is no agreed-on method for resolution of the dispute and we decline to defer to the grievance-arbitration machinery of that agreement. *Stage Employees IATSE (Metromedia)*, 225 NLRB 785, 787–788 (1976).

As to the mootness contention, the Board has long held that a jurisdictional dispute is not moot, in spite of the completion of the work involved, where there is evidence of similar disputes in the past or there is nothing to indicate that such disputes will not arise in the future.[2] The record is clear that glazing contractors will continue to install the type of work in dispute in the future in the Anchorage area and that the Respondents will continue to assert jurisdiction over the work involved. There is a real likelihood, therefore, that similar disputes will arise in the future. Accordingly, we find that the dispute is not moot.

As to the nonexistence of a demand on Contract by the Respondents, it is clear that an attempt to force the indirect assignment of work from employees of one employer (Contract) to employees of another (Hoffman) is within the reach of Section 8(b)(4)(D). *Electrical Workers IBEW Local 3 (Western Electric)*, 141 NLRB 888, 894 (1963), enfd. 339 F.2d 145 (2d Cir. 1964). As for the alleged lack of a threat in support of any demand for the work in dispute, the Board has held that the filing of grievances, as here, against employers who have no control over the assignment of the work (i.e., Hoffman) applies indirect pressure on an employer in the assignment of the work, *Pulp & Paper Workers Local 194 (Georgia Pacific)*, 267 NLRB 26 (1983), and is coercive within the meaning of Section 8(b)(4)(ii). *Millwrights Local 102 (Frederick Meiswinkel, Inc.)*, 260 NLRB 972 (1982). In any event, there is unrefuted testimony that a steward of Respondent Local 751 threatened to "throw a sign" on Contract after claiming the disputed work.

As to the Respondents' attempt at the hearing to disclaim the work of Contract's employees, such tardy disclaimer is ineffective, particularly in light of the simultaneous pursuit of the grievance against Hoffman. See *Laborers Local 910 (Brockway Glass)*, 226 NLRB 142, 143 (1976).

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

None of the labor organizations involved in this dispute has been certified by the Board as the collective-bargaining representative of Contract's em-

[2] *Electrical Workers IBEW Local 581 (National Telephone & Signal)*, 223 NLRB 538 (1976), and cases cited at fn. 2.

ployees in an appropriate unit. The record does indicate that Contract has recognized Glaziers and currently has a collective-bargaining agreement with Glaziers covering the wages and working conditions of "all workmen . . . who are required to use any of the recognized tools of the trade covered by this Agreement," such being "tools and machines as is necessary in the performance of skilled glaziers and glass workers work." The agreement specifically includes the installation of metals related to storefront and window construction and unitized and prefabricated curtain wall systems. We therefore find that the collective-bargaining agreement is sufficient to cover the work in dispute. The record further indicates that Contract has no employees represented by the Respondents and has no collective bargaining with those Unions. Moreover, Contract is not a member of NCA with whom the Respondents maintain a collective-bargaining agreement. We therefore find that the factor of collective-bargaining agreements favors an award of the disputed work to the employees of Contract who are represented by Glaziers.

2. Employer assignment, area practice, and preference

Contract has assigned the work in dispute to employees represented by the Glaziers and prefers this assignment. Other glazing contractors in the Anchorage area have used employees represented by the Glaziers to perform the same type of work on numerous occasions. Area practice, the employer's assignment, and Contract's preference all strongly favor the assignment to employees represented by the Glaziers.

3. Relative skills

Employees performing glazing work who are represented by the Glaziers are required to complete an apprenticeship program or to demonstrate their ability to perform glazing work which requires working to tolerances of one-eighth inch, handling glass by "feel" to prevent damage, an ability developed only through experience, and sealing joints of various types (glass to glass, glass to metal, metal to metal, metal to concrete) with various compounds to prevent moisture invasion. Employees represented by the Ironworkers do not work to such close tolerances. We find that this factor favors the award of the work to employees represented by the Glaziers.

4. Economy and efficiency of operations

It is more efficient to use a crew composed only of employees represented by the Glaziers rather than a composite crew composed of some employees represented by the Glaziers and some employees represented by the Ironworkers, or a crew composed of employees represented by the Ironworkers working under the supervision of Contract's superintendent and job foreman who are skilled in the glazing trade. This factor favors the award to employees represented by the Glaziers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Glaziers Local 1140 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between Contract and Glaziers, employer assignment, area practice, employer preference, relative employee skills, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by International Brotherhood of Painters and Allied Trades, AFL–CIO, Local 1140, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Contract Glass, Inc. represented by International Brotherhood of Painters and Allied Trades, AFL–CIO, Local 1140, are entitled to perform construction installation and preparation of certain metal frames for glass and the installation of glass into the metal frames at the SOHIO headquarters building project in Anchorage, Alaska.

2. Ironworkers District Council of the Pacific Northwest and International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO, Local 751, are not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Contract Glass, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Ironworkers District Council of the Pacific Northwest and International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO, Local 751, shall notify the Regional Director for Region 19 in writing whether it will refrain from forcing Hoffman Construction Company or Contract Glass, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

State Bank of India *and* Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO. Case 2–CA–19487

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

Upon a charge filed by the Union on 8 March 1983[1] the General Counsel of the National Labor Relations Board issued a complaint 18 March against the Bank, the Respondent, alleging that it has violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and the complaint were duly served on the parties to this proceeding.

The complaint alleges that on 23 February following a Board election in Case 2–RC–19372, the Union was certified as the exclusive collective-bargaining representative of the Bank's employees in the unit found appropriate.[2] The complaint further alleges that since 17 March the Bank has refused to bargain with the Union. On 23 March the Bank filed its answer admitting in part and denying in part the allegations in the complaint.

On 5 April the General Counsel filed a Motion for Summary Judgment. On 14 April the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Bank filed a brief opposing the General Counsel's Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its response to the Notice to Show Cause, the Bank contends that the Board should deny the Motion for Summary Judgment and dismiss the complaint in its entirety because: (1) the Bank is a direct instrumentality of the Government of India and therefore is not an "employer" as that term is defined in the National Labor Relations Act or, in the alternative, is an employer over which the Board, in its discretion, should not exercise jurisdiction; (2) the Bank's objections to the election in the underlying representation proceeding are valid; and (3) the Board denied the Respondent due process in the representation case by failing to hold a hearing on the Bank's objections and by failing to consider the entire administrative record which was before the Regional Director in that case. Should the Board fail to dismiss the complaint, the Bank requests that the Board order a hearing on its objections or at least make a de novo review of the entire administrative record that was before the Regional Director.

The General Counsel asserts that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 2–RC–19372, discloses that an election was held on 2 September 1982 pursuant to a Stipulated Election Agreement. The tally of ballots shows that of 83 eligible voters, 43 cast valid votes for and 34 against the Union; there were no challenged ballots. After conducting an investigation of the Bank's objections, the Regional Director on 15 October 1982, issued his Report recommending that the Bank's objections be overruled. The Bank filed exceptions to the Regional Director's Report. On 23 February the Board found no merit in the Bank's exceptions and certified the Union as the exclusive bargaining representative of the Bank's employees in the stipulated unit.[3]

By letter dated 4 March the Union noted its certification by the Board and demanded that the Bank bargain with it. By letter dated 17 March the Bank's attorney notified the Union that the Bank considered the Board's certification of the Union to be wrong and that it would therefore decline to bargain with the Union. The Bank has refused at all times since 17 March to bargain with the Union.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding.[4]

All issues raised by the Bank were or could have been litigated in the prior representation proceeding. The Bank does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation pro-

[1] All dates are 1983 unless otherwise noted.

[2] Official notice is taken of the record in the representation proceeding, Case 2–RC–19372, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electro Systems*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[3] Chairman Dotson did not participate in the underlying representation proceeding.

[4] See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

ceeding.[5] We therefore find that the Bank has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Bank is a financial institution organized under the laws of India and licensed to do business in the State of New York, with a place of business at 460 Park Avenue, New York, New York. Annually, in the course and conduct of its business operations, the Respondent derives gross revenues in excess of $1 million, and it engages in interstate financial transactions in excess of $100,000 from its New York place of business.

We find that the Bank is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held 2 September 1982 the Union was certified 23 February 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed by the Employer at its 460 Park Avenue, New York, New York facility including tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, secretaries, and machine operators, but excluding all officers, managerial and professional employees, confidential employees, India-based temporary and other temporary employees, maintenance employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 4 March the Union has requested the Bank to bargain, and since 17 March the Bank has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 17 March to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Bank has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, and to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement, and to provide the Union on request information necessary for collective bargaining.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, State Bank of India, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

---

[5] In addition to its claim that the Board incorrectly failed to grant its exceptions in the underlying representation case, the Bank contends that the Board does not have jurisdiction over it because it is a direct instrumentality of the Government of India and therefore it is not an "employer" as that term is defined in the Act. The Board rejected this argument in *State Bank of India*, 229 NLRB 838 (1977), and that decision is controlling here. See also *State Bank of India*, 262 NLRB 1108 (1982).

The Respondent further contends that the Board denied it due process in the underlying representation proceeding because the Board did not have before it statements of witnesses on which the Regional Director relied in reaching his decision. We find no merit in this contention. See *Frontier Hotel*, 265 NLRB 343 (1982).

Member Dennis finds it unnecessary to rely on Frontier Hotel in rejecting the Respondent's due process contention. She relies instead on the failure of the Respondent's evidence, taken as true, to warrant setting aside the election.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement, and provide the Union, on request, information necessary for collective bargaining:

> All full-time and regular part-time employees employed by the Employer at its 460 Park Avenue, New York, New York facility including tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, secretaries, and machine operators, but excluding all officers, managerial and professional employees, confidential employees, India-based temporary and other temporary employees, maintenance employees, guards and supervisors as defined in the Act.

(b) Post at its New York, New York facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time employees employed by us at our 460 Park Avenue, New York, New York facility including tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, secretaries, and machine operators, but excluding all officers, managerial and professional employees, confidential employees, India-based temporary and other temporary employees, maintenance employees, guards and supervisors as defined in the Act.

STATE BANK OF INDIA

State Bank of India *and* Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO. Case 2–CA–19667

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

Upon a charge filed by the Union 26 May 1983[1] the General Counsel of the National Labor Relations Board issued a complaint 20 July against the Bank, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Copies of the charge and the complaint were duly served on the parties to this proceeding.

The complaint alleges that about 28 April the Respondent, without notice to or bargaining with the Union, granted a wage increase to unit employees effective retroactively to 1 April. On 2 August the Respondent filed its answer to the complaint admitting in part and denying in part the allegations of the complaint.

On 17 October the General Counsel filed a Motion for Summary Judgment. On 19 October the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Bank filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its response to the Notice to Show Cause, the Bank contends that the Board should deny the Motion for Summary Judgment and dismiss the complaint in its entirety because: (1) The Bank is a direct instrumentality of the Government of India and therefore is not an "employer" as that term is defined in the National Labor Relations Act or in the alternative is an employer over which the Board in its discretion should not exercise jurisdiction; (2) there is now pending before the Board a related Motion for Summary Judgment which presents a threshold issue testing the underlying certification; and (3) the Respondent promised the wage increase to its employees in October 1982 and the increase was given as of a date the Bank traditionally has granted salary increases.

In his Motion for Summary Judgment, the General Counsel asserts that the Bank is raising issues which were raised and determined or could have been raised and determined in the underlying representation proceeding. We agree with the General Counsel.

In a letter dated 4 March, the Union noted its certification[2] by the Board and demanded that the Bank bargain with it. By letter dated 17 March, the Bank's attorney notified the Union that the Bank considered the Board's certification of the Union to be wrong and that it would therefore decline to bargain with the Union. The Bank has refused at all times since 17 March to bargain with the Union. On 28 April the Bank granted wage increases retroactive to 1 April to its employees in the unit described above without prior notification to, or consultation or negotiations with, the Union.

The Bank contends that the Board does not have jurisdiction over it because it is a direct instrumentality of the Government of India and therefore it is not an "employer" as that term is defined in the Act. The Board rejected this argument in *State Bank of India*, 229 NLRB 838 (1977), and that decision is controlling here.[3]

The Bank further contends that the pending technical 8(a)(5) proceeding would render premature a decision in the instant case. The Board has granted the Motion for Summary Judgment in Case 2–CA–19487, thereby rendering this contention moot.[4]

Finally, the Bank's contention that it gave the wage increase on the basis of an earlier promise is not a legally sufficient defense. Even accepting the Bank's evidence that the employees were promised a wage increase in April and that the timing of the increase was predetermined, the amount of the increase was discretionary and became a matter as to which the Bank was obligated to consult with the bargaining agent.[5]

We therefore find that the Bank has raised no issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Company is a financial institution organized under the laws of India and licensed to do business in the State of New York, with a place of business

[1] All dates are in 1983 unless otherwise indicated.

[2] The Union was certified as the representative of the employees in the appropriate unit 23 February in Case 2–RC–19372.

[3] See also *State Bank of India*, 262 NLRB 1108 (1982).

[4] 273 NLRB 38 (1984).

[5] *Charles Mfg. Co.*, 245 NLRB 39 (1979); *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973). See also *State Farm Mutual Auto Insurance Co.*, 195 NLRB 871, 890 (1972).

at 460 Park Avenue, New York, New York. Annually, in the course and conduct of its business operations, the Respondent derives gross revenues in excess of $1 million and engages in interstate financial transactions in excess of $100,000 from its New York place of business. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees employed by Respondent at its 460 Park Avenue, New York, New York facility including tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, secretaries and machine operators, but excluding all officers, managerial and professional employees, confidential employees, India-based temporary and other temporary employees, maintenance employees, guards and supervisors as defined in the Act.

The Union was certified as the collective-bargaining representative of the employees in the unit on 23 February, and the Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *The Refusal to Bargain*

About 28 April the Respondent, without notice to or bargaining with the Union, granted a wage increase to employees in the unit.

We find the Respondent has, by this conduct, violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By granting a wage increase to unit employees on 28 April 1983, without notice to or bargaining with the Union, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and, on request, bargain collectively with the Union concerning wage increases for unit employees.

ORDER

The National Labor Relations Board hereby orders that the Respondent, State Bank of India, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO as the exclusive bargaining representative of its employees in the bargaining unit, by granting wage increases without prior notice to or bargaining with the Union, providing that the Respondent shall not be required to rescind any wage increase previously granted.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning wage increases:

> All full-time and regular part-time employees employed by Respondent at its 460 Park Avenue, New York, New York facility including tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, secretaries and machine operators, but excluding all officers, managerial and professional employees, confidential employees, India-based temporary and other temporary employees, maintenance employees, guards and supervisors as defined in the Act.

(b) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[1] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT grant wage increases to unit employees without prior notice to or bargaining with Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL–CIO as the exclusive representative of its employees in the following appropriate unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to wage increases. The bargaining unit is:

> All full-time and regular part-time employees employed by Respondent at its 460 Park Avenue, New York, New York facility including tellers, clerks, clerk-typists, messengers, bookkeepers, receptionists, secretaries and machine operators, but excluding all officers, managerial and professional employees, confidential employees, India-based temporary and other temporary employees, maintenance employees, guards and supervisors as defined in the Act.

STATE BANK OF INDIA

N & T Associates, Inc. d/b/a Aladdin Hotel and Casino *and* Harvey Kerin *and* Steven R. Dalen.
Cases 31–CA–11999 and 31–CA–12381

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 13 January 1984 Administrative Law Judge Harold A. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel has filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, N & T Associates, Inc., d/b/a Aladdin Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(b) and reletter original paragraphs 2(b) through (d) accordingly.

"(b) Expunge from our files all references to the layoffs, and notify all laid-off employees in writing that this has been done and that their layoffs will not be used as a basis for future action against them."

2. Substitute the attached notice for that of the administrative law judge.

[1] On 19 August 1983 the General Counsel filed with the Board a motion to strike the Respondent's exceptions. In its motion the General Counsel asserts that the Respondent's statement of exceptions fails to meet the specificity requirements of Sec. 102.46(b) of the Board's Rules and Regulations. We hereby deny the motion. Member Hunter notes that when the Board's Office of the Executive Secretary received the Respondent's exceptions and brief it advised the Respondent's attorney that the brief exceeded the page limitation set forth in the Board's Rules and Regulations and that, as a result of this discussion and with the approval of the Executive Secretary's Office, the Respondent modified its brief. He further notes that during this discussion the Executive Secretary's office made no reference to the Respondent's statement of exceptions. In these unique circumstances, Member Hunter finds it appropriate to deny the General Counsel's motion to strike.

Member Zimmerman, while noting the lack of specificity of the exceptions themselves, nevertheless finds that the exceptions, coupled with the Respondent's brief and supporting arguments supplied therein, suffice to set forth those parts of the judge's decision that the Respondent claims are erroneous. *Roofers Local 66 (Sierra Employees Assn.)*, 267 NLRB 601 (1983).

Chairman Dotson would grant the General Counsel's motion. He finds that the Respondent's statement of exceptions contests the legal conclusions of the judge but fails to except specifically to any part of the judge's decision or allege with any degree of particularity what error, mistake, or oversight the judge committed. Chairman Dotson finds that the Respondent's statement of exceptions is indistinguishable in terms of lack of specificity from the statements of exceptions the Board found did not comply with Sec. 102.46(b) of the Board's Rules and Regulations in *Ditch Witch of Illinois*, 248 NLRB 452 (1980), and *Aitoo Painting Corp.*, 238 NLRB 366 (1978). In light of the Board's heavy caseload and the corresponding need to narrow the issues for review so that the Board may expedite the review process, Chairman Dotson believes that the Board's minimal requirements for the filing of exceptions should be strictly enforced. Accordingly, Chairman Dotson adopts in the absence of exceptions, the findings, conclusions, and recommendations of the judge.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Member Hunter adopts the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act based on certain threats made by Supervisor Dinino to employee Dalen. Member Hunter finds it unnecessary to pass on the judge's finding that such threats also violated Sec. 8(a)(4) of the Act since the finding of such additional violations would not materially affect the Order.

[4] The Order is modified to require that the Respondent expunge from its records evidence of its unlawful layoff of employees and that they be so notified in writing. See *Sterling Sugars*, 261 NLRB 472 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off or otherwise discriminate against employees for filing or preparing grievances.

WE WILL NOT lay off or otherwise discriminate against employees for giving a statement to the National Labor Relations Board.

WE WILL NOT threaten employees for filing a grievance.

WE WILL NOT tell employees that laid-off employees will be recalled when one or more of them obtains other employment or when the recall rights of one or more of them expired.

WE WILL NOT tell an employee that he is on the "shit list," that he is on the "barbecue," or other-

wise threaten him for going to the National Labor Relations Board.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Jess Atkinson, Harley Kerin, Maurice McBride, Joseph Washington, Ronald Achzet, George Nicholson, and Steven Dalen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges; and WE WILL make them whole for any losses of earnings and benefits suffered because of our discrimination against them as a result of their union activity.

WE WILL expunge from our files all references to the layoffs, and notify all laid-off employees in writing that this has been done and that their layoffs will not be used as a basis for future action against them.

N & T ASSOCIATES, INC. D/B/A ALADDIN HOTEL AND CASINO

DECISION

HAROLD A. KENNEDY, Administrative Law Judge. This case was tried before me on February 17 and 18, and May 2 and 3, 1983, on a consolidated complaint issued on October 28, 1982, by the Regional Director for Region 31 of the National Labor Relations Board. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by laying off six employees on or about November 20, 1981; violated Section 8(a)(1), (3), and (4) of the Act by laying off another employee on or about August 6, 1982; and violated Section 8(a)(1) as a result of certain statements made by two of Respondent's officials. Certain of the statements also allegedly violated Section 8(a)(4).[1]

Respondent concedes jurisdiction, and many facts are not in dispute. Respondent admits in its answer a number of relevant matters, including the following:

1. Respondent N & T Associates, Inc., d/b/a Aladdin Hotel and Casino (Aladdin) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent is a Nevada corporation with its principal place of business located in Las Vegas, Nevada, where it operates a hotel and casino. Respondent grosses over $1 million annually. Respondent annually purchases and receives goods or services valued in excess of $5,000 directly from suppliers located outside Nevada.

2. The Professional, Clerical and Miscellaneous Employees, Local Union 995, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times relevant, the following persons held the positions indicated and were agents and supervisors of Respondent: Connie Kennington, personnel director; John Grandi, director of building maintenance; and Chris P. Dinino, labor foreman.

4. During the relevant period Respondent was bound by a 1980–1983 collective-bargaining "Labor Agreement Between and Professional, Clerical and Miscellaneous Employees, Local 995" (G.C. Exh. 3).

5. A grievance was filed on or about November 12, 1981 (G.C. Exh. 2).

6. On or about July 30, 1982, certain employees prepared and submitted a grievance to the Union (which was later withdrawn).

7. On or about August 6, 1982, Respondent laid off six employees—Jess Atkinson, Harley Kerin, Maurice McBride, Joseph Washington, Ronald Achzet, and George Nicholson—and has not since that time recalled them.

8. On or about August 6, 1983, Respondent laid off Steven R. Dalen, Charging Party in Case 31–CA–12381, and has not since recalled him.

Respondent denies that the layoff of the six employees was unlawful—i.e., that they were laid off either because a grievance was filed in November 1981 or because they engaged in union or other protected concerted activities as alleged. Respondent also denies that its layoff of Dalen was unlawful—i.e., that he was laid off because of the July 1982 grievance, because of union or other protected concerted activities, or because employees filed charges or gave testimony under the Act as alleged.

Respondent also denies that it violated the Act through statements allegedly made by two of its supervisors and agents, John Grandi and Chris Dinino. Grandi allegedly made unlawful statements as follows:

1. On or about November 18, 1981, near the engineering section of Respondent's facility, impliedly threatened to lay off certain maintenance employees because of the filing of the [November 12, 1981] grievance and because one employee had engaged in other union or protected concerted activities (par. 8(a)).

2. On or about November 20, 1981, in Grandi's office at Respondent's premises, impliedly informed an employee that Respondent was laying off certain maintenance employees because of the union or other protected concerted activities of a particular maintenance employee (par. 8(b)(1)).

3. On or about November 20, 1981, informed an employee that Respondent would recall to work said maintenance employees when the employee who had engaged in union or other protected concerted activities had obtained other employment (par. 8(b)(2)).

4. In or during December 1981 or January 1982, a more precise date presently unknown to the General Counsel, in Grandi's office at Respondent's premises, during a discussion with an employee, impliedly refused to recall to work the maintenance employees laid off on November 2, 1981, and because a particular maintenance employee had filed the [November 12, 1981] grievance

[1] A complaint issued on May 6, 1982, in Case 31–CA–11999, based on a charge filed by an individual named Harley Kerin on March 19, 1982. That complaint was superseded by the consolidated complaint that issued following the filing of charges by another individual, Steven R. Dalen, in Case 31–CA–12381 on August 9 and September 21, 1982.

and because said employee had engaged in other union or protected concerted activities (par. 8(c)).

Dinino allegedly made unlawful statements as follows:

1. On or about November 18, 1981, at Respondent's premises informed Respondent's maintenance employees that they were being laid off because an employee had filed numerous grievances during the past month (par. 9(2)(1)).

2. On or about November 18, 1981, in the hallway on the north end of Respondent's casino, informed an employee that Respondent had decided to lay off certain maintenance employees because one such employee had filed the [November 12, 1981] grievance and because said employee had engaged in other union or protected concerted activities (par. 9(a)(2)).

3. In early January 1982, a more precise date presently unkown to the General Counsel, during a telephone conversation with an employee, informed the employee that, as soon as the employee who had filed the [November 12, 1981] grievance had obtained a job with another employer, the other maintenance employees laid off by Respondent on November 20, 1981, would be recalled to work by Respondent (par. 9(b)).

4. In early March 1982, during a telephone conversation with an employee, informed the employee that Respondent intended to wait for 1 year before recalling to work the maintenance employees laid off on November 20, 1981, because the employee who filed the [November 12, 1981] grievance would then lose his seniority and recall rights under the terms of the Union's contract with Respondent (par. 9(c)).

5. On or about April 5, 1982, in back of Respondent's Performing Arts Theater, threatened an employee with layoff because Respondent believed that said employee had given testimony to the National Labor Relations Board in connection with Case 31–CA–11999 (par. 9(d)).

6. In or about mid-July 1982, and on other occasions, the exact dates being presently unknown to the General Counsel, at Respondent's premises, impliedly threatening an employee with discharge by stating that said employee was on the "shit" list and "on the barbeque," because Respondent believed that said employee had given testimony to the National Labor Relations Board in connection with Case 31–CA–11999 (par. 9(e)).

All of the alleged statements of Grandi and Dinino, according to the complaint, violated Section 8(a)(1) of the Act. The statements which Dinino allegedly made in April and in mid-July 1982 and on other occasions (par. 9(d) and (e)) also violated Section 8(a)(4) of the Act, according to the complaint, since they were made because employees filed charges or gave testimony under the Act (pars. 13(b) and (15)).

Background Summary of Case

Respondent operates a 1105 room hotel in Las Vegas, Nevada, which includes a casino, a cocktail lounge, a showroom, a theater for the performing arts, seven restaurants, and a convention center. Respondent's facilities, except for the hotel portion, were closed between July and October 1980. On October 1, 1980, Edward Torres became general manager and the facilities reopened. Respondent's maintenance department includes engineers, carpenters, painters, maintenance laborers, gardeners, and truckdrivers. Local 995 represents the maintenance laborers employed by Respondent. During all relevant times, John Grandi has been the chief engineer of the maintenance department; Chris Dinino has been the supervisor of the maintenance laborers and drivers; and Jess Atkinson was, until his layoff in November 1981, the union steward for the maintenance laborers.

Maintenance laborers move furniture and equipment, including slot machines, operate jack hammers and heavy equipment, dig trenches, remove carpeting, drive trucks and loaders, and perform general demolition and cleanup work. They also assist other trades by hauling their supplies, setting scaffolding, cleaning up, and hauling debris.

In October 1980, the maintenance department included nine laborers, plus the supervisor, Dinino. The laborers were Terry Atwood, Elmer Parolini, Robert Mayhall, Steven Dalen, Jess Atkinson, Joe Washington, Ronald Achzet, Harley Kerin, and Maurice McBride. Four new hires employed in 1981 were laid off in August of that year, but one of them, George Nicholson, was rehired 3 months later.

On November 20, 1981, Respondent laid off six laborers—Atkinson, Washington, Achzet, Kerin, McBride, and Nicholson. The laborers were laid off by seniority except Chris Dinino, who has been a management employee at all times relevant. Of the six, Atkinson had the most seniority. On August 6, 1982, Respondent laid off Steven Dalen, the laborer then working with the least seniority.

The General Counsel maintains that in addition to making various threats and statements, Respondent instituted the November layoffs in retaliation for a work assignment grievance which was filed by Jess Atkinson on November 12, 1981, and which was signed by Mayhall, Dalen, Atkinson, Washington, Achzet, Kerin, and McBride. The gist of the General Counsel's argument is that Respondent laid off five employees with less seniority than Atkinson in order to "get" Atkinson. The General Counsel also maintains that, in addition to threatening Dalen, Respondent laid off Dalen because in March 1982 Dalen provided an affidavit to the NLRB concerning the November layoffs and because he participated in a work assignment dispute on or about July 30, 1982. Respondent denies making the alleged statements and threats and maintains that the layoffs were part of a general reduction in the work force which was ordered by General Manager Torres without regard to, or knowledge of, the work assignment disputes or Dalen's contact with the National Labor Relations Board.

The Evidence

Thirteen witnesses testified, eight for the General Counsel, one of whom (Robert Mayhall) was recalled as a rebuttal witness, and five for Respondent, one of whom (Chris Dinino) was recalled as a surrebuttal witness. The testimony of the witnesses will be summarized in the order of their appearance.

Jess Atkinson, who was not employed at the time of the hearing, went to work at the Aladdin Hotel in April

1976. He said he became a full-time employee in 1977. His job at the hotel was also maintenance laborer. He had been laid off at different times but had been thereafter recalled except for the most recent layoff occurring on November 20, 1981. In 1981 Atkinson was designated shop steward for the hotel's maintenance laborers and gardeners.

Atkinson testified that November 11, 1981, Veterans Day, was a holiday for the laborers. He received a telephone call at home from a fellow employee who told him that maintenance engineers were performing laborers' work at the Aladdin. Specifically, Atkinson was told the engineers drove a truck to the Marina Hotel, picked up a dance floor, and delivered it back to the Aladdin. Atkinson drove to the Aladdin, noticed that the truck was not parked in the place where the laborers had last left it and that the truck contained a dance floor. Atkinson spoke to a security guard about who had driven the truck and they went to see John Grandi, the director of building and maintenance,[2] and asked Grandi why engineers had driven the truck contrary to the union agreement. Grandi became angry and asked who the "stool pigeon" was. Grandi told Atkinson that "if you don't have anything better to do, get out of my mother-fucking office and go play union elsewhere."[3] On the following morning Atkinson met with the other laborers, and it was decided that it would be in the best interest of the crew to file a grievance. The grievance (G.C. Exh. 2) was filed with the Union and, within a week, Respondent made a monetary payment to settle the grievance.[4]

Several days later, on or about November 18, Atkinson's immediate superior, Chris Dinino, approached Atkinson in the work area. Dinino appeared upset and said that Grandi was going to lay off all the laborers up to and including Atkinson, the most senior laborer, because of the grievance. At the suggestion of Dinino, Atkinson tried to talk to Grandi about the layoffs but without success. Atkinson "approached" Grandi about the layoffs as the latter passed through the work area, but Grandi replied that there was nothing to talk about. Atkinson and five other laborers, Maurice McBride, Joe Washington, Harley Kerin, Ron Achzet, and George Nicholson, were laid off on November 20, and on that date Atkinson asked Dinino if the layoffs were a result of the grievance that had been filed. Dinino replied, in part, "Well, you know, Mr. Grandi will cool off by a couple of weeks and we'll get this straightened out."[5]

Atkinson explaned on cross-examination that Respondent undertook some major renovation projects soon after the Aladdin reopened in October 1980. (Atkinson indicated that the casino was closed in 1980 and that it was around that time, he thought, that he heard that "Mr. Torres and Mr. Newton" had purchased the Aladdin.) According to Atkinson, the laborers helped to move, among other things, the baccarat tables, remodel four restaurants, move the marquee, redo the carpets in the casino and lobby area, and install a new health spa. Because the restaurants were completely gutted and moved, some temporary laborers were hired in 1981.[6] The restaurants opened sometime in the summer of 1981, on a staggered basis, and the new health spa was opened about mid-November that year. Atkinson estimated that he spent about 65 percent of his time working on the renovation projects while they were in progress. Atkinson said he operated a jackhammer, moved dirt by wheelbarrow, and performed other "renovation and clean-up" work.

Harley Kerin, on active duty with the United States Marines at the time of the hearing, testified that he was hired by Respondent on October 10, 1980, and was laid off December 26, 1980, and again on November 20, 1981. He was recalled within a couple of weeks after being laid off in December 1980, but he was not called back after being laid off in November 1981. Kerin testified that in December 1980 Respondent wanted to lay off Brian Hesse, who was at the time working under the supervision of Hesse's father, but had no legitimate reason to do so. "So what they did was," according to Kerin, "they laid off three other employees to get to Hesse"—Ron Achzet, Joe Washington, and Kerin. The laid-off employees, other than Hesse, were told, Kerin said, that as soon as Hesse got another job they would be recalled. Hesse obtained a job at Caesars Palace, and the other laid-off employees were immediately recalled.[7]

Kerin stated that he was a member of Local 995 and worked as a maintenance laborer while employed at the Aladdin. Kerin said he was told when hired that he would be "full-time" and was assigned to a crew to help with the remodeling of the hotel. He helped install carpeting and performed "mostly cleanup" work. Kerin recalled that others, including Nicholson, Neal, Leavitt, and Smith, were hired in early 1981 and that some of them were laid off in August of the same year.

Kerin said he was told of his November 29, 1981 layoff by Dinino on that date. There was talk earlier of the possibility of a layoff because of the filing of grievances. Said Kerin: "Chris Dinino had mentioned that if we don't quit filing them, that something is going to happen."[8] Kerin said Dinino told him and others in the break area around 1 or 1:15 p.m., on November 20, that they were being laid off "because our shop steward was filing grievances against the hotel for workers doing our job." Achzet asked Dinino at the time, Kerin testified, "if

[2] Grandi is in charge of the maintenance department, but was not Atkinson's immediate supervisor.

[3] Grandi's version of the confrontation was not too different, as indicated infra.

[4] Checks were made out to the two laborers with the most seniority, Bob Mayhall and Steve Dalen, but the money was divided among those who had signed the grievance.

[5] As indicated infra, Dinino denied making the statement. Atkinson stated that no grievance was filed over the November 20 layoff; someone at the Union had told him that "it's a right of management to decide . . . their working force."

[6] Nicholson, Neal, Smith, and Leavitt were identified as the temporary hires. All four were laid off in August 1981, but Nicholson was recalled shortly thereafter and laid off again on November 20, 1981.

[7] A number of witnesses testified that they understood the collective-bargaining agreement to provide that employees were to be recalled according to seniority, that recall rights expire after a year, and that an employee could accept another job without losing recall rights.

[8] Dinino denied making such a statement but agreed that Hesse had been laid off under circumstances similar to those described by Kerin. Dinino denied, however, that the November 1981 layoff was similar to the Hesse situation or related to a grievance.

it was going to be another Hesse situation," and Dinino agreed, "yes, it was."

Dinino sent Kerin to speak with Grandi on November 20 concerning Kerin's question about the length of the layoff. Grandi told Kerin that "he was sorry to see us go, but he wasn't going to let some smart-mouth punk tell him how to run his business. And as soon as he got another job, we would all be back to work again."

Kerin agreed that some of the remodeling of the hotel had been completed at the time of the November 20, 1981 layoffs but stated there was further remodeling work yet to be completed. At the time of the layoff Kerin said he was averaging about 20 hours of overtime every 2 weeks.

Kerin said he went to the Union to complain about the November 1981 layoffs, but he was unaware of whether the Union filed a grievance protesting the layoffs.[9]

Ronald Achzet, a member of the Union, testified that he was hired by Dinino on October 8, 1980. and was laid off on November 20, 1981. Two days earlier, on November 18, 1981, Dinino had told him and Kerin that "you guys are going to get laid off" because of grievances filed by Atkinson. Either Achzet or Kerin (Achzet was not sure which one) asked Dinino if this were another "Hesse situation," and Dinino replied that it was.[10]

Achzet testified that after the November 1981 layoff he had three conversations with Dinino in 1982. In early January 1982, he telephoned Dinino and asked whether the laborers were going to be recalled; Dinino said "yes," as soon as Atkinson had gotten a job. Achzet again called Dinino in March to ask about coming back to work. Dinino said that "they were going to wait for Jess Atkinson's recall rights to run out" and then the laborers would be called back without regard to seniority rights. On April 7 Achzet again inquired by phone whether the laborers would be recalled. Dinino responded, Achzet said, by telling "me that my name was on Grandi's desk, naming me in a suit that Harley Kerin had filed." Achzet understood Dinino to be referring to the charge leading to the instant case. Achzet asked if he could get his job back if he took his name off the suit. Dinino told Achzet that Achzet would have to talk to Grandi.[11]

George Nicholson testified that, sometime during the week prior to the November 20 layoff, John Grandi spoke with a number of the laborers just prior to quitting time. Grandi, according to Nicholson, said, "I hate to let a few good guys go to get to one guy." Although Nicholson did not understand at that time whom Grandi was talking about, he subsequently understood Grandi to be referring to Atkinson.[12]

Nicholson said he was hired by Dinino in January 1981 to do labor maintenance and was laid off in August with five or so others and again on November 20, 1981.

Steven Dalen was hired as a maintenance laborer in 1976 and laid off on August 6, 1982. He said he was a member of Local 995. He testified that on several occasions following the November 1981 layoffs Chris Dinino said to him, "If Jess [Atkinson] hadn't opened his big mouth them six guys would still be working." On another occasion, in December 1981 or January 1982, Dinino and Dalen walked into Grandi's office and Dinino asked Grandi when the laid-off laborers would return to work. Grandi replied, "Has Jess Atkinson got a job yet?"[13]

In 1982, toward the end of his employment with Respondent, Dalen and Bob Mayhall were concerned with the amount of work being required of them and asked Dinino when the six persons laid off in November 1981 would be recalled. Dinino replied, "after their recall rights expired he would hire new guys."

Dalen also testified that on the morning of April 5, 1982, Dinino approached Dalen and Bob Mayhall as they were working. Dinino told Dalen that Connie Kennington, Respondent's personnel director, thought that Dalen had provided a statement to the NLRB. Dinino then told Dalen he had better "watch it" or he "might still get laid off."

Later that day while eating lunch, Dalen was asked by Dinino to go with him and explain to Kennington that "the reason I didn't get laid off [in November] was because my wife was going to have twins."[14] Dalen met with Kennington and a Nevada Resort Association attorney, Vincent Helm, who he thought at first was an NLRB attorney, in Grandi's office. Dalen explained to them that "everybody"—i.e., "the carpenters, the painters, gardeners and all the other trades"—had been doing the laborers' work. Dalen stated that when he was asked whether he had gone to the NLRB he realized that the attorney present was not from the NLRB. He then refused to make further comment.[15]

[9] Respondent offered in evidence an affidavit of Kerin (R. Exh. 1), but I find no significant contradictions between it and his testimony.

[10] Achzet said he was among four employees laid off for 2 weeks on December 26, 1980. At that time Dinino stated that as soon as Hesse got a job the workers would return to work. Achzet said that there were two or so hired shortly after his recall in January 1981 and that there were layoffs around August 1981.

[11] Dinino denied the essence of Achzet's testimony. Dinino did recall one postlayoff phone conversation with Achzet. According to Dinino, Achzet called and said he understood that Respondent had undertaken a construction project and asked if he could come back to work. Dinino explained that Respondent was not hiring any more "maintenance Teamsters" because it had "construction laborers coming in . . . it was another situation all together."

[12] Robert Mayhall, a member of the labor maintenance crew, testified that Nicholson was present when the November 12 grievance was signed by a number of laborers but Nicholson did not sign it.

[13] Dinino's recollection of the conversation in Grandi's office is somewhat different. Dinino asked if he would be getting any new employees and Grandi said no, that there was not going to be any hiring for a while. It was possible, according to Dinino, that Grandi mentioned Atkinson, but if he did, it would have been because Grandi had, on occasion, inquired whether "any of the guys would be working or not."

[14] Both Grandi and Dinino testified (as did Dalen) that Dalen had been included on the list of employees to be laid off in November. Dalen's wife was pregnant, however, and Dinino was concerned Dalen would lose his medical coverage. When Dinino discovered that Terry Atwood, one of the employees who was to be retained, was on a disability leave, he persuaded Grandi to keep Dalen on until Atwood's return. Atwood returned in March 1982, but Dalen was not laid off until the following August.

[15] On cross-examination Dalen said, "I think Chris [Dinino] had asked me a few times if I had went down there [NLRB], and stuff." Dinino denied mentioning the NLRB to Dalen before the April meeting with Kennington and the Resort Association attorney took place. Dinino said "it was brought up back in April" that Dalen had gone to the NLRB. He

Continued

Dalen testified that on April 7, 1982, and on other occasions that Dinino had told Dalen, "no matter what happens, I was on the shit list." Dinino repeated the statement or a similar statement during the following months. Dalen recalled on cross-examination that Dinino also told him that he was on the "Barbecue."

Finally, Dalen testified that he filed a grievance on Friday, July 30, 1982, concerning a work assignment of laborers (running a forklift and driving a truck) to the stagehands. The grievance was later withdrawn by Dalen, however. Dinino was present and observed Dalen, Atwood, and Mayhall prepare the grievance but, Dalen conceded, Dinino did not actually read it. Later that evening Dinino called Dalen at home and told him to report to work the following day, a Saturday, to complete the disputed assignment.[16]

Robert Mayhall went to work at the Aladdin Hotel in 1975 and was still employed there at the time of the trial. He said he was currently a maintenance truckdriver and member of Local 995. Mayhall said he also operated loaders and other equipment. When not engaged in driving or operating equipment he works as a maintenance laborer.

Mayhall testified for the General Counsel on his case-in-chief and on rebuttal.[17] On his first appearance, Mayhall told of Jess Atkinson telling him and other members of the maintenance laborers' crew that two engineers had moved a dance floor on Veterans Day in November 1981. All of the members of the crew present, except for Nicholson, signed a grievance.[18] The company paid compensation, in the form of two checks, to Mayhall and Dalen, the most senior members, and the proceeds were divided among those who had signed the grievance.

Mayhall also recalled being told by Dinino a couple of days before the November 20, 1981 layoff of six laborers that "everybody was getting laid off up through Jess." Mayhall said Dinino also stated that "if Jess would have kept his big mouth shut and butted out, everybody would have kept their jobs." A few weeks later Dinino told Mayhall that the laid-off workers would not be recalled for a year while they still had seniority rights.[19]

Mayhall testified that he complained to Dinino on March 24, 1982, that other employees were performing the laborers' work. About the same time mention was made about the fact that the six laid-off workers would not be recalled for a year. Dinino told Mayhall that if he did not keep his "mouth shut" he would lose his job. Mayhall overheard several conversations during which Dinino had told Dalen that Dalen was on the "barbecue." Mayhall also heard Dinino tell Dalen that Connie Kennington was aware that Dalen "was one of the ones" who had filed a charge with the NLRB and that Dalen was on the "shit list." Asked on cross-examination for details of the conversation he overheard, Mayhall testified:

> Chris had gone into Connie's office with a lawyer or somebody and he come out of the office and got Steve and told Steve that they knew that he was one of the ones that went down and filed the charges on them at the Labor Board.

When Dalen was laid off in August 1982, there were no maintenance laborers as such working at the Aladdin. Terry Atwood, another maintenance truckdriver, Mayhall (who was on vacation at the time), and other bargaining unit employees were doing the maintenance laborers' work. Mayhall agreed on cross-examination that around August 1982 there was a substantial layoff, involving engineers, carpenters, painters, and gardeners.

Steven Burrus, the business representative for Local 995, testified that he spoke with Grandi and Dinino a number of times after the November 1981 layoffs. He said no grievance was filed concerning the layoffs, but he tried to "settle it informally between the parties and get people back to work."

Burrus went to the Aladdin in late November or early December to meet Grandi pursuant to an appointment but was able to speak with him there only by telephone. Grandi was abrupt and asked Burrus if he got a job yet for Atkinson. Burrus stated that Grandi said to him, "You son of a bitch, what are [you] going to do for me?" Grandi also told Burrus that "unless you get this guy a job, there isn't anything going to happen." Burrus said he saw Grandi again at the Aladdin in April 1982, and Grandi again asked if Burrus had got Atkinson a job.

Burrus said his meetings with Dinino were in the summer months. Dinino would also ask whether or not Atkinson had a job yet. Burrus recalled that Dinino, a union member, attended a union meeting and remarked: "Unless you guys quit putting out some heat, you're never going to get anywhere with Grandi."[20]

---

said there were "no hard feelings," and it had nothing to do with Dalen's layoff. Dinino said he sent Dalen in to talk to Kennington and Helm "about the situation, about his family, the insurance and that." He was not sure if he told him it was the hotel attorney. Kennington testified, however, that she introduced the attorney as the attorney for the Resort Association.

[16] Dalen indicated on cross-examination that Mayhall had told him that stagehands were doing "our work" and that Mayhall was more upset at Dinino than Dalen was. According to Dalen, Mayhall "was mad" and yelled to Dinino: "You know why I'm mad." Dalen took the grievance to the union office on Friday afternoon but later called the Union and told Business Representative Burrus "to rip it up" as Dalen had been called in to perform the work. Dalen also telephoned Mayhall, who had begun a vacation that weekend, and told him that he had done the work.

Dinino also testified about the incident. He said the stagehands had always used the forklift. He said he gave the keys for the truck and forklift to the stagehand crew that day and argued with Mayhall about the stagehands' use of the forklift. Dinino went to the union hall that day seeking to clarify matters and, after talking with the stagehand crew chief, called Dalen and told him to go in and do the work. Dinino said he did not mention the incident to Grandi.

[17] Mayhall was recalled on rebuttal to testify concerning laborers' work performed by construction laborers and other crafts following the November 1981 layoffs. Such rebuttal testimony is summarized in a footnote at the end of the summary of Dinino's testimony.

[18] As previously noted, seven members of the maintenance labor crew signed the November 12 grievance. Terry Atwood and Elmer Parolini also did not sign the grievance but were not laid off. Mayhall also was retained, although he signed the grievance.

[19] Mayhall testified that the November 1981 layoff came after two restaurants had been completed and while work on a third and a health club was in progress. He stated that the layoff came unexpectedly but conceded that Dinino had indicated that layoffs would come when the construction work was completed.

[20] Grandi claimed on cross-examination that he had explained to Burrus that there was nothing that could be done for the laid-off laborers. Grandi denied that he had ever met Burrus face-to-face before the trial or that he had been asked to attend a meeting with Burrus.

Terry Atwood, a member of Local 995, was employed by Respondent at the time of trial as a truckdriver. He testified concerning a conversation he had with Dinino sometime in March 1982. Dinino said that Respondent would never rehire the six laborers who had been laid off in November 1981, and that Respondent would wait until the laborers' recall rights had expired before it would hire more employees. Following Dalen's layoff (in August 1982) Dinino told Atwood that Dalen would never be rehired because Dalen had filed charges with the NLRB. In November 1982 Dinino told Atwood that Atwood would be terminated if he testified during the NLRB trial.[21]

John Grandi testified that he came to the Aladdin Hotel when Ed Torres took over the hotel in October 1980. He said he worked as a consultant at first and became an employee of the hotel at the beginning of 1981.

Grandi identified himself as the director of building and maintenance and chief engineer of the maintenance department. He reports directly to Torres. Chris Dinino, the laborers' foreman, reports to Grandi as do supervisors of other groups (painters, engineers, carpenters, gardeners, and a locksmith). Grandi stated that all new construction "goes through" him as well as Torres and the hotel's architect. All maintenance employees work under Grandi.

Grandi testified that Torres began major renovations in 1980. The casino was rearranged, requiring moving of the "21" tables, slot machines, and baccarat. Three restaurants "were completely torn out" and replaced. A new health club was also constructed. The health club, one of the last projects, was finished around October 1981. A new 150-room addition to the Camelot building was constructed by a contractor and finished around April 1982. Considerable demolition work was required in connection with the remodeling, and the laborers performed it "mostly." The laborers were also involved in the construction of the Camelot addition, primarily in cleanup.

Grandi explained that during the renovation Dinino would ask for more laborers. Grandi would speak to Torres, who would say, "go ahead and get the work done." Dinino would call the Union and hire laborers to work on a temporary basis. According to Grandi, the laborers were hired to work "just until the work was done, and they knew about it, a lot of them knew about it."

Grandi testified that he thought that four laborers were laid off around August 1981 after work on the restaurants (except apparently for the Saber Room, the new Chinese restaurant) had been completed.

According to Grandi, Torres spoke to Grandi about the possibility of a layoff in early September 1981. Torres told Grandi that it is "the worst time of the year around here, and . . . let's cut down." Grandi had an assistant (Al) prepare a list of all employees in the department, by craft, and submitted the list to Grandi later in the month. Torres and Grandi went over the list and, according to Grandi's direct testimony, Torres told Grandi to cut down the number of employees in maintenance as follows: engineers, including electricians—36 to 25; painters—6 to 4; carpenters—6 to 3; laborers—9 to 3, plus a driver.

Grandi asked for an opportunity to go over the list and make a "breakdown" so he could cover 24-hour shifts with engineers and still comply with the seniority rights of employees. Torres agreed, and Grandi then advised his assistant to reschedule the work of the engineers, utilizing no more than 25. Thereafter, Grandi reported to Torres that he could cut the number of engineers to 22, painters to about 3 or 4, carpenters from 6 to 3, gardeners from 6 to 4, and laborers "down to 3 and 1." Torres replied, "fine, get it started" but later agreed to delay the layoffs because electrical and other work needed to be done on the health club and on the new Chinese restaurant. Torres would not delay the layoffs beyond November, however, and the layoffs began on November 21—strictly by seniority.

Grandi stated he consulted with each group boss and made up schedules for each craft. Grandi and Dinino conferred on the layoff of laborers and "cut the crew down to Steve Dalen," which left only two laborers. This would mean that Dinino, who could be kept on because he was in charge, Terry Atwood, and Bob Mayhall would be the only laborers retained. Grandi agreed to keep Dalen on at that time because his wife was expecting, or already had, a baby, and Atwood was out on disability (M.I.C.).

Grandi recalled that a grievance was filed in November 1981 over the fact that he allowed two engineers to drive a truck on a holiday to pick up merchandise. Grandi was unsure what the engineers had picked up. Grandi denied the grievance had any bearing on the layoff of workers that month. He remembered that Union Steward Jess Atkinson came to the hotel that day and complained about the engineers using the truck. Grandi said he told Atkinson: "Haven't you got anything better to do than sit on your ass in the parking lot watching that truck going back and forth? I said, if I made a mistake, I will pay for it. Now, get your ass out of here."

Grandi told Connie Kennington later, when the grievance was filed, that "we goofed" and "we have to pay for it."

Grandi acknowledged that he saw Atkinson on the day of the layoff, November 20, 1981, and told him that it was "Mr. Torres' doing" and there was nothing he could do about it.

Grandi said he also talked with Harley Kerin in November 1981. Kerin asked about the layoff and mentioned that he might go back into the Marine Corps. Grandi said he advised Kerin to take a job if he could find one. That was the only conversation he had with Kerin, Grandi said.

Asked if he ever stated in George Nicholson's presence that he hated to let a few good guys go to get one, Grandi said he "never said such thing." Grandi also denied telling Steve Dalen that laid-off workers would

[21] Dinino denied telling Atwood that the six laborers would not be recalled or that Dalen's layoff was related to his giving a statement to the NLRB.

be recalled if Jess Atkinson got a job. He said Dalen was laid off in August 1982 because Atwood had come back and had been "steady" on the job. He stated that other employees were laid off about the same time.

Grandi denied ever meeting Union Business Agent Steven Burrus. Grandi said he only spoke to Burrus by phone at the request of Connie Kennington, and on that occasion told him there was nothing he could do about the (November 1981) layoffs. Grandi denied telling Burrus that employees would be recalled if Atkinson got a job.

Grandi acknowledged that Connie Kennington told him around April (1982) that Dalen had made a complaint to the NLRB "about the stagehands or something." He said the complaint, however, "had nothing to do" with his layoff. Grandi stated that Mayhall was laid off for only about 2 weeks and was recalled. There have been no other laborers hired since November 1981, he said.

Grandi agreed on cross-examination that the number of laborers grew during the renovation in 1981, from 4 or 5 to around 13. Only one of six gardeners was actually laid off in November 1981. Two carpenters listed on Respondent's Exhibit 2 had quit around November and were not laid off, he said. Two carpenters and two painters were hired about the same time to perform some retrofitting work. Also, Parolini was not laid off as he was considered a truckdriver and not a laborer. Grandi's affidavit stated that Torres wanted four laborers (not three) and a truckdriver to be retained.[22]

Connie Kennington has been personnel director and paymaster at the Aladdin since Torres took it over and reopened it on or about October 1, 1980. Kennington had worked at the hotel previously between December 1978 and March 1980. The hotel had been partially closed down in July 1980.

Torres promptly undertook "a massive reconstruction program." A new casino, four new restaurants, the Bagdad Showroom, and a new health club were among the projects undertaken. Two of the restaurants, the Continental and Hickory, were finished in May 1981, another (the Fishery) was completed in August 1981 and the House of Chan was opened early September 1981. The health club was completed in October 1981.

Kennington said there were maintenance laborers, including Foreman Dinino, on board when the hotel reopened on October 1 or shortly thereafter. Additional laborers were hired in 1981. A number of employees were laid off in August or early September 1981, including laborers Nicholson, Neal, Leavitt, and Smith because construction "was winding down." Kennington acknowledged that construction continued on a new 150-room addition to the Camelot section which was being built primarily by a "subcontractor." The work on the health club begun around August 1981 also continued. George Nicholson, who was laid off in August, was recalled in November to help finish the health club. Maurice McBride was transferred into a laborer's classification from the warehouse on November 5, 1981, she said. The layoff of six laborers came on November 20, 1981. Kennington testified that only one other maintenance worker, construction carpenter George Briscoe, was laid off between November 1981 and July 1982.

Kennington said the controller of the hotel, Toni Spratt, told her around the end of October 1981 that Torres wanted to cut back in personnel. She thereafter regularly prepared and submitted every other week so-called monthly status reports showing the number and classification of all personnel in the hotel. She recalled seeing Torres about 2 months later, at the end of the year, when he commented that he had let a lot of people go "in order to survive." Kennington stated that there had been reductions in every department since January 1981. She gave the number of employees at Aladdin in January 1981 as 1828, in January 1982 as 1703, and 1147 in January 1983. Maintenance employees numbered 68 in January 1981 and 37 in January 1983.[23]

Kennington recalled receiving the November 12, 1981 grievance from the Union and telephoning Grandi concerning it. Grandi told her at the time that he had thought "Engineers and Teamsters are all one" but that she should settle it. Two checks were then drawn for "a little over a hundred dollars" (based on 8 hours of holiday pay) each for Steven Dalen and Bob Mayhall to dispose of the grievance. Kennington testified that there was no grievance filed either in connection with Dalen's layoff in August 1982 or the layoff of six laborers in November 1981.

Kennington also testified concerning an April 1981 meeting in Grandi's office when Dalen met Nevada Resort Association Attorney Vince Helms, Aladdin's counsel at that time. The charge Harley Kerin had filed with the NLRB was being investigated, and Helms had been told earlier that Dalen's job had been saved because Dalen's wife was expecting twins and Atwood was out on leave. Helms had inquired of Dinino if Dalen was aware of being so "lucky" and would verify the information. Dinino thought Dalen would and arranged for Dalen to come into the meeting. Kennington acknowledged at the trial that Dalen was apparently confused during the April 1981 meeting as to Helms' employer when Dalen stated that he had already been to the NLRB and given a statement. When he realized that Helms was not from the NLRB, Dalen declined to respond to further questions and left. Kennington maintained that both she and Helms had explained to Dalen at the outset who Helms was. Helms explained his purpose in talking to Dalen and told Dalen he was free not to answer questions if he preferred.[24]

[22] Grandi was not an impressive witness. At times he was vague, and much of his testimony was contradictory. He claimed to have no recollection of dates. He gave different times on construction of the health club and the number of employees to be cut in given crafts varied.

[23] A number of documents were introduced through Kennington, including R. Exh. 4 (copies of checks delivered to Dalen and Mayhall to settle the November 12, 1981 grievance); R. Exh. 5 (list of maintenance laborers laid off after January 1981, with hire and termination dates); R. Exh. 6 (status reports); R. Exh. 7 (list of persons laid off [except "short term"] between October 1980 and January 1983); and R. Exh. 8 (Atwood's leaves of absence).

[24] No doubt Dalen was initially confused who Helms was, but I credit Kennington's account that the attorney was correctly introduced, first by her and then by himself.

James Edward Byrne, assistant controller of the Aladdin, identified and explained a summary and two graphs, Respondent's Exhibits 9, 10, and 11, that he had prepared to show when capitalized labor costs were incurred, on a monthly basis, during the calendar years 1981 and 1982 at the Aladdin. Byrne's documentation shows the breakdown of costs involved in making changes in the casino: concourse carpeting; county inspection repairs; a projected (but not contructed) hotel highrise; construction of a health club, parking lot, storage warehouse, a 3-story "highrise," and the renovation of the Bagdad Show Room; four "gourmet" restaurants and Camelot rooms. A little over $425,000 was expended in 1981 and only about $95,000 in 1982. The casino changes, which cost approximately $130,000, and the renovation of the restaurants, which cost $181,598, were completed in October and September 1981, respectively. Most of the work on both projects was performed in the first 6 or 7 months of that year. County inspection repairs (approximately $24,000) were spread over the period January 1981 to May 1982, but most ($16,044) were performed in 1982. Construction of the health club (approximately $48,000) took place in the last 6 months of 1981. Renovation of the Bagdad Room, at a cost of approximately $30,000, took place primarily between February and May 1982, although $6,475 had been spent for that purpose in January 1981. The Camelot rooms were renovated between July 1981 and April 1982 ($24,273). Most of the work performed on the three-story highrise (approximately $25,000) was done between March and May 1982. The concourse carpeting was not a significant project ($4,022), and most of it was performed in July 1982. The parking lot ($5,874) and storage warehouse ($544) were not major projects and had been completed by November 1981. The graphs show capitalized labor costs were the highest in April 1981 when the restaurants were being renovated. Construction of the health club caused labor costs to peak again (at a lower level) in November 1981. In 1982 labor costs peaked in March 1982 when work was being performed on the three-story highrise, 150-room addition.[25]

Edward Torres said he had been the general manager of the Aladdin since October 1980. He said he "very actively" oversees everything in connection with operation of the hotel. Prior to his takeover the hotel had employed between 2200 and 2800 persons.

Torres stated that "the place" was run down when he took over. "It was closed for four months" and there "had been no management for about 18 months."[26] Torres undertook to do extensive remodeling. The casino was rearranged, banquet facilities were improved, and rooms remodeled. Construction of a 150-room addition was awarded to J. R. Porter, a general contractor. Some of the remodeling work was contracted out (e.g., drywall, plumbing), and some of it was performed by hotel employees (e.g., electrical, painting).

Torres said he keeps himself apprised of the staffing and labor costs. He receives figures every 2 weeks from Controller Toni Spratt and sometimes also will check (with Connie Kennington) to get a daily count in a particular department if he sees "too many people standing around."

Shortly after Labor Day 1981 Torres began meeting with department heads in order to reduce staff. He met with Grandi and told him that there was to be no more remodeling; Grandi was to finish up what he was doing and start cutting down the number of employees. Grandi submitted a list of names in different departments but asked for, and was given, more time in reducing the number of laborers as there was cleanup work to do "around the place, particularly the health club, that was still a mess." By November Torres thought Grandi was "dragging his feet" and directed Grandi to "cut now." As he recalled it, Torres told Grandi to reduce the number of maintenance laborers to three laborers and one truckdriver. Torres wanted cuts made across the board but indicated that layoffs were focused on laborers because in remodeling laborers finish their work first. Laborers, he said, are used at the hotel "mostly" to "haul a lot of stuff."

Cuts were made in other departments in 1981, and even further cuts were made in 1982. "The bottom fell out in April 1982," and business dropped even further in the summer months. Torres said he told Grandi at that time he wanted to go down to "rock bottom" in all departments. He thought around 11 engineers were laid off around June 1982.[27] Business picked up some in 1983, Torres said, and some additional help (maids, porters, registration, and food service) was added. The number of employees increased in 1983 from 950 to about 1022.

In discussing layoffs, Torres said the names of individuals were not mentioned. No mention was made of any grievance or the fact that an employee presented a problem. Torres said Grandi never referred to an employee being involved in NLRB investigation. Steven Dalen's name was unknown to him, Torres said. Torres stated that he decided the number of persons to be laid off, and the department heads "implemented it."

Christopher (Chris) Dinino described himself as a working foreman and "supervisor for the laborers and Teamsters driver." He stated his position is covered by the collective-bargaining agreement between the hotel and Local 995. He said he has been a member of Local 995 for about 11 years. His supervisory status is not disputed.

Dinino said he was hired to supervise the maintenance laborers on the day the hotel reopened. Renovation of the hotel began immediately. Dinino explained that maintenance laborers basically "assist" other trades—"clean up their messes," "set up the scaffolding," "a lot of dem-

[25] Byrne testified that the labor expenses are capitalized when spent on construction or major rebuilding of an asset. He explained that the timecards of employees performing the work were the source of the data used in preparing R. Exhs. 9, 10, and 11 and that "the transactions were reviewed by our independent auditors." I credit the evidence given by Byrne.

[26] Apparently only the casino, restaurants, and entertainment facilities were closed down as Torres said the hotel itself was "open for business at all times."

[27] Torres testified on cross-examination that Grandi was still "dragging along" in 1982 and gave Grandi "numbers" in May or June that year. Asked on cross-examination if the maintenance department had not employed new people in 1982, Torres said if it did they would have been temporary hires to finish up a job.

olition," "expediting . . . warehouse and transport." There are two labor classifications, jackhammer and driver, which call for premium pay.

Dinino said he had hired additional members for the maintenance crew, after getting Grandi's approval, by calling the Local Union. He said he would advise the Union the type of work to be done and explain that it would be temporary. Dinino would interview prospects and explain to them the work would be temporary. Dinino said he had hired Kerin and Achzet in October 1980 and later four others, Nicholson, Smith, Neal, and Leavitt. Dinino stated he also had replaced people "because people didn't show up for work or whatever." Nicholson, Smith, Neal, and Leavitt were laid off in August 1981 because the restaurants were finished, and less manpower was needed. Dinino indicated that the layoffs were taken "for granted" as he had explained the temporary nature of the employment.

In November 1981 John Grandi, Dinino's superior, told Dinino that the health club was done, "it's slowing down," and that the crew was being reduced to the driver, himself, and two others. Grandi told him, Dinino said, "Mr. Torres decided we just didn't need that many laborers there, so he wanted to cut it to the bare minimum." Dinino said he spoke to Grandi shortly thereafter about saving Steve Dalen from the layoff because his wife was expecting twins and Terry Atwood was "on a leave of absence, for NIC." Dinino asked that Dalen be kept on until Atwood returned to duty, and Grandi agreed.

Dinino stated that he spoke about layoffs with the laborers crew during the week prior to the November 1981 layoff. Some employees asked if the layoffs were related to the grievance that Jess Atkinson had filed that month. Dinino specifically denied telling Atkinson, Achzet, and Dalen that the layoffs were occurring because of the grievance filed by Atkinson. He also denied telling Atkinson that Grandi would cool off in a couple of weeks and that everything would be straightened out. Dinino said he told Atkinson that "Mr. Torres was cutting back to a certain amount of men, and that was all that I knew."

Dinino acknowledged that the laborers compared the November 1981 layoff to the previous layoff of Brian Hesse (also appearing in the transcript as Heese). Said Dinino:

> Yes, it was the situation where these guys were under the impression that because of Jess's grievance that John, or management, was getting back at the crew just to get Jess out. That was the general talk.
>
> And the reason they were comparing this with the Hesse situation was that Brian Hesse had been let go at a time, and other people at a time, when Mr. Torres had changed his policies. When he took over the hotel there was a situation of relatives in departments, and he more or less, he cut that out.
>
> And in our department he ran into a problem because of the seniority situation. Brian was up the ladder a little bit, and his father was running the department, and Brian was working for his father, and Mr. Torres didn't want that.
>
> So Brian—a couple of guys and Brian left for awhile, then Brian got relocated, and the crew came back, and that was all I know about that. And that's what they were comparing that to, that situation.

Dinino said he discussed the situation with Kerin but told him the November 1981 layoff was not the same. Dinino testified: "I told him I didn't think it was like that. I says it's a straight lay off status situation. The job is over with, and we had to be cutting back."

Dinino said he talked to Achzet over the telephone around March 1982, when the hotel was starting a new project, but only told him that the hotel was not hiring any maintenance laborers. Dinino stated that it was "general knowledge" that persons laid off have a "year hire back rights," but he denied ever telling Achzet, Dalen, Mayhall, or Atwood that the laid-off laborers would not be recalled for a year.

Dinino stated that he had told Dalen that he was lucky that he was still working but never stated to Dalen that the other laborers would still be working if Atkinson had kept his mouth shut and not filed a grievance. He also denied making a similar statement to Mayhall.

Grandi would ask whether Atkinson and other employees had got a job, Dinino acknowledged. Dinino also acknowleged that Grandi could have asked, with Dalen standing in the doorway of Grandi's office, whether Atkinson had got a job or not. Grandi regarded it, however, as just "idle talk."

Dinino stated that Dalen was laid off around September 1982, shortly after some painters and carpenters were laid off. Carpeting of the concourse, in the casino area, was nearly complete at the time, Dinino recalled. Dinino acknowledged that it was known in April 1982 that Dalen had given a statement to the NLRB and that Dalen had been involved, with Mayhall, in a work assignment dispute concerning the use of a forklift by stagehands about 2 weeks before Dalen's layoff. Dinino indicated, however, that neither of these facts was involved in the decision to lay off Dalen. Torres had directed further cutbacks, and Grandi had made the decision to lay off Dalen. There were "no hard feelings" over Dalen giving a statement to the NLRB, and Grandi had not told Torres about the work assignment dispute. Dalen was ultimately assigned to perform the disputed work, was paid for it, and no grievance was filed in this regard.

Dinino denied telling Dalen in April 1982 that Connie Kennington thought he had gone to the NLRB and that he should watch his step or he would be laid off. Dinino acknowledged that he would use the term "barbecue" (as a joke) but denied that he told Dalen he was on the barbecue or on the "shit list." Dinino also denied telling Mayhall that he would be fired or laid off if he testified in an NLRB proceeding.

Dinino was not a persuasive witness. His testimony was vague and indicated uncertainty at times. Asked on cross-examination what he said to Shop Steward Atkinson when he first told Atkinson of the impending layoff,

Dinino said, "I don't remember the conversation." He said he did remember "basically" the conversation he had with Atkinson on the day of the layoff:

> He asked me why there was a layoff, and I told him because of Mr. Torres. And he says, well, that doesn't seem right, we've got a lot of work to do around here. I says that's all I can tell you, that's all I know, talk to John if you've got any more questions.

He said he had "basically the same conversation with" Kerin the same day, adding—"[h]e probably brought up the deal about Jess. The same thing Jess said. You know. And I told him there's no substance to that."

Asked why more maintenance laborers were laid off in 1981 than persons in other crafts, Dinino said the hotel needed carpenters and electricians to perform retrofitting to provide the hotel with fire protection. But later, under further cross-examination, he conceded he did not know when the retrofitting was done. "The dates," he said, "don't mean a thing to me."[28]

Dinino acknowledged on cross-examination that he knew Dalen had provided a statement to the NLRB because Dalen had told him—"after I'd mentioned it to him." Dinino said he had sent Dalen in to "explain the situation why he wasn't laid off" to the then hotel attorney, Vincent Helms, and Connie Kennington, and "he came back out all upset." Dinino said it was "general knowledge" that "we'd all" given statements to the NLRB, but, he said, "I don't think John [Grandi] never knew he gave a statement."

[28] Robert Mayhall, who has continued to work at the Aladdin, testified on rebuttal concerning maintenance laborers' work that he had observed other crafts perform at the hotel after the 1981 layoffs. Shortly after the November 1981 layoffs, four carpenters helped move slot machines for 2 days. Beginning around Christmastime 1981, while Dinino was hospitalized, Grandi directed that gardeners assist Mayhall and Steve Dalen in performing laborers' work (tearing out tiles, carpeting, and removing furniture) in the old Camelot building. Such work continued for 2 or 3 months. Also in early 1982, Mayhall observed engineers and carpenters tear out walls and carry ovens and other items out of the old Chinese kitchen. In March 1982, construction carpenters were hired and assigned by Dinino to help Mayhall and Atwood move 300 chairs. Construction laborers helped the maintenance laborers crew move files out of the underground parking area over a period of 2 or 3 weeks. Construction laborers and carpenters were assigned by Dinino to help maintenance laborers take out furniture, walls, and carpeting from the Bagdad Room. Construction laborers helped move slot banks and assisted, up to around July 1982, the maintenance laborers move things to and from a new warehouse facility. Carpenters were used in June or July 1982 to move 700–800 slot machines. After Dalen was laid off in August 1982, a butcher was assigned for a month to drive a truck hauling meat back and forth between the Aladdin and El Rancho Hotel. Also, after Dalen's layoff, Mayhall observed laborers from the El Rancho Hotel (affiliated with the Aladdin) move items over a 2- or 3-week period between the El Rancho and the Aladdin.

Testifying on surrebuttal, Dinino said he did hire construction laborers in March 1982. He said he had wanted to get a head start in furnishing the lower floors of the new, 150-room "lowrise" addition that got into trouble with the Construction Laborers' Union for having brought in maintenance laborers before the building was finished. The Union, however, agreed to the use of a composite crew, consisting of both maintenance laborers and construction laborers, which worked in the lowrise for 4 to 6 weeks. A composite crew was also used for a very short time in moving files and in the Bagdad Room. The construction laborers also helped out the gardeners for a month or 6 weeks and then were laid off.

Analysis

1. The alleged unlawful statements

a. *John Grandi*

The record convinces me that John Grandi, as George Nicholson testified, approached Nicholson and other employees one afternoon a few days prior to the November 20, 1981 layoff and stated in substance that he hated to let "a few good guys go" to get one. I reject Grandi's assertion that he never made such a statement. It is clear from the record that the employee Grandi was referring to was Union Steward Jess Atkinson and that he was the object of special attention because he took the initiative in preparing and filing the November 12 grievance protesting the use of a "company vehicle" by engineers in transporting and unloading of a dance floor.[29] Such a statement on the part of Grandi constituted a threat and a violation of Section 8(a)(1) of the Act. Paragraph 8(a) of the complaint was thus established.

I am persuaded that on November 20, 1981, the day Respondent laid off six employees, Grandi told Harley Kerin, in response to Kerin's inquiry about the duration of the impending layoff, that Grandi was sorry about the layoff but that a "smart-mouth punk" was not going to tell him how to run his business; also, that when he (the "punk") got a job, the others could return. Kerin correctly understood that Grandi was referring to Atkinson, even though his name was not mentioned. Kerin's testimony was more persuasive than Grandi's denial and sustained the allegations of paragraph 8(b)(1) and (2).

I am satisfied that Grandi stated to Chris Dinino, in the presence of Steve Dalen in late December 1981 or at the beginning of 1982 and in response to Dinino's inquiry concerning the recall of persons recently laid off: "Has Jess Atkinson got a job yet?" Dalen's testimony to this effect was credible, and I accept it as correct. Neither Grandi nor Dinino directly contradicted Dalen. Grandi acknowledged there could have been a conversation on the subject but did not remember it. Dinino acknowleged that there was a time when he spoke to Grandi about hiring new people while Dalen waited in a doorway. Dinino said Grandi's response was that there would be no hiring for a while and acknowledged that Grandi "could very well" have asked whether Jess had got a job. The allegations of paragraph 8(c) were established.

b. *Dinino*

The several allegations of paragraph 9 of the complaint that assert that Dinino made a number of unlawful statements to employees between November 1981 and July 1982 were also established. Jess Atkinson testified that Dinino told him on or about November 18 that the labor crew was being laid off up to and including Atkinson over the grievance that he had filed the previous week. Kerin testified that something would happen if grievances did not stop and, shortly thereafter, on November 20, 1981, Dinino announced that the layoffs were

[29] The filing of such a grievance of course was protected activity. See, for example, *Ernst Steel Corp.*, 212 NLRB 78 (1974).

taking place because the union steward had been filing grievances "for workers doing our job." Achzet also testified Dinino explained the "guys" were being laid off because of grievances filed by Atkinson. Grandi denied making such statements to Atkinson, Achzet, and Dalen, but I find the testimony of the workers more credible than that of their foreman, Chris Dinino. Paragraph 9(a)(1) was established.

Robert Mayhall testified that a couple of days before the November layoff that Chris Dinino stated to him, while the two of them were working on the carpeting of the ramp that goes into the Camelot building from the north end of the casino, that "everybody was getting laid off up through Jess" and that everyone would have had their jobs if Atkinson had "kept his big mouth shut and butted out." I reject Dinino's assertion that he "didn't make such a statement like that" and find, therefore, that pargraph 9(a)(2) was sustained.

The credible testimony Ronald Achzet gave concerning two telephone conversations he had with Dinino in early 1982 established 8(a)(1) violations as alleged in paragraphs 9(b) and (c) of the complaint. Dinino had told Achzet and Harley Kerin earlier in November 1981 that they were being laid off because of the grievances filed by Jess Atkinson. After being laid off, Achzet telephoned Dinino about possible recall of the laid-off workers the following January and again in March 1982. Dinino responded in the January conversation that Achzet could return "as soon as Jess Atkinson had gotten a job" and told Achzet in March that "they were going to wait for Jess Atkinson's recall rights to run out, which would be a year." Dinino acknowledged having one conversation with Achzet after the November layoffs but denied stating that recalls would not occur for a year, adding that everyone laid off knew that he had "a year hire back rights."

The testimony of Steve Dalen sustained the allegations of paragraphs 9(d) and (e). Dalen said he wrote down the date, April 5, 1982, as the day he was called into a meeting with Connie Kennington and Resort Association Attorney Vincent Helms, about 10 days after he had gone to the NLRB with Harley Kerin. Dinino had told Dalen to go into the meeting and explain that he would have been laid off earlier except for the fact that his wife had been pregnant with twins. Dalen said he explained in the meeting with Kennington and the attorney that others—carpenters, painters, gardeners, and persons in other trades—had been doing "our work." When he was asked if he had gone to the NLRB, he said he "realized who these guys were" and thereafter made no further response to them. Bob Mayhall, who was at the NLRB when Dalen and Kerin visited the Board's office (on March 26), knew that Dalen had given a statement, but Dalen told no one else except possibly his wife.

Dalen testified that he thought Dinino had asked "a few times" if he had gone to the NLRB but had not written down such incidents as he had other events. Dalen recalled, however, that 30 or 40 minutes prior to his meeting with Kennington and the Resort Association attorney, around 10:30 a.m., that Dinino had told him behind the Performing Arts area, where Dalen and Mayhall were unloading chairs from a truck, that Dalen had "better watch" it; that he "might still get laid off"; and that Connie Kennington thought he had gone to the NLRB. Dalen said he took Dinino's words to be a threat—that he should not "testify anymore" or "defend the six people that got laid off." Two days later Dinino told Dalen that he was on the "shit list" and repeated it or another statement—that he was "on the barbecue"—several times thereafter, even up to the time "just before [he] was laid off."

Dinino stated that Dalen's testimony concerning what Dinino had told him in early April 1982—that Kennington thought Dalen had gone to the NLRB and that he should watch out or be laid off—was "ridiculous." While conceding that he had been known to use the word "barbecue" as a joke, he denied ever telling Dalen that he was on the "shit list" or would be laid off for going to the NLRB. Dinino was equivocal about how he knew that Dalen had given a statement to the NLRB; he maintained that it was "general knowledge" that "we had given statements" and that Dalen had told him that he had given a statement "after I'd mentioned it to him." Dalen's testimony was more credible than Dinino's, and I therefore credit the former.

The statements Dinino made to Dalen in early April 1982 and later just prior to his layoff in August of the same year constituted threats and were made, I find, because Respondent believed Dalen had given a statement to the NLRB and might continue to cooperate with that agency. Such statements violated Section 8(a)(4) as well as Section 8(a)(1) as alleged.[30]

2. The layoffs

The disciplining of employees for filing grievances violates the Act. *General Motors Corp.*, 233 NLRB 47 (1977), enfd. 616 F.2d 967 (6th Cir. 1980); *Pere Marquette Lodge*, 237 NLRB 855 (1978); *Ernst Steel Corp.*, supra. Moreover, the discharge or layoff of employees in order to discriminate against a particular employee is discriminatory as to all such employees. See *Arnoldware, Inc.*, 129 NLRB 228 (1960); *Englewood Lumber Co.*, 130 NLRB 394 (1961); *Northwestern Publishing Co.*, 144 NLRB 1069 (1963), enfd. 343 F.2d 521 (7th Cir. 1965); and *Givaudan Corp.*, 225 NLRB 1272 (1976).

The record persuades me that the grievance Atkinson prepared and signed by him, along with other maintenance employees, on November 12, 1981, triggered the layoff 8 days later, on November 20, 1981, of six employees—Steward Jess Atkinson, Harley Kerin, Maurice McBride, Joseph Washington, Ronald Achzet, and George Nicholson.[31] There is convincing evidence that

[30] The General Counsel requests in his brief that I find Respondent made other unlawful statements not specifically alleged in the complaint, but I decline to do so. Such findings would be similar to those made herein, would be cumulative, and would serve no useful purpose.

[31] Respondent treats Dalen as one of six persons laid off in November 1981, contending that his departure was simply deferred because at the time Atwood was on medical leave and Dalen, whose wife was expecting, was kept on to take Atwood's place. Atwood returned to duty, however, on March 12, 1982, and Dalen was not laid off thereafter until August 6, 1982. Respondent maintains that McBride should not be considered as part of the November 1981 layoff as he was "reinstated shortly

Continued

Respondent's layoff of the six men was conceived as an effort to make it appear to be a legitimate reduction in force—i.e., in accord with seniority rules—but was actually an act of retaliation against Atkinson for filing the November 12 grievance.[32]

Both Dinino and Grandi, whose statements were attributable to the Respondent,[33] were quite explicit, as several maintenance laborers credibly testified, in stating that the November 12 grievance filed by Atkinson was the reason for the November 20, 1981 layoffs.

Atkinson testified that Dinino told him that he and other maintenance laborers less senior to Atkinson were going to be laid off because of the grievance. Kerin and Achzet both testified that Dinino threatened a layoff over the filing of grievances. On November 20 Dinino told Kerin and Achzet that the layoffs were occurring because of grievances and agreed that "another Hesse situation" was taking place. Dinino indicated to Dalen after the layoff that Atkinson was responsible for six people being out of work by opening "his big mouth" and that the Company was waiting for their recall rights to run out. Mayhall also heard similar messages from Dinino. Dinino told Atwood in March 1982 that Respondent would not recall the laid-off workers but would let their recall rights expire.

Grandi, the head of Aladdin's maintenance, told Kerin, in effect, that all were being laid off because of Atkinson's "smart mouth" and no one would be recalled until Atkinson got another job. Grandi also told Nicholson that a few persons were being let go to get "one guy." Grandi made statements to Dinino in front of Dalen and to Union Business Agent Burrus that indicated no one would be recalled until Atkinson obtained other employment.

While Dinino and Grandi denied telling employees that the November 1981 layoffs were connected with the November 12 grievance filed to protest a work assignment, I credit the employee witnesses over the testimony given by the two officials of Respondent. Both Dinino and Grandi were equivocal witnesses, and each exhibited animus toward work assignment disputes. Grandi conceded that he was upset with Steward Atkinson on Veterans Day 1981 when the latter complained about the engineer's use of a truck and admitted ordering him to get his "ass out of here." Dinino threatened employees a few days before the November 1981 layoffs because of the filing of grievances. Dinino acknowledged that employees in November 1981 were comparing the layoffs, which included the steward who filed the grievance, to "the Hesse situation" wherein seniority had also presented an obstacle. Contrary to Dinino's testimony, I do not believe he took issue with the analogy the employees had drawn but frankly agreed with them that it was applicable to their layoffs. And, as in the Hesse situation, Respondent did not recall the persons laid off in November 1981 (with the exception of McBride) while Atkinson remained unemployed. Grandi told Nicholson that the layoff was to get one person and also remarked to Dalen that the persons who were laid off would be recalled if Atkinson got a job. Grandi's comment to Union Business Agent Burrus about finding a job for Atkinson is consistent with the hotel's plan not to recall the laid-off workers (within a year) unless Atkinson found other employment.

I reject the notion that General Manager Torres was oblivious to the names of individuals who might be laid off and whether they filed a grievance or presented a problem to the hotel. It strains credulity to believe that a person who watches costs so closely as Torres does would have been unaware who was protesting work assignments and giving statements to the NLRB.[34]

I also reject Respondent's assertion that the decision to lay off specifically Atkinson, Washington, Kerin, Achzet, Nicholson, and Dalen had been made at least 6 weeks prior to the November 11 confrontation. Perhaps consideration was given in September 1981 to make cutbacks in the future as some of the renovation work was winding down. I have no doubt, however, but what the protest and resulting grievance over the use of a truck by the engineers to move a dance floor on November 11 brought about the layoff of maintenance laborers Atkinson and five other less senior to him (except Dinino). After the November 1981 layoff, Respondent used other crafts to perform maintenance laborers' work. The number of maintenance employees actually increased after the layoff. In early 1982 construction laborers were hired and utilized to perform functions that would have otherwise been done by maintenance laborers. There is no doubt about the fact that the cutback of maintenance laborers was out of proportion to the layoff of other crafts.

---

after the November 20th layoff." R. Exh. 5 shows McBride was hired March 15, 1978, and laid off as a laborer on November 20, 1981, and reinstated December 9, 1981 (with subsequent as well as earlier layoffs and reinstatements). Respondent's list of layoffs, R. Exh. 7, does not list McBride. I am convinced, in any event, that McBride was part of a sham layoff which was calculated to make it appear appropriate to reach Steward Atkinson. The amount of backpay due McBride, albeit small in amount, should be determined in the compliance stage.

[32] Of course where layoffs are motivated by employees' protected activity, as is the case here, that ends the inquiry, even though there may have been an economic reason for them. See *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

[33] I reject Respondent's assertion that Dinino's remarks are not imputable to Respondent. The maintenance laborers regarded Dinino as a spokesman for management, even though such determination need not be based on his supervisory status. See *Helena Laboratories Corp.*, 225 NLRB 257 (1976), modified on other grounds 557 F.2d 1183 (5th Cir. 1977); also *Aircraft Plating Co.*, 213 NLRB 664 (1974). The record establishes that he was a supervisor and an agent of the management of the hotel. The record does not portray Dinino as a person "plagued by conflicting loyalties," as Respondent contends. The "Montgomery Ward doctrine"—that "the Board has generally refused to hold an employer responsible for the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management," *Montgomery Ward & Co.*, 115 NLRB 645 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957)—has no application in the instant case. There is no evidentiary basis here for concluding that employees regarded Dinino as being "a fellow employee" or as "one of themselves" as was the situation in *Montgomery Ward*. The evidence is to the contrary. Not only did the employees regard Dinino as aligned with management, management considered him as one of its own and protected him from the November 1981 layoff on that basis.

[34] The supervisor's knowledge of unlawful activity is attributable to the respondent in any event. See *Panchito's v. NLRB*, 581 F.2d 204 (9th Cir. 1978); *NLRB v. Fremont Mfg. Co.*, 558 F.2d 889 (8th Cir. 1977); and *Montgomery Ward & Co.*, supra.

I thus agree with the General Counsel that the real reason for the November 1981 layoff was to get rid of Atkinson and that Respondent's claim that the layoffs were made only for economic reasons was pretextual. General Manager Torres himself testified that he "didn't really get concerned until April 1982 because business was still fairly good" up to that time.

Respondent's economic defense has more validity as to Dalen's layoff, but still falls short. At the time of his layoff Respondent's renovation program was at an end or nearly so, and other employees were laid off about the same time. The record nevertheless persuades me that Dalen was laid off because of his protected activities—for giving a statement to the NLRB and his participation in the preparation of a grievance on July 30, 1982.

Respondent did not establish that Dalen would have been discharged in the absence of such protected activities. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Certain of Respondent's authorities deserve comment. None of them require dismissal of the allegations relating to the layoffs in this case, however, as Respondent suggests. In *Regency at the Rodeway*, 255 NLRB 961 (1981), the administrative law judge (whose decision was modified in respects not relevant here) was persuaded that the decision to reduce two employees was made prior to the onset of their union activities and for valid reasons. The judge was persuaded that one employee was discharged in fact "for reasons of economy" (by a supervisor who was under pressure to reduce the staff and, later regretting it, hired a replacement to "blunt the employee hostility") and the other employee for misconduct. The dismissal of two probationary employees in *Rio Grande Valley Gas Co.*, 151 NLRB 489 (1965), was found lawful by the trial examiner because he was persuaded that both were let go "strictly on the basis of their work, with no knowledge of the supervisor's union animus or the identity of the employee who had filed charges against the employer." The 8(a)(1), (3), and (4) charges in *Kinter Bros., Inc.*, 172 NLRB 199 (1968), were dismissed because the trial examiner was not convinced that the respondent employer had either laid off or reduced the hours of work of a meat wrapper (who later rejected offers to return to work) because she had testified in a hearing or engaged in union activity. In *American Display Mfg. Co.*, 259 NLRB 21 (1981), the layoffs were occasioned by a customer's request that the production and delivery of a large order be delayed. Most of the layoffs were determined by seniority and others were made for valid reasons (i.e., Luquis, because she had given notice of an intention to quit; Nieves, because of a mistake as to her seniority and without any discriminatory intent; and Pinto, because of absenteeism). In *General Electric Corp.*, 256 NLRB 753 (1981), the administrative law judge dismissed the complaint, including allegations that all of the electricians on a project had been dismissed because the shop steward brought in the union business agent to demand a public apology by the site manager for accusing the shop steward of pilfering. The judge found that the layoffs were for business considerations and were not pretextual. A finding that the layoffs were made in an attempt to get rid of the steward "on the state of the record" in the case "would be mere speculation," the judge said.[35]

Respondent's officials admittedly knew after April 5, 1982, that Dalen had provided a statement to the NLRB. Dinino reminded Dalen on a number of occasions from that day forward until laid off that his continued employment was not to be taken for granted: Dinino warned Dalen that he was on the "shit list" or that he was "on the barbecue." Dalen's time ran out when he, Mayhall, and Atwood protested Dinino's allowing the stagehands to use the truck on July 30. Within a matter of days Respondent moved to lay off Dalen. What Dinino stated to Terry Atwood after Dalen's layoff—that Dalen would never work again at the Aladdin because he had filed charges with the NLRB—leaves no doubt about the fact that the affidavit that he gave to the NLRB was significantly involved in the decision to lay him off and was reason enough not to ever rehire him.[36]

I find that the statement Dalen gave to the NLRB motivated Respondent in laying him off on August 12, 1982, and thereby violated Section 8(a)(4) of the Act.[37] I also find that Dalen's layoff, like the layoffs made in November 1981, were in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by

(a) Threatening to lay off maintenance employees because of the filing of a grievance.

(b) Telling employees they are being laid off because Steward Jess Atkinson had filed a grievance.

---

[35] Respondent contends in its brief, citing *General Electric Corp.*, that the protected activity which the complaint relates to the layoffs was so insignificant that no discriminatory animus can be found. Says Respondent: "The stakes raised by the two grievances were [too] nominal compared to the costs of unlawful retaliation for the financially troubled Aladdin." But the work dispute protests (as well as Dalen's NLRB affidavit) were obviously taken quite seriously by Respondent, and its representatives articulated as much to its employees.

[36] Atwood testified that Dinino also threatened him with termination if he testified in a Labor Board proceeding. The General Counsel has requested that I find such statement also violative of the Act. Respondent has objected to such request on the basis that the statement was beyond the complaint. I decline to make the finding, however, as it would be cumulative and would provide no basis for any further relief.

[37] Sec. 8(a)(4), which proscribes discrimination because an employee "has filed charges or given testimony under the Act," has been given a broad interpretation. See *NLRB v. Scrivener*, 405 U.S. 117 (1972), where the Supreme Court held an employer in violation of Sec. 8(a)(4) for discharging employees who, like Dalen, had signed affidavits but had not filed charges or testified prior to their dismissal. The complaint herein alleges that Dalen's layoff was occasioned by "filing charges or giving testimony under the Act," but it is apparent that Respondent was not misled by such pleading.

(c) Telling an employee that laid-off workers would be recalled when the employee who filed a grievance, Steward Jess Atkinson, obtained other employment.

(d) Stating in the presence of Steve Dalen in effect that there would be no recall of maintenance workers while the employee who filed a grievance, Steward Jess Atkinson, was unemployed and subject to a recall.

(e) Telling employees that they were being laid off because of grievances filed by Steward Jess Atkinson.

(f) Telling an employee that maintenance employees are being laid off because Steward Jess Atkinson had filed a grievance.[38]

(g) Telling an employee over the telephone that employees would be recalled when the employee who filed a grievance obtained other employment.

(h) Telling an employee over the telephone that Respondent would recall laid-off maintenance employees after Steward Jess Atkinson's recall rights expire.

4. Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (4) of the Act by

(a) Threatening an employee by telling him that an official thought he had gone to the National Labor Relations Board and that he should watch it and might still get laid off.

(b) Telling an employee known to have given a statement to the National Labor Relations Board that he was on "the shit list" and "on the barbecue."

5. Respondent violated Section 8(a)(1) and (3) by laying off Jess Atkinson, Harley Kerin, Maurice McBride, Joseph Washington, Ronald Achzet, and George Nicholson, because a grievance protesting the assignment of work to engineers was filed.

6. Respondent violated Section 8(a)(1), (3), and (4) of the Act by laying off Steven Dalen because he gave a statement to the National Labor Relations Board and because he participated in the preparation of a grievance protesting the assignment of work to stagehands.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain corrective action to effectuate the policies of the Act. Having found that Respondent laid off Jess Atkinson, Harley Kerin, Maurice McBride, Joseph Washington, Ronald Achzet, George Nicholson, and Steven Dalen in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer full and immediate reinstatment to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, as well as payment of backpay for earnings lost by them as a result of the discrimination against them. Backpay shall be computed with interest as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Isis Plumbing Co.*, 138 NLRB 716 (1962); and *Florida Steel Corp.*, 231 NLRB 651 (1977). The fact that Dalen's layoff also violated Section 8(a)(4) of the Act does not require any additional relief as to him. *Sinclair Glass Co.*, 188 NLRB 362 (1971), enfd. 465 F.2d 209 (7th Cir. 1972).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, N & T Associates, Inc., d/b/a Aladdin Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees or otherwise discriminating against them for filing or preparing grievances.

(b) Laying off employees or otherwise discriminating against them for giving a statement to the National Labor Relations Board.

(c) Threatening to lay off employees for filing a grievance.

(d) Telling employees that laid-off employees will be recalled when one or more of them obtained other employment or when the recall rights of one or more of them expire.

(e) Telling an employee that he is on the "shit list," on the "barbecue," or otherwise threatening the employee for going to the National Labor Relations Board.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer Jess Atkinson, Harley Kerin, Maurice McBride, Joseph Washington, Ronald Achzet, George Nicholson, and Steven Dalen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Las Vegas, Nevada place of business copies of the attached notice marked "Appendix."[40]

[38] The violations referred to in subpars. (e) and (f) are essentially the same although based on statements made by Dinino to different employees.

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[40] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Albertson's Inc. ***and*** **Barbara J. Miller, Petitioner** ***and*** **Kathy M. Wright, Petitioner and United Food and Commercial Workers Union, District Local No. 1614, Chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC.** Cases 19–RD–1907 and 19–RD–1908

14 December 1984

SUPPLEMENTAL DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION AND TO REOPEN THE RECORD

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 April 1984 the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which the decertification petitions were reinstated and the case remanded to the Regional Director for further processing. Thereafter, on 9 May 1984 the Union filed a motion for reconsideration and to reopen the record. On 24 May Petitioners filed an answer to the motion.

The Union urges in its motion that the Board's decision was in error in referring to the absence of any evidence that the Employer and the Union agreed to continue to bargain on a multistore basis after the expiration of the recent agreement. The Union asserts that, rather, the Employer entered into a multistore contract with the Union following the Employer's withdrawal from multiemployer bargaining. This contract was allegedly executed on 14 February 1983, 2-1/2 months after the petitions were filed and a month after the hearing in this case. The Union moves to reopen the record to receive this exhibit, which the Union asserts covers the same Employer's stores covered by the multiemployer contract, including the two stores that are the subject of the decertification petitions.

The Union asserts that the record was silent as to this recent contract because under existing Board law "a unit appropriate in a decertification election must be coextensive with either the unit previously certified or the one recognized in the existing contract unit," citing *W. T. Grant Co.*, 179 NLRB 670 (1969); *Goldeen's Inc.*, 134 NLRB 770, 775 (1961). The Union states that in view of the prior multistore, multiemployer association bargaining history established on the record, and since the hearing was held prior to the expiration of the then existing contract, the most recent agreement "which had not yet been negotiated" was not presented into evidence at the hearing. Further, referring to *Goldeen's*, supra, it notes that the Board refused to direct an election in a single employer unit based on a decertification petition following a dissolution of a multiemployer association, because it was unable to say that the single employer unit was the currently recognized unit. Here, the Union argues, the Board incorrectly inferred that the parties had not negotiated, let alone reached agreement on, a multistore contract. The Union contends that the existence of the current agreement covering the multistore unit should serve as a bar to the instant decertification petitions. We are not persuaded by the Union's arguments, and for the reasons set forth below, which further clarify our previous decision in this case, deny the Union's motion for reconsideration and to reopen the record.

It is undisputed that the Employer timely withdrew from multiemployer bargaining and that the decertification petitions for two of the Employer's stores were timely filed with respect to the expiring multiemployer agreement. Thus, there was no contract bar to the processing of the petitions. Further, as our initial decision finds, the Regional Director erroneously relied on the multistore bargaining history which had transpired under the multiemployer bargaining in dismissing the petitions. As we stated, once the Employer properly withdrew from that bargaining arrangement the considerations for grouping its eight represented stores together no longer existed. There was no prior Board certification of the eight-store unit, no particular geographical cohesiveness, and, in fact, the multiemployer contract had been applied to new stores of the Employer on an individual basis, upon a demonstration of union majority. In these circumstances, we found that upon the timely withdrawal from the multiemployer bargaining, and in the absence of a multistore contract or multistore recognition by the Employer shown on the record, the single-store units sought by the petitions were presumptively appropriate.

We believe that the result reached in our prior decision was correct and, contrary to the assertion of the Union, that it does not do violence to Board law regarding the scope of units in decertification elections. Although in the usual case, where only single employer bargaining has occurred, the previously certified or currently recognized unit for decertification is easily identifiable as the appropriate one, here the recognized unit and hence the proper unit for decertification is in a state of transition. We are unwilling to hold that during this period the employees are deprived of their statutory right to select, or to refrain from selecting, a bargaining representative. Thus, upon the Employer's timely withdrawal from the multiemployer association, the

[1] 270 NLRB 132 (1984).

Union has a presumption of continued majority status among the Employer's employees;[2] the Employer is free, as we indicated in our prior decision, to make a reassessment of the scope of the appropriate bargaining unit, particularly where, as here, the multistore grouping under the prior multiemployer agreement was not one which the Board would originally certify; and the employees should likewise be free to utilize the Board's processes, including the right to file a decertification petition in an appropriate unit to question the Union's continued representation. There is no doubt that a petition filed by another labor organization seeking certification on a single-store basis would raise a question concerning representation and would have been processed. So, too, the timely filing of the decertification petitions on behalf of the employees at two separate stores, in which the Union had a continued presumption of majority status, properly raised a question concerning representation in those presumptively appropriate units.[3] To hold otherwise would subordinate the rights of the employees under Section 9(c)(1) of the Act to those seeking representation.[4]

ORDER

Accordingly, the reinstatement of the petitions was proper in our view, and the Union's motion for reconsideration and to reopen the record is denied.

[2] *Jim Kelley's Tahoe Nugget*, 227 NLRB 357 (1976) (Member Walther dissenting); see also *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980). Member Hunter notes that the record shows that the Union here demonstrated a majority at each location. On this basis, he agrees that a question concerning representation exists here. He therefore finds it unnecessary to reach the question of whether a presumption of majority status survives an Employer's withdrawal from multiemployer association bargaining and he does not pass on the continued validity of the above-cited cases.

[3] As previously noted, Member Hunter relies on the Union's having demonstrated a majority at each location as supporting a question concerning representation.

[4] To the extent this result is inconsistent with that in *Goldeen's Inc.*, supra, that case is hereby overruled.

Airtron, Division of Litton Systems, Inc. *and* **Patricia Kenyon.** Case 22-CA-10877

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 3 September 1982 Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Airtron, a Division of Litton Systems, Inc., Morris Plains, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(1) by discharging employee Pat Kenyon. The General Counsel established a prima facie case of a violation by showing that Kenyon engaged in protected concerted activities, that the Respondent had knowledge of and expressed displeasure with Kenyon's activities, and that the discharge followed soon after the protected activity. Further, the Respondent failed to demonstrate that the same action would have taken place in the absence of the protected conduct. As found by the judge, the Respondent seized on Kenyon's alleged release of confidential information as the basis for the discharge. In fact, as the judge further found, Kenyon did not make the alleged disclosure. Accordingly, we find that the Respondent's discharge of Kenyon violated Sec. 8(a)(1) of the Act. We need not pass on the judge's discussion, based on an arguendo assumption, of the ramifications if Kenyon had revealed the Respondent's information.

Subsequent to the judge's decision, the Board issued *Our Way, Inc.*, 268 NLRB 394 (1983), in which it overruled *T.R.W. Bearings*, 257 NLRB 442 (1981), relied on by the judge, and returned to the principles set forth in *Essex International*, 211 NLRB 749 (1974). Nonetheless, as the Respondent's rule prohibited solicitation during "working hours," we find under *Our Way* that the rule was presumptively invalid. Further, since the Respondent failed to clarify its presumptively invalid rules, its maintenance was unlawful.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. Pursuant to a charge filed on May 22, 1981, by Patricia Kenyon (Kenyon), a complaint in this proceeding was issued on July 6, 1981, alleging that Airtron, Division of Litton Systems, Inc. (Airtron or Respondent) violated Section 8(a)(1) of the National Labor Relations Act in that within the six months prior to the filing of the charge and thereafter to date,[1] including in March 1981, Respondent has maintained, and enforced, an invalid no-solicitation rule, and that on May 19, 1981, it discharged Kenyon because she engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection. Respondent filed an answer denying the substantive allegations of violations of the Act. Full hearing was held on May 13, 1982, after the record opened briefly to consider and grant an adjournment request on March 17, 1982.

On the entire record in this case, from my observation of the demeanor of the witnesses, and after having considered the briefs filed by the General Counsel[2] and Respondent, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation. The unincorporated division involved in this proceeding has its principal office and place of business in Morris Plains, New Jersey, where it maintains a facility engaged in the business of manufacture, sale, and distribution of microwave components, laser crystals, simulated jewelry, and related products. At all times material herein, Respondent annually caused to be manufactured, sold, and distributed from the Morris Plains facility products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from the facility in interstate commerce directly to States of the United States other than the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent employs several hundred employees at the Morris Plains, New Jersey facility, including office and plant clerical employees and a complement of production employees. They are not organized.

Respondent admits that about June 25, 1979, it promulgated the following rule:

> It shall be considered a violation of company rules for an employee to:

[1] General Counsel clarified that by the allegation related to the maintenance of the no-solicitation rule he did not intend the language therein describing the rule's promulgation on June 25, 1979, as an element of the violation but was only attacking the rule's maintenance within the 10(b) period.

[2] The motion to correct the transcript filed with the General Counsel's brief is hereby granted; the corrections it embodies have been physically made on the original transcript, and the motion as approved has been physically attached to the transcript with a notation thereon noting its adoption.

v) Solicit or canvass for any purpose without Personnel approval, such as selling chances or merchandise during working hours.

According to Personnel Manager Paul Csigi, the rule was in effect in 1981—it had never been rescinded but neither had it been enforced by the Company. In 1979, on a review and update of company personnel policies which had commenced in 1978, Respondent mailed summaries of company policies as they appeared in policy manuals to all employees at their homes and provided them to all new employees as they were thereafter employed. Rule v is contained in a memorandum to all employees dated June 29, 1979, and entitled "Up-date of Airtron Policies #3." Rule v is one of a series of 23 rules specifically set forth in this memorandum and preceded by the heading "*Disciplinary Action—all employees* 6/25/79" and the statement "Airtron recognizes the necessity of establishing and maintaing regulations for the acceptable conduct of employees and to provide for fair, constructive and consistent disciplinary action whenever an employee fails to observe such company rules and regulations."[3] The list of disciplinary rules is immediately followed by a description of what Respondent agrees may be characterized as a "progressive disciplinary policy," that is, a policy permitting but not requiring, depending on the infraction, a series of progressively more severe disciplinary measures from verbal warning to written warning, suspension, and, finally, discharge, normally to be meted out by the supervisor but, in the case of serious offenses, with consultation of the industrial relations (personnel) director to ascertain the appropriate disciplinary action.

With respect to the no-solicitation rules' enforcement, the evidence appears to bear out Personnel Managers Csigi's assertion that it was not enforced, at least until March 1981.[4] Before that date, all nature of solicitations of employees, both before and during working time, to sell raffle chances, combinations or numbers in sports pools, home products, and food stuffs and even one to sign a petition to replace an employee used soda machine dispensing drinks in paper cups with one dispensing canned sodas,[5] were conducted with managerial and supervisory knowledge and consent and even, in some respects, with their participation, and without any attempt to enforce the rule.

A few months before the Airtron personnel policy memorandum containing the disciplinary rules was issued to employees, another memorandum, titled "Update of Airtron Policies—No. 2" and dated April 26, 1979, was issued. Among other subjects, it dealt with Respondent's sick pay policy for hourly, weekly, and salaried employees. That policy provided, inter alia, for an accumulation of a maximum number of paid sick days by months and years, and permitted the accrual and payment of unused sick days on certain occasions and in accordance with a certain formula for hourly and weekly employees. This memorandum also contained a policy related to storm closings. The gist of it, relevant to this proceeding, was that on those occasions that the Company found it necessary to close the plant and suspend normal operations, lost time up to two continuous days per emergency for hourly and weekly employees would be paid from their accumulated sick pay but any such lost time would not affect the good attendance bonus. There is good reason to believe that the implications of this storm closings policy did not make much impression on the employees, generally, at the time this policy was adopted and made known.

On Thursday, March 5, because of a snow storm, the plant closed at 2 p.m. and all employees, except for a few who were permitted to finish certain work tasks, were sent home. Kenyon, who worked from 8 a.m. to 4:45 p.m., had asked to remain at work but had been denied permission to do so. By memorandum dated Monday, March 9, Personnel Manager Csigi notified all employees as follows:

> Due to snow storm closing Thursday, March 5, 1981, any lost time will be paid from accumulated sick pay as per storm closing policy.
>
> Should you not wish to be paid from sick pay please notify your supervisor who will notify the Payroll Department.

Among other employees, Kenyon's lost time was made up from her accumulated sick pay.

Employee Kenyon, one of two accounts payable clerks, employed since January 15 1979, after thinking over the Company's policy, came to the conclusion it was not fair and that she was going to do something about it. Sometime after the March 9 notice, she went to Csigi's office, stood in the doorway, and told him, "Paul . . . I think the storm closing policy stinks." According to Kenyon, he replied, "I agree with you, Pat, it's unfair." Kenyon continued: "And, I said, 'I'm really upset about it.' I said, 'I'd like to start a petition.' And he said, 'Go ahead.'" She then left Csigi's office.

Csigi agreed that Kenyon's testimony relating this conversation was accurate for the most part. He disputed Kenyon's version of his response, claiming he said, "Fine, do what you have to do." This conveys, in substance, the import of Kenyon's version of his last response. Csigi did not specifically dispute his personal agreement with Kenyon's opinion that the policy was unfair. Even if he had, I credit Kenyon that Csigi, in fact, voiced agreement with Kenyon. I conclude that Csigi, who started in his position for Respondent as recently as October 1, 1979, was the most truthful of Respondent's witnesses, and took care to testify as accurately as possible. He was not asked about his initial response to Kenyon on direct and, I conclude, consciously avoid-

[3] Omitted from the list of disciplinary rules is any mention of the alleged ground for the discharge of Kenyon on May 19, 1981, on which Respondent relies; to wit, disclosure of confidential financial information outside the accounting department. This ground is unrelated to Rule r), another among the 23 disciplinary rules promulagted on June 25, 1979, which prohibits disclosure to any person or organization of confidential information which would weaken the competitive position of the Company.

[4] All dates hereinafter shall refer to 1981 unless otherwise noted.

[5] This undated petition, handwritten on blank paper and signed by 141 employees, including Kenyon, was initiated by employee Paul Jacobs at some unspecified time between January 1979 and March 1981.

ed disputing Kenyon's attribution to him of his initial response to her while on cross-examination.

Shortly after her talk with Csigi, Kenyon initiated a petition designed to convey the employees' dissatisfaction with Respondent's storm closing policy. In contrast to the soda machine petition, Kenyon arranged to have the petition typed on Airtron letterhead. It stated the following in capital letters:

> We feel strongly that the storm closing policy as it is now written penalizes the hourly and weekly employee. When the announcement was made on March 5th that Airtron was closing the building at 2 p.m., nothing was mentioned at that time that the employees who were being sent home would not be paid for the remainder of the day. Those who wished to stay and complete the work day were not given the opportunity to make that decision for themselves. In effect, Airtron locked us out and is now using one of our benefits to pay us.

Kenyon divided up the solicitation with Paul Jacobs. Hers is the first signature. A total of 92 signatures of employees were obtained and take up three full columns below the typed petition and 1-1/3 columns on a second attached blank page. They included names of employees in all plant locations, including production employees. Jacobs solicited primarily the production workers. According to Kenyon, and not disputed by Respondent, she personally solicited roughly half of the signatures during her own work breaks including lunchtime and while on worktime both at her own work cubicle, in the cafeteria, and while on work trips through the plant.

On March 13, Kenyon and Jacobs took the completed petition to Csigi's office. The employees handed the petition to Csigi and told him they would like Donald Lepore, president of Airtron, to see it and requested that they get some sort of answer. Csigi said okay. The same day, Kenyon received a 6-month evaluation of her work performance from Edward Griffin, cost accounting manager and her immediate supervisor. She saw but was not given a copy of her review, which described her performance as "fully satisfactory." Following her work review, she told Griffin she had started a petition to protest Respondent's storm closing policy and had turned it in to Csigi. Kenyon testified Griffin responded, "Pat, why?" Kenyon then testified she explained why, that "we felt it was unfair to the employees to have their sick time docked." Griffin did not deny making this statement, and I credit Kenyon.

Kenyon was a highly credible witness. Her answers on direct and cross-examination were invariably direct, responsive, and thoughtful and, when she was asked to repeat on cross-examination conversations she had testified to on direct, she did so consistently, accurately, and confidentially. Not once did she lose her composure even when placed under stress by a vigorous cross-examination. Her explanation as to what on the surface appears to be a discrepancy between her testimony and pretrial affidavit was typical of her direct, intelligent, and trustworthy demeanor. Respondent's counsel pressed her to admit to a conflict between her affidavit in which she denies ever being warned or reprimanded as an employee and her trial testimony in which she related an incident which occurred in early April following the submission of the petition to Csigi and the conversation with Griffin. According to Kenyon, Griffin called her into Respondent's board room. They were alone. He told her, "Pat, Mr. Lepore was very upset over the petition. He thought it was an extreme action, no more petitions, Pat." Kenyon testified she replied, "I can't say that," to which statement Griffin did not respond.

During cross-examination, when asked whether she had ever received a reprimand for circulating the petition, Kenyon testified that she had when Griffin spoke to her as described above. Later, when given an opportunity, which she sought, to explain the apparent discrepancy with her sworn pretrial statement, Kenyon stated that, at the time she gave the affidavit to the Board agent, they were discussing her work performance reviews and the statement in her affidavit related to such reviews and the time before the petition was started, and further, that until questioned as to whether the early April meeting with Griffin constituted a warning or reprimand she was not even sure it could be so termed. I find this explanation totally satisfactory and more than sufficient to negate Respondent's claim implied in its brief at pages 6–7 that Kenyon's credibility as a witness was thereby impeached.

Griffin acknowledged on cross-examination that at the early April meeting he held with Kenyon he told her the company president thought the petition was an extreme action but denied he also told her that company president was upset or that he also said no more petitions. Griffin also acknowledged he was aware at the time that Kenyon had instigated the petition. In this conflict, I also credit Kenyon. In spite of Griffin's denial on cross-examination, I find that Griffin believed that his own evaluation was affected by Kenyon's actions, that what Kenyon had done was a reflection on his supervision, and that he sought the opportunity of the meeting with Kenyon to attempt to foreclose any further concerted conduct on her part. It further appears, and I infer, that the meeting was not Griffin's own idea. Griffin's own supervisor, Vice President of Finance Robert Guglielmi, had informed Griffin of Company President Lepore's displeasure with Kenyon's conduct. Furthermore, during the same time frame that Griffin spoke with Kenyon, he was also meeting individually with each of the employees he supervised to review with them the subject of a two-page memorandum issued to all supervisors by Personnel Manager Csigi under date of March 24, dealing with the storm closing policy, and which Csigi had thereafter discussed with the Airtron supervisors at several group meetings in order to advise them how to present the subject matter to the individual employees.

After first reporting the filing of the petition by a group of Airtron employees who felt the closing of the plant the previous Thursday locked them out and resulted in the removal of a benefit when they were paid out of sick pay, the memorandum went on to described the policy as fair and laid out the thinking behind it. It further reported that the policy had been distributed to all

employees on April 26, 1979, and to all new hires after that date, and to date "has not once been questioned through any channel of communication, i.e., group meetings, communicator, supervisor, etc." The memorandum went on:

> By presenting a petition, these employees bypassed the most important link in the chain of command, the supervisor. All of our policies are subject to revision. By communicating their opinions to their supervisor, employees have a voice in this policy revision.
>
> Many employees expressed the feeling they did not have the option of staying and working because they did not have sick time. We must make it clear that we close the plant for the safety of all involved, and we will allow people to remain in the plant only if the work they are doing cannot be interrupted, such as someone in the middle of a coating run, and only if there is adequate supervision.

The memorandum concluded by asking each supervisor to speak to those people who signed the petition and make the points previously discussed which were then enumerated. Among them was the item that the supervisors should encourage employees to bring problems to their supervisor.

In his individual meetings with employees, among other things, Griffin stated he told them "that the petition as received, that they were looking for—the lines of communication should be directly from their—from them to their supervisor and from the supervisor up above; that there is an open door policy which we can follow."

The other senior accounts-payable clerk besides Kenyon at the time, Rita Petrozzo, corroborated Griffin's testimony on the individual supervisory meetings with respect to the storm closing protest petition. Petrozzo, who was called alone into Griffin's office several weeks after the petition had been turned in, in late March or early April, reported, inter alia, that Griffin had advised her that in the future "you were to come to your supervisor with any problems." It also appears that all Airtron employees who signed the petition were individually addressed by their supervisors in accordance with the memorandum.

Kenyon and Petrozzo shared a cubicle which opened on a large room in which approximately eight other accounting personnel were employed. As senior accounts-payable clerks they paid invoices for materials that Airtron purchased and filed paid bills. This work entailed matching invoices to purchase orders and checking into any problems which arose with the various transactions. Kenyon, in particular, picked up the purchase orders every morning in the receiving department.

Just outside their cubicle were filing cabinets which housed purchase records for the current and immediately preceding fiscal years, 1981 and 1980. The records included copies of the suppliers' invoices and vouchers evidencing payment for the merchandise. Files for earlier years starting with 1979 were stored in a separate loft area above the stock room. Stored in these cabinets were the records, among others, of the cost borne by Respondent of an annual weekend spent by Respondent's key 25 executives those 8 or 9 who reported to Company President Lepore and their first-line deputies—and their spouses (called the Plan 1 meeting) reviewing the financial plan for the next year, setting targets, and socializing. For the past 3 years, the weekend meeting had taken place in May at hotels in various resort areas. In 1979, it was held at Shawnee on the Delaware, in 1980 at Hershey, Pennsylvania, and in 1981 it was scheduled for Atlantic City, New Jersey. The 1979 trip cost the Respondent roughly $14,000, the 1980 trip cost the same, and the 1981 trip cost approximately $18,000. The filed material for the 1979 and 1980 weekends comprised single vouchers evidencing Respondent's payment of the total hotel invoices.[6]

The evidence establishes that Kenyon, as well as Petrozzo and other accounting personnel, and others who asked for permission for a particular purpose, usually reviewing their own expense reports, and including Ed Bukofsky, manager of the purchasing department, had access to these accounting files, both current and those stored in the loft. The evidence also shows that Kenyon probably filed the vouchers relating to the 1980 Plan 1 trip to Hershey, Pennsylvania, but that the invoices relating to the Plan 1 meeting did not come to her for payment but to someone else in the accounting department, since she arranged payment of job cost invoices related to materials purchased by Airtron, and not those related to such fixed indirect costs as freight and utilities, and often executive trip invoices were forwarded directly to the personnel department or the company president's office.

None of the accounting files were marked confidential and they were not locked. Also, as earlier noted, no policy or rule distributed to employees prohibited disclosure of financial information to unauthorized personnel or those who would not normally deal with the information, although according to Robert Guglielmi, vice president of finance, when hired, accounting employees were informed that all financial information was confidential.[7]

Late on Monday, May 18, Joseph LaSchiavo, vice president of manufacturing, told Guglielmi that he had learned from Ed Bukofsky that production employees on the shop floor were circulating information about the cost of the management trip and they had received it from Mattie Kitchen, a receiving clerk who worked in an area adjacent to the production area. The 1981 week-

[6] The record is unclear as to whether the individual participants filed expense reports covering their attendance and proportion of hotel expenses incurred at the conference.

[7] I credit Kenyon's testimony that she did not recall ever having been told before the day of her discharge that she could be discharged for passing on confidential information and that she was not made aware of any such prohibition and never gave any thought to one. Employee Petrozzo also had never been formally advised that the executive Plan 1 meeting information was confidential although it may have been stated in some informal way. Thus, it appears that whatever effort Respondent made to alert accounting employees at their hire to restrictions on financial dislcosure was not effective or memorable. This is confirmed by Respondent's failure to include this restriction in its extensive list of disciplinary rules initially distributed in 1979.

end Plan 1 meeting at Atlantic City the weekend of May 16 and 17 had just been held.

Kitchen was called in Tuesday morning, May 19, by Bukofsky, her supervisor. According to Kitchen, Bukofsky told her he knew that she had information concerning a trip, that the company president was very annoyed about it, and that it was really none of her business what Lepore did for the executives. He proceeded to ask how she had gotten that information and Kitchen said she had no access to any information such as that in her purchase orders and that the information had been revealed to her.[9] This ended the interview.

Bukofsky did not testify. Apparently, his meeting with Kitchen had been directed by higher authority. That morning Guglielmi and Griffin met together and arranged to question Kenyon and Petrozzo to determine if they had disclosed the information to Kitchen.

Kenyon was called in first. According to Guglielmi, he asked her if she had given out any information concerning the meeting and she indicated that she had not. According to Griffin, who was also present, Guglielmi referred to cost information and Kenyon denied giving it out. Guglielmi also stated that a breach of financial information was cause for termination. According to Kenyon, she was called in to Griffin's office just after her mid morning break around 10 a.m. Guglielmi told her that Mattie Kitchen was shouting her mouth off about the company trip. Mattie claimed there was information given to her by accounts payable about the cost of the trip. He then asked if she knew anything about it. Kenyon replied, "Well, I might have been bitching to Mattie about the fact that management goes on these trips while the employees make diddlybob." Guglielmi then told her that giving out confidential information is a reason for dismissal. He asked if she understood that and Kenyon said yes.[9] She was then told she could leave.[10]

As related by Kenyon, during the prior week, before the weekend management trip, while on her daily visit to the receiving department to pick up purchase orders, she had a conversation with Kitchen during which the subject of the management trip came up. Kenyon had been discussing a serious personal problem and Kitchen offered her the use of a trailer she had in Pennsylvania. At some point their talk turned to the upcoming management trip, a subject of general knowledge among the employees, and Kenyon made the remark she readily disclosed to Guglielmi and Griffin. Kenyon denied that she disclosed or ever learned the cost of the 1981 trip[11] or that she revealed the specific dollar cost of any prior management trip. Kitchen, who also testified about the conversation as a witness called by Respondent, said that prior to the Atlantic City trip, while in her office, Kenyon said "that they were going on a trip again and—the executives, and she also proceeded to tell me about a trip that they had taken prior to that, and the cost of the trip."

I do not credit Kitchen's testimony that Kenyon told her the cost of a prior year's Plan 1 meeting. Kitchen was an extremely hostile witness to the General Counsel and revealed as well an evident concern with the security of her own position with Respondent which she had held for 10 years, 9 years as receiving clerk. On Respondent's direct examination of her, Kitchen characterized her initial conversation with Bukofsky on May 19 as a reprimand, first explaining on cross-examination that this meant she had been scolded and then later changing this to having been told that if ever anything like that would happen again she could lose her job. Thus, if Kitchen is to be believed, her long-term career with Respondent had been placed in jeopardy. She revealed that, when she appeared under subpoena by the General Counsel on the hearing date which was ultimately adjourned, she informed then counsel for the General Counsel she would plead the fifth amendment, and that later, when contacted by counsel for the General Counsel who later tried the case, she had Csigi tell the counsel she would not meet him. When she ultimately did meet him she asked if Csigi had told him she would not see him and stated that she did not need to tell him anything when asked to fill him in on some of her statements.[12]

Aside from the conflict in Kitchen's testimony to which I have already alluded, Kitchen also varied her testimony on the matter of her meeting with management which immediately followed the initial questioning of Kenyon and Petrozzo.

Kitchen testified that after her talk with Bukofsky early that day, later in the morning of May 19, she was called to Griffin's office. When she arrived, Guglielmi, Griffin, Bukosky, and Csigi were present. Gugliemi asked her where she had received the information. She said she was not there to get anybody into any problem or cause any friction, but after being questioned again she said there was only one person who came to her

[9] Kitchen's testimony in this regard does not fully corroborate Guglielmi's assertion that he had been told the cost of the management meeting had come from accounts payable. Kitchen herself did not reveal the source of whatever it was she disclosed on the plant floor on her initial questioning by Bukofsky. Thus, management's decision to immediately question the senior accounts payable clerks could not have been based on any accusations by any other employee.

[9] In spite of this reply, Kenyon credibly testified she was not previously aware of this ground for discharge.

[10] Petrozzo, next questioned, denied talking with Kitchen or ever learning the cost of the management-supervisor weekend.

[11] Since it had not yet taken place, the cost had not yet been determined and certainly no invoice had yet been prepared.

[12] Apparently, Kitchen had provided an affidavit to the General Counsel during the investigation of the case, although it was not produced during the hearing. Kitchen did acknowledge, however, that her affidavit did not contain her testimony in which she revealed for the first time on cross-examination that Kenyon called her on May 19, before her meeting in Griffin's office, to ask her not to tell them that she had given her any figure, that they were going to fire her, a claim which, in the face of Kenyon's later denial on rebuttal, I also do not credit. Kenyon's ackowledgment that she talked with Kitchen by telephone at the plant from time to time does not detract from Kenyon's credibility on this matter as asserted by Respondent in its brief, but rather serves to buttress what I have previously described as her open and responsive demeanor. Kitchen, in contrast, claimed that she had nothing to hide about this dispute, yet she not only failed to disclose this alleged telephone contact from Kenyon to the Board agent who took her affidavit but also to Bukofsky and Guglielmi, and only informed Respondent's counsel on the eve of the trial.

office to pick up paperwork. She did not mention any names, and then was excused. On cross-examination, Kitchen said that Guglielmi's initial question was, "I want to know if there was a figure revealed." Kitchen responded, "Yes, there was." Kitchen said she knew what was being referred to after her earlier questioning by Bukofsky. Kitchen on the witness stand could not recall the figure because she tried to put it out her mind. She also did not think that she revealed the figure to anyone and no one present at her interrogation revealed a figure to her. However, she was certain that the figure Kenyon disclosed to her concerned the Shawnee on the Delaware trip in that Kenyon actually used those words to described the particular trip with reference to which she revealed the cost. That Plan I trip had been taken in 1979. Kitchen also agreed that when Kenyon spoke with her the week before her discharge she basically complained that while management goes on these trips the employees did not get benefits and wages, yet she did not disclose this complaint to Bukofsky or Guglielmi on May 19, even though Bukofsky had asked her what had happened.

After Kitchen was questioned, Kenyon was brought back in. Present this time were Guglielmi, Griffin, and Csigi. As related by Kenyon, Guglielmi said, "Pat, Mattie Kitchen has been spoken to again, and she gave your name as the person who gave her the information." He then said, "I have no alternative but to fire you, to let you go." Kenyon responded, "I can't believe it—it's her word against mine. Are you going to take her word against mine?" Guglielmi said, "You admitted to bitching to Mattie about the trip," to which Kenyon responded she had but she did not know any dollar amount. She added she had not done any filing for approximately a month and did not even think that those bills were filed yet. At this point Guglielmi said, "Well, Pat, I believe this has to do with last year's trip." He said Mattie had said that she said, "If they spent that much money last year, just think what they'll spend this year." Kenyon replied, "Dennis had been doing all the filing and I didn't do any. I don't know any dollar amount." She then noted, "Well, I said I have been told that if I initiated that petition I would be fired, or a witch-hunt would occur." Guglielmi denied that and then confirmed her firing. Kenyon then refused to sign a separation notice.

Three other witnesses testified about Kitchen's interview and Kenyon's exit interview, Guglielmi, Griffin, and Csigi, and their testimonies differ in certain respect from Kitchen's and Kenyon's and, more significantly, differ from each other's.

In a very significant respect, Guglielmi's version differs from Kitchen's version of her interview. Guglielmi testified, as against Kitchen's denial, that Kitchen revealed the cost of the trip. Further, according to Guglielmi, Kitchen did not disclose which trip Kenyon had been talking about, although Kitchen was sure it had to do with the 1979 one. And Guglielmi did not question Kitchen as to which trip it was, although he assumed it was the 1980 Hershey trip. Subsequently, during cross-examination, Guglielmi said he did not recall whether Kitchen or Kenyon told him the cost but one of them did.

Griffin agreed with Kitchen in his recollection that during her interrogation no amount had been revealed. But Griffin also testified that Kenyon at neither of her meetings on May 19 admitted that she revealed a dollar amount to Kitchen.[13] Thus, according to Griffin, no figure came up at any of the employee meetings that day. Here, he differs significantly from Guglielmi.

Csigi was firm in his recollection that Kitchen did not provide a figure and, further, that at no time was she asked for one. This corrborates Kitchen's testimony but conflicts with Guglielmi's. Csigi corroborated Kitchen's earlier testimony that Guglielmi asked her where she got the information but added that, in line with Kitchen's later recital and Guglielmi's, Kitchen was asked if cost information was given, adding that "we never at any time asked her the amount."

I credit Kitchen and Csigi that Kitchen was not asked for the cost information she claimed Kenyon had revealed to her although she was pressed as to whether Kenyon had told her the cost of a trip which was not otherwise identified.

Guglielmi claimed that at her first interview Kenyon denied having had a conversation with Kitchen but that at her second interview she admitted she was having some personal problems the previous week and had given the cost information to Kitchen. On cross-examination, Guglielmi added for the first time that in the second meeting with Kenyon she told him that she had been complaining to Kitchen that management gets to go on these trips and "we don't and we make diddlybob." At this point in his cross-examination, Guglielmi started fencing with the General Counsel, refusing at first to answer a direct question as to whether he had this information regarding Kenyon's complaints before he fired her, then rephrasing his earlier answer now characterizing Kenyon's "dibblybob" remark as complaining about people going on a staff meeting, then swearing he did not recall Kenyon's statement, and finally denying she had ever made it. I conclude that Guglielmi's testimony is essentially unreliable, calculating, and less than forthright and I do not credit him. Aside from the inherent contradictions in Guglielmi's testimony I find incredible his statement that, after having been informed at her first interview that revealing financial information was grounds for discharge, Kenyon would later at her second interview admit she had done so. For the reasons earlier stated regarding Griffin's lack of candor on the witness stand[14] and his bias resulting from his belief in responsibility for the storm closing petition and the "disclosure" of executive meeting information because both originated in his department in the person of Kenyon, I likewise do

[13] Griffin's testimony on this point is somewhat unclear. At first, under cross-examination, he claimed Kenyon at her second interview admitted that she spoke with Kitchen and did not remember the amount she had told her. Then Griffin responded negatively when asked if Kenyon did not admit that she revealed a dollar amount to Kitchen.

[14] At one point Griffin started to relate a meeting which took place on May 19 in Guglielmi's office among Guglielmi, Bukofsky, and himself before any employees were called in. Later, on cross-examination, Griffin called this meeting a "mistake," stating that it never had been held and that he had been confused. His earlier testimony as to his managerial meeting reveals no confusion whatsoever.

not credit Griffin's testimony, in so far as it may be said to corroborate Guglielmi's, in spite of its ambiguity, that Kenyon admitted revealing a cost figure to Kitchen at her second interview.

Cisigi testified that he had been told by LaSchiavo and Lepore on May 18 that information about the meeting had been leaked and that they were to find out what happened. He was later brought in with Bukofsky for Kitchen's interview and remained when Kenyon was recalled. All he could recall about Kenyon's second interview was that she said she had given out the information to Kitchen. Later, on cross-examination, he defined this information to mean her admitting to discussing the plan meeting with Kitchen but denying that she revealed a specific dollar cost amount. Although Csigi did not recall Kenyon revealing complaints to Kitchen about management going on trips and employee wages were diddlybob, he did not deny that it may have been said by Kenyon. Csigi also recalled on cross-examination Kenyon asking "Why are you taking Mattie Kitchen's word against mine." Csigi's testimony here, to the extent of his recall, corrborates Kenyon, and I credit it.

Cisigi also acknowledged that, in spite of Respondent's progressive discipline policy, Kenyon's denial, and Kenyon's clean record and satisfactory rating, she was immediately discharged for discussing confidential information concerning the trip.

Cisigi also did not testify about a third meeting before Kenyon's discharge when, according to Guglielmi, Kenyon had been asked to leave the room after her second interview, Csigi was brought in for the first time to discuss Kenyon, and then on the basis of his recommendation to Csigi a decision was made to fire Kenyon and she was recalled and told of the decision. I conclude that there was no third meeting with Kenyon, and that, as testified to by Kenyon and implicitly acknowledged by Csigi, Kenyon was immediately discharged on Kitchen's word at the conclusion of the second interview.

Analysis

There are two issues posed in this proceeding. The first concerns Respondent's no-solicitation rule. Was that rule maintained and enforced within the 10(b) period? As a subissue, Respondent raises whether the complaint allegations regarding the rule, not specifically alleged in Kenyon's charge, constitute a fatal variance form the charge.

There is no question but that Respondent had codified in 1979 a rule prohibiting solicitations for any purpose without personnel approval during working hours and the rule had thereafter never been rescinded. It is also clear that Respondent, when it suited its purpose, was not timid about alerting employees to the fact that company rules had, from time to time, been distributed to all employees and new hirees thereafter. Witness Personnel Director Csigi's March 24, 1981 recommendation to all supervisors discussing and justifying Airtron's snow closing policy. Like the snow closing policy, the no-solicitation rule had been prepared and distributed at a time, in 1979, when the Company was undergoing a review and update of its personnel policies and manuals.

Since the rules as written "is reasonably susceptible to an interpretation by employees that they are prohibited from engaging in protected activity during periods of the workday when they are properly not engaged in performing their work tasks (e.g., meal and break periods)" it "tends unlawfully to interfere with and restrict employees in the exercise of their Section 7 organizational rights."[15] In *T.R.W. Bearings*, supra, the Board obliterated the distinction between rules banning solicitation during "working time" and "working hours," finding the latter as ambiguous as the former.[16] Absent some clarification to employees that the restriction does not apply to organizational activity conducted during break periods and mealtimes the rule must be found to be presumptively invalid. Respondent having failed to clarify its presumptively invalid rule, its maintenance is found to be unlawful.

Respondent argues that since its promulgation the rule has not been enforced or observed, and there is no basis to conclude, as urged by the General Counsel, that Respondent violated the law by enforcing it. Yet, by its own considerable reaction to Kenyon's storm policy petition, Respondent has revealed an intention to prevent the solicitations of other employees to protest company policies dealing with terms and conditions of employment. Such an effort bespeaks an enforcement of the rule to prohibit protected concerted activity whether or not the rule itself is specifically invoked in support of Respondent's efforts.

There can be no other interpretation of Griffin's injunction to Kenyon to refrain from such activity in the future after voicing the chief executive officer's displeasure at her "extreme action." Even Griffin's initial questioning of Kenyon's motive when she first disclosed what she had done on the occasion of her job review tends to show the employee that such conduct is questionable at best. When Griffin's later injunction is coupled with the pattern of identical individual employee interrogations of the petition signatories devoted solely to the subject of the petition as described, it is virtually impossible to avoid the conclusion that it enforced the no-solicitation rule in such a manner as to resolve the ambiguity inherent in the rule and make clear that its intent was to prohibit all protected concerted solicitations whether on the employee's own time or actual worktime. Respondent's attempt to distinguish Csigi's memorandum and Supervisor Griffin's questioning wherein they sought to emphasize the proper chain of command, as against an outright prohibition, is elevating form over substance. The clear import of their remarks is that in the future the way to complain about a working condition is to see your supervisor, not join with other employees to petition for relief. In spite of the apparent subtlety of this approach, the Employer's basic aim is not lost on the employee recipient. The instruction to all employees to direct future work concerns and remarks to their super-

[15] *T.R.W. Bearings*, 257 NLRB 442, 443 (1981).

[16] Even under the more limited, and now rejected, principle enunciated in *Essex International*, 211 NLRB 749 (1974), since Respondent's rule used the phrase "working hours" it would have been found unlawful.

visor and not to fellow employees is an independent coercive limitation on employee rights,[17] even apart from its relationship to Respondent's outstanding no-solicitation rule.[18]

Contrary to Respondent's claim at page 11 of its brief, the no-solicitation rule may thus be viewed as part and parcel of the unlawful restrictions it has placed on the exercise by employees of protected rights. It is also clear, contrary to Respondent's urging on the same page of its brief, that the relationship between Kenyon's charge and the complaint is more than sufficient to warrant the conclusion that the Region did not act on its own initiative in alleging the rule as violative of the Act, both as maintained and enforced.[19] The nexus between Kenyon's testimony regarding her own interrogations and the Respondent's expressed concern with the employees' exercise of Section 7 rights provides direct evidence of the relationship between the charge and the no-solicitation rule.

I come now to the issue as to whether Kenyon's discharge was motivated by her engagement in protected concerted activities. I have little difficulty in concluding that it was.

Kenyon's key role in drafting and spearheading the circulation, signing, and submission to management of the protest petition is undisputed. On two separate occasions she identified herself to management representatives as the originator of the petition, and she signed it before all others. In turning it in, Kenyon and Jacobs requested a direct meeting with the company president to discuss it.

The petition caused such a stir that Respondent took the unprecedented action of convening special sessions between its personnel director and supervision to plan a formal response and had its personnel director prepare a detailed memorandum to counter the impact of the employees' activity not only with respect to the policy in issue but, more importantly, with respect to the concerted procedure and manner the employees' utilized to raise their complaint. Respondent's fear was twofold. First, the change in the storm closing policy sought by the signatories could be costly. The employees sought pay for the remainder of any day in which they were sent home. Barring that, the employees sought rentention of their accrued sick pay. Modification of the storm closing policy in either respect could involve outlays of thousand of dollars. Second, and what I consider to be the heart of the matter, group action such as manifested with regard to the petition, unless nipped in the bud, could encourage employees to continue their concerted dealing and even expand it to include consideration of retaining union representation and engaging in collective bargaining in the long run.

The highest authority in Respondent's hierarchy made known his extreme displeasure with Kenyon's action and in the same conversation in which Kenyon was made aware of his feelings about the matter she was told to cease such activity in the future. Significantly, Kenyon emphatically stated her refusal to comply. The consequence was that Respondent was faced with the possibility of future solicitations and concerted conduct spearheaded by an employee who had demonstrated her independence from employer domination and intimidation.

The incident between Kenyon and Kitchen which arose not more than a month later provided a convenient and ostensibly nondiscriminatory basis for Respondent to rid itself of Kenyon's irritating and potentially costly presence. I am convinced that Kenyon's alleged disclosure of confidential financial information was a pretext shielding Respondent's true discriminatorily motive.

There a number of facets of the incident which lend weight to this conclusion. The first is that, while Respondent appears to rely on a breach of an alleged well-recognized ethical principle, it thought so little of the principle that it failed to include it among the numerous disciplinary rules it created and distributed on the 1979 personnel policy review even though it included a rule prohibiting financial disclosure to achieve ends admittedly not related to Kenyon's alleged activity. The offhand manner in which it sought to alert employees to the prohibition of disclosure of financial information on their hire also says a great deal about the lack of seriousness with which Respondent dealt with the matter before it ever sought to invoke the rule in Kenyon's case. It is also apparent that Respondent, in effect, created a new disciplinary rule during Kenyon's initial interview when Guglielmi alerted her to it and stated it was grounds for discharge. In this connection, Respondent made what amounted to an on-the-spot decision that Kenyon's alleged conduct was not going to be subject to its otherwise generally applicable policy of progressive discipline.[20]

The manner in which Respondent investigated the incident and concluded its investigation also demonstrates its patent falsity. The employee, Kitchen, who had circulated the information about the Plan 1 meeting and on whose word management relied in firing Kenyon was not even asked the figure she had been given so as to provide some concrete factual underpinning for the alleged disclosure. Also, an ambiguity was allowed to remain as to which management trip costs had been disclosed, Kitchen believing the trip under discussion was the 1979 one and Guglielmi assuming the disclosure re-

[17] *R. J. Liberto, Inc.*, 235 NLRB 1450, 1453 (1978), citing *Jeannette Corp.*, 217 NLRB 653, 656 (1975), enfd. 532 F.2d 916 (3d Cir. 1976).

[18] The consistent evidence of employer permissiveness toward benign solicitations, even those involving working conditions with a nominal employer cost such as the soda machine petition, rather than supporting Respondent's claim of nonenforcement, just because of the disparity of treatment when a matter of substantial employer outlay is involved, services to highlight Respondent's coercive and intimidating reaction to the employee exercise of Sec. 7 rights.

The written rule may thus be said to have been construed and interpreted by Respondent as limited to prohibitions against employee solicitations constituting the exercise of protected concerted activity of more than a de minimus nature. On this ground alone Respondent's citation of *Detroit Plastic Molding Co.*, 209 NLRB 763 (1974), wherein the Board dismissed a complaint alleging the unlawful maintenance of invalid no-solicitation rules because their maintenance was so minimal and isolated, misses the mark. The instant rule was maintained and enforced in its narrow and unlawful aspects.

[19] See *NLRB v. DHJ Industries*, 494 F.2d 588 (5th Cir. 1974). See also *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959).

[20] While, admittedly, that policy was not applicable to every offense, not even Airtron's 1979 statement of disciplinary policy by its terms excluded any infraction from its coverage.

lated to the trip in 1980. Furthermore, an employee who, in management's characterization, had been "shouting her mouth off" was credited in the absence of any other proof of disclosure of specific figures against an employee who readily admitted her griping, but who consistently denied the disclosure of actual costs, and the facts show others had access to the information.[21]

The conflicts among Respondent's management personnel further reveal the effort that was made to justify Kenyon's release. Among Respondent's executives, Vice President Guglielmi stands alone in insisting that Kenyon revealed a cost figure and admitted having disclosed it to Kitchen, as against the denials and ambiguous responses of Cost Manager Griffin and the consistent denials of Personnel Manager Csigi. Guglielmi's discredited assertion that there was an interim managerial conference to determine Kenyon's fate also supports this conclusion. In the face of Kenyon's denials, but after disclosing her continued dissatisfaction with Respondent's benefits for employees, she was summarily released.

It is also apparent that the employees generally were aware that a certain number of executives and their spouses spent a weekned away at the Company's expense once a year. Even though the precise overall cost would be unavailable to them, it would hardly seem to be beyond the estimating power of any of them to conclude that Respondent's funding of the weekend reached five figures.[22] Thus, Respondent's stated concern with figures seems to have been picayune and over trifling and, therefore, its response to the matter was wholly out of proportion unless some other motive was at work.

I conclude that Respondent's real concern when it learned from Kenyon at her first interview, and, I believe, from Kitchen as well, that Kenyon had griped and bitched about employee treatment to Kitchen was that the same employee who had started the petition was not getting involved, at least to the extent of making known her feelings to a fellow employee, in a matter of dissatisfaction with employee benefits generally, not limited to loss of pay on storm closings, in contrast to the benefits management and higher supervision enjoyed. That expression of concern could reasonably lead to further group conduct of the nature represented by the anti-storm closing policy petition. This motive is exhibited most clearly in Bukofsky's statement to Kitchen on May 19, when he told her the company president was very annoyed and it was really none of her business what Lepore did for the executives. Kenyon's interests were getting too close to the bone now. She had previously revealed her unreliability in refusing to refrain from involvement in future employee work-related solicitations and her present conduct reaffirmed this attitude.

Yet, Respondent did not rely on Kenyon's griping as grounds for her discharge,[23] but rather it took its stand on the alleged improper disclosure. In the foregoing discussion, I have concluded that Respondent seized on the alleged confidential disclosure during the Kenyon-Kitchen interchange as the best way it then had available to it to remove Kenyon from its work force.

Assuming, arguendo, that Respondent had a reasonable basis for believing Kitchen that costs were disclosed and that such disclosure provided lawful grounds for discharge, Respondent's good-faith belief does not shield it from the consequences of its error in attributing such misconduct to Kenyon.[24] Having found that Kenyon did not make the alleged disclosure, Respondent cannot defend its action on the basis of its good-faith belief that she did.

Furthermore, assuming, arguendo, that Kenyon had revealed the actual cost of a prior executive weekend meeting, a conclusion contrary to the findings of fact contained herein, that conduct would also have been protected.

It should first be made clear that this is not a case of employee disloyalty. Kenyon did not release company information to third parties to the disadvantage of Respondent's business.[25] The specific company rule prohibiting such disclosure was not invoked and is not applicable here.

Respondent argues that the cost of the Plan 1 meeting is confidential because, in the words of Vice President Guglielmi, "the cost of all our expenditures that we make, the cost of anyone's expense report, the cost of anyone's salary, is confidential information." Guglielmi then asserted that, had Kenyon revealed her own or another's salary to another person, that would be revealing financial information and cause for immediate discharge.[26] Yet, as pointed out earlier, Respondent had no formal rule prohibiting any such disclosures. There was nothing about the location, appearance, or accessibility of the files in which the information was stored which would reveal that they had a special status. A variety of personnel had immediate access and others, with a simple request, had the filing cabinets readily available to them. I also conclude that the nature of the information

[21] On Respondent's own terms, the extreme disparity in treatment accorded the two employees—Kitchen receiving not even a reprimand for passing along confidential financial information and Kenyon being summarily fired for the same offense—show that other factors contributed to the making of Respondent's judgment, surely unrelated to Kenyon's satisfactory work record. It is not enough to respond, as Guglielmi did, that Kenyon had access and originated the deed. It was not Kenyon who circulated the information on the plant floor. Some fault surely had to be borne by the receiver and circulator of the prohibited material if Respondent was to act in an evenhanded manner. Kitchen's appreciation for her good fortune was readily apparent on this record.

[22] Respondent's reliance on employee Petrozzo's testimony at p. 18 of its brief that, in a conversation with Kenyon just before the May 1981 Atlantic City executive weekend, a statement was made that "you spend all this money on weekends, but when you want a chair or something decent in the office you have to really fight to get it" as supporting Kenyon's disclosure of dollar cost is not convincing just because of employee ability to infer the general cost.

[23] Consequently, there is no need to examine whether Kenyon's conversation with Kitchen, standing alone, rises to the level of protected concerted activity, a matter both counsel have addressed in their respective briefs.

[24] *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

[25] *Vitronic Inc.*, 182 NLRB 1067 (1970); see generally *NLRB v. Electrical Workers IBEW Local 1229*, 346 U.S. 464 (1953). Also see *Furlow Rubber Supply*, 193 NLRB 570 (1971).

[26] See *W. R. Grace Co.*, 240 NLRB 813 (1979), where an employer rule which prohibited employees from discussing wage rates among themselves was held to violate Sec. 8(a)(1).

Kenyon's disclosure of an executive benefit was directly related to employees' conditions of employment. See *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980).

itself was not such as to provide a basis for reasonable employee belief in its privacy.[27] Thus, and for all the foregoing reasons, I am prepared to distinguish *Clinton Corn Processing Co.*, 253 NLRB 622 (1980), relied on by Respondent, in which the Board affirmed, without opinion, an administrative law judge's decision in which he concluded that employee disclosure of the company's confidential wage structure to a third-party labor organization was not protected.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an activity affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining, distributing, and enforcing its Company Rule v appearing under the heading "DISCIPLINARY ACTION—all employees 6/25/79" in its June 29, 1979 "Update of Airtron Policies #3" to all employees and by advising its employees that they should refrain from circulating petitions of any kind, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By discharging Patricia Kenyon because she engaged in concerted activities for the purpose of collective bargaining or other mutual aid and protection, Respondent has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist order and notice posting, my recommended Order will require Respondent to offer Patricia Kenyon unconditional reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and to make her whole for any loss of earnings or other benefits she may have suffered by reason of her unlawful discharge, computed in accordance with the formula stated in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Airtron, Division of Litton Systems, Inc., Morris Plains, New Jersey, its officers, agents, sucessors, and assigns, shall

1. Cease and desist from

(a) Discharging employees, or refusing to reinstate them, in consequence of their participation in concerted activity for the purpose of collective bargaining or other mutual aid and protection.

(b) Distributing, maintaining in effect, and enforcing Company Rule v appearing under the heading "DISCIPLINARY ACTION—all employees 6/25/79" in its June 29, 1979 "Update of Airtron Policies #3" to all employees, and advising its employees that they should refrain from circulating petitions of any kind.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Offer Patricia Kenyon immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings or other benefits she may have suffered by reason of her unlawful discharge in the manner set forth in the section of this decision entitled "The Remedy."

(b) Withdraw and abolish its Company Rule v set forth under the heading "DISCIPLINARY ACTION—all employees 6/25/79" in its June 29, 1979 "Update of Airtron Policies #3" to all employees, and notify its employees of said withdrawal and abolition in writing.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Morris Plains, New Jersey offices and facilities copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[27] *Gray Flooring*, 212 NLRB 668 (1974). Kenyon's understanding that invoices for executive trips were often forwarded directly to personnel or the company president's office provides an insufficient basis for a contrary conclusion. In any event, even if this procedure evidenced a certain managerial sensitivity toward the information, sensitivity is not the equivalent of confidentiality, particularly where employee knowledge of the approximate cost of the trip would easily be inferred. On the record before me, employer sensitivity is much more akin to embarrassment or discomfort that employees would be able to contrast, as did Kenyon, their more meagre benefits against the perquisites of management.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[29] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge, or fail or refuse to reinstate, any employee in consequence of his or her participation in concerted activity for the purpose of collective bargaining or other mutual aid and protection.

WE WILL NOT distribute, maintain, and enforce Company Rule v set forth under the heading "DISCIPLINARY ACTION—all employees 6/25/79" in its June 29, 1979 "Update of Airtron Policies #3" to all employees, and advise our employees that they should refrain from circulating petitions of any kind.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE HEREBY NOTIFY YOU that we have withdrawn and abolished Comany Rule v described above.

WE WILL offer Patricia Kenyon immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously engaged, and WE WILL make her whole for any loss of earnings or other benefits she may have suffered by reason of her unlawful discharge, with interest thereon.

AIRTRON, DIVISION OF LITTON SYSTEMS, INC.

United Food and Commercial Workers International Union, Local 1357 *and* Elizabeth Murphy. Case 4–CA–12427

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 October 1983 Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as restated below, and to adopt the recommended Order as modified.

In adopting the judge's finding that the Respondent Union reprimanded Murphy, required her to take a psychiatric examination, and ultimately discharged her in reprisal for her activity in support of a May 1981 strike against the Respondent, we note the prominent and outspoken role that Murphy played during that strike. A shop steward for the Respondent's office employees, Murphy was a leader of the strike and conducted the picket line in front of the Respondent's offices. She was also quoted in the local newspaper accusing the Respondent Union's president, Wendell Young, of being a hypocrite for not meeting the employees' contract demands. Additionally, the judge credited Murphy's testimony that after the strike, the Respondent's secretary-treasurer told her that President Young "said he was going to make an example of you, that nobody would ever strike against him again." Based on these findings, we agree with the judge's conclusion that the Respondent's subsequent actions against Murphy were in retaliation for her protected strike activity in violation of Section 8(a)(1) of the Act.[3]

CONCLUSIONS OF LAW

1. By discharging Elizabeth Murphy on 14 July 1981 for engaging in protected concerted strike activity, the Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

2. By issuing Murphy a warning letter in reprisal for her engaging in protected concerted strike activity, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. By threatening Murphy with reprisals for engaging in protected concerted strike activity, the Respondent violated Section 8(a)(1) of the Act.

4. By requiring Murphy to undergo a psychiatric and psychological examination as a condition of

[1] The Respondent excepts to the exclusion of a hospital record it sought to admit as evidence that Murphy sought medical treatment on 10 July 1981 for intoxication. The Respondent contends that this record is relevant to the charge that it unlawfully required Murphy on 4 August 1981 to undergo a psychiatric evaluation. We find that the proffered evidence is irrelevant and that the Respondent was not prejudiced by its exclusion. The issue is not the fact of Murphy's hospital visit but the Respondent's motivation in requiring the psychiatric evaluation. On this issue the Respondent was not precluded from presenting evidence. The judge permitted the Respondent's president Young to testify that he had heard of Murphy's hospital visit before 4 August and that it was a motivating factor in the decision to require her to take the psychiatric examination.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We have further considered the Respondent's contention that the judge has evidenced bias or at least the appearance of bias in this proceeding. We have carefully considered the decision and record and find these charges unsupported and without merit.

The judge found it unnecessary to rule whether the Respondent's actions against Murphy also violated Sec. 8(a)(3) of the Act. The General Counsel contends that the judge's findings are clearly sufficient to conclude that the Respondent violated that section. We agree and find that the Respondent's actions against Murphy discouraged union activity in violation of Sec. 8(a)(3) of the Act. See *Radio Officers v. NLRB*, 347 U.S. 17 (1954).

[3] The judge found that the Respondent's actions against Murphy also violated Sec. 8(a)(1) insofar as they were also in reprisal for Murphy's protest to Young after the strike was settled over an article he had written concerning the strike. The judge found that Murphy's protest concerned union business and was therefore protected concerted activity.

Chairman Dotson and Member Hunter do not adopt this finding for the following reasons. Chairman Dotson would reverse the judge's finding. In the Chairman's view, because Murphy sought only the retraction of the article and not any change in terms and conditions of employment, her protest over the article was not protected activity. See *Phase Inc.*, 263 NLRB 1168, 1170 (1982); *Champion Parts Rebuilders*, 260 NLRB 731 fn. 3 (1982). Member Hunter finds it unnecessary to pass on whether Murphy's protest over Young's article was protected concerted activity. Insofar as the judge found that the Respondent's defense that Murphy was insubordinate and threatened and humiliated Young during their discussion was a fabrication, Member Hunter would find that it was solely Murphy's protected strike activity which motivated the Respondent to reprimand and ultimately discharge her. Thus, in Member Hunter's view, the Respondent's reliance on Murphy's protest as justification for her discharge was, like Murphy's refusal to take a psychiatric examination, simply another pretext for discharging her in retaliation for her protected strike activity.

Accordingly, the judge's Conclusions of Law and recommended Order are amended to reflect the Chairman's and Member Hunter's findings that the Respondent's actions against Murphy were due solely to her protected strike activity.

The judge also stated in dictum that, even if Murphy had threatened during their discussion to tell Young's wife that he was having affairs with two of the female office employees, this threat "would not have been so opprobrius to be unprotected." Chairman Dotson does not adopt this dictum. In the Chairman's view, a threat to disclose private sexual affairs, in the circumstances here, exceeds the bounds of protected conduct. Cf. *Bell Federal Savings & Loan Assn.*, 214 NLRB 75 (1974) (disclosing employer's private telephone calls unprotected). In view of the judge's finding that Murphy did not in fact make such a threat, Member Hunter finds it unnecessary to pass on the judge's dictum.

Member Zimmerman agrees with the judge's analysis of Murphy's actions concerning Young's article and adopts his findings in all respects.

employment to provide a pretext to discharge her, the Respondent violated Section 8(a)(1) and (3) of the Act.

5. The Respondent's aforesaid actions are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not make Murphy's working conditions more onerous in reprisal for her protected concerted strike activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Food and Commercial Workers International Union, Local 1357, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute in paragraph 1(a) the words "protected concerted strike activity" for the words "protected concerted activity."

2. Substitute in paragraph 1(b) the words "protected concerted strike activity" for the words "protected concerted activity."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or discipline any of our employees for engaging in protected concerted strike activity.

WE WILL NOT issue any employee a warning letter in reprisal for such activity.

WE WILL NOT threaten an employee with reprisals for engaging in this activity.

WE WILL NOT require any employee to take a psychiatric or psychological examination to provide a pretext for discharging the employee.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Elizabeth Murphy immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and warning letter and that they will not be used against her in any way.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1357

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, September 16–17, 1982. The charge was filed September 24, 1981,[1] and the complaint was issued February 10, 1982.

An SIU shop steward, representing office employees of a large local union, led an 11-day strike against the Union, to the embarrassment of its president. In a heated meeting after the strike with the steward concerning strike publicity, as credited evidence shows, the union president ejected her from his office, seizing her arm, badly bruising it. After she filed a claim alleging injury from the assault, the Union suspended her, later required her to undergo a psychiatric evaluation as a condition of employment, and gave her a formal notice of termination when she refused.

The primary issues are whether the Union, the Respondent, (a) unlawfully issued the office employees' steward a warning letter, (b) threatened her with reprisals because of the strike, (c) made her working conditions more onerous as a reprisal, (d) required her to undergo a psychiatric and psychological examination as a condition of employment, to provide a pretext for discharging her, and (e) discharged her for engaging in protected concerted activity during and after the strike, in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Local 1357, an integral part of a multistate labor organization, is an unincorporated association in Philadelphia, Pennsylvania, where it annually receives over $100,000 in dues and fees, and remits over $25,000 to its International in Washington, D.C. The Union admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are in 1981 unless otherwise indicated.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Embarrassing Strike Against Union*

Elizabeth "Betty" Murphy, who led the office employee strike against the Union from May 6 to 16, was a good employee and, as admitted by Union President Wendell Young, a "very good shop steward" (Tr. 367). She was the telephone operator and receptionist, and did volunteer work as secretary and loan officer for the credit union.

She was a member of the Seafarers International Union's negotiating committee, which failed to reach an agreement with the Union without a strike. As the SIU strike captain, she conducted the picket line in front of the union offices, causing considerable disruption in the operations when the officers and business agents honored the picket line.

The strike was a personal embarrassment to President Young. A May 12 news story in the Philadelphia Daily News (G.C. Exh. 2), identifying Murphy as a picket captain and former nun, quoted her as stating that the major issues in the strike were overtime and a cost-of-living clause and that her boss, Wendell Young, was a hypocrite. "How can a man like him run around preaching about contracts and be so hypocritical?"

President Young admittedly was "very upset" with the "completely one-sided" news article (Tr. 360). He also revealed his displeasure "over the fact that there was a strike altogether." He testified that the "local fellows could not control the situation. In other words, they lost control. In fact, I had to go into the negotiations at the end, and try to sell the package instead of the union official doing it. That is how goofed up it was." (Tr. 375.) This was an obvious reference to the bargaining position of the SIU negotiating committee on which Steward Murphy served.

Acknowledging his embarrassment from the adverse publicity, President Young responded to the news story the same day, stating in a letter to the Daily News that "In our opinion, the people on strike are trying to embarrass us into a very unfair contract" (G.C. Exh. 3).

It was this response, which was printed in full in the June issue of the Union's newspaper, the Dialogue, that was the subject of Steward Murphy's heated meeting with President Young on June 9 when, as Young admitted, she went to his office "to talk about union business" (Tr. 410).

B. *Assault Upon Shop Steward*

On June 9, 3 weeks after the office employee strike against the Union was settled, SIU Shop Steward Murphy saw in the Dialogue an article entitled, "The President Replies to Phila. Daily News," quoting President Young's May 12 response to that newspaper's strike story. At 4:15 p.m., she went to Young's office to give him the SIU position on the lack of accuracy of a statement in his response about one of the strike issues (Tr. 74–75, 175). His statement was that "As a result of extensive days off and lost time due to these programs, over the past few years there has been an increasingly large amount of overtime needed to run the office."

As Murphy credibly testified, she told him she would like to talk to him about the article, he asked what was the problem, she handed him the newspaper, and he started reading the article. "It is in reference to this overtime. You say that our girls are getting overtime because they missed so much time during the year, but the truth of the matter is they are filling in for the secretaries who are never at their desks . . . and then they have to do their work at nighttime." (Tr. 33–34.) She insisted on a retraction (Tr. 79). A heated argument ensued. (Murphy did not remember the full conversation.) Finally Young asked, "Are you telling me how to run his office? She said, "No, Mr. Young, but I think you should print the truth." When asked what then happened, she credibly testified (Tr. 34):

> A. Mr. Young said "Get out of my office. Get out." He got up from his chair and he came around. I don't think I moved. Then *he grabbed my arm and I pulled away. He grabbed me again, and he pulled me toward the door.*
>
> He opened the door and he dropped my arm, and I left his office. *He threw me out of his office.* [Emphasis added.]

She returned to her desk "in terrible pain," spent 3 to 5 minutes closing (Tr. 77), clocked out at 4:32 p.m. (R. Exh. 1), and met two awaiting friends, one of whom drove her car (Tr. 35). Her left arm "felt like it was out of its socket" (Tr. 96). She was holding it and was "teary eyed" (Tr. 422). When asked what was wrong, she said, "He threw me out of his office." (Tr. 426.) The next morning when she showed one of the two friends (employee Sophia Cleary, the SIU shop steward for another group of the office employees) her "red and swollen" arm (Tr. 423), she explained, "He gripped my arm" (Tr. 427).

This was the day, June 10, when she came to work and found two of her pictures broken, as discussed below. With Secretary-Treasurer Rosmini's permission, she did little work that day and spent most of the time resting. At quitting time, Rosmini asked her if she was staying to do some credit union loans and, as she credibly testified, "I told him no, that I was having . . . a lot of pain with my arm, and I was going right home." (Tr. 38–39.) I discredit Rosmini's denial (Tr. 180) that Murphy complained about her arm at any time that day. (By his demeanor on the stand, he appeared more concerned about supporting the Union's cause on critical matters than giving an accurate account of what happened.)

Rosmini permitted Murphy to rest much of the time during the next 2 days, Thursday and Friday, June 11 and 12. About 2:45 p.m. Friday, when she saw President Young, she told him, "Look at what you did to my arm." He looked at it and said, "I know. I know. See your union." (Tr. 44, 122.) Before leaving early that day (with permission from Secretary-Treasurer Rosmini to see a doctor about her arm (Tr. 128)), she told Rosmini, "I just showed Mr. Young my arm and he said he knew he did it," to see her union. Rosmini asked, "Do you mean he admitted it?" and she suggested that Rosmini

ask him. In his testimony, Rosmini admitted that he saw Murphy's arm; that it was "very black and blue" with "two large black and blue marks" and "four smaller marks on the other side of her arm;" that he told her "That doesn't look good . . . . That looks terrible;" that he told her to talk to Young; and that when she returned, she said she had showed Young the black and blue marks and Young "admitted that he did it" (Tr. 188). I discredit Young's testimony that he merely told Murphy, "Come on, get out, go see your union" (Tr. 379). (Murphy impressed me most favorably by her demeanor on the stand as an honest, conscientious witness, but Young appeared to be less than candid.)

That Friday afternoon, upon the suggestion of an attorney, Murphy had four color photographs taken of her injured arm, graphically recording the condition of the arm as described by Rosmini.

The Union took the position at the beginning of the trial that Young "never laid a hand on her" (Tr. 20). After the photographs were introduced into evidence (G.C. Exh. 6), Secretary-Treasurer Rosmini testified that he had no information how Murphy's arm was injured and admitted having no reason to believe that the bruises were self-inflicted (Tr. 277–278). Young continued to deny touching her.

I reject as frivolous the suggestion in the Union's brief that there is "a reasonable probability that Ms. Murphy self-inflicted these bruises while rubbing her arm after leaving Mrs. Young's office or at some other time, in some other way." In arguing that Young's grabbing her arm as Murphy described would not leave two large bruises on the front of the arm, the Union ignores the credited testimony that Young gripped her arm twice.

After weighing all the evidence and discrediting President Young's denials, I find that Young injured SIU Steward Murphy's arm June 9 when ejecting her from his office.

C. *Destruction of Steward's Personal Property*

On Wednesday, June 10, Steward Murphy received another shock that added to the trauma of the assault of the afternoon before.

She arrived about 8:30 and office boy Thomas Spellane opened the door for her. After clocking in at 8:32 (R. Exh. 1), she went to her desk and found the pictures of her mother and her friend, Sister Gloria Keltz, lying on the floor with the frames broken. She was "most upset" (Tr. 37) and "kind of in total shock" (Tr. 98) upon seeing "the glass all over the floor" and the broken pictures. She turned and walked out, and asked Spellane for Secretary-Treasurer Rosmini's telephone number. Rosmini had already left home.

As other employees arrived, Spellane opened the door and let them in. The next employees to arrive were Renee Kelly and Margaret O'Brien, followed by Sophia Cleary, who arrived about 8:35, and Kathy Barrett, who arrived a minute or so later (Tr. 420, 429–430).

As Kelly and O'Brien entered the reception area, they noticed that the clock on the wall was also broken and Murphy's small Irish flag was burned. One of them commented, "Your flag is burned, too, Betty, and so is the clock" broken. (Tr. 38.) As Murphy credibly testified, "it was the pictures that were on my mind, my mother's picture and Sister's picture"; "I didn't know the clock was broken . . . I didn't examine it. . . . I think part of [the flag] was burned. I didn't examine it that well, because I was very upset about the whole episode" (Tr. 101). She did notice that the wall clock had stopped at 11 p.m. (Tr. 38).

When employees Cleary and Barrett came to the area, as Cleary credibly testified, "The first thing that I observed was the clock up on the wall stopped at 11:00. . . . And I turned to Kathy Barrett and said, 'It happened at nighttime.' She said, 'It would have had to'" (Tr. 421, 431).

When Secretary-Treasurer Rosmini arrived about 9:05 or 9:10 a.m., he saw Murphy standing at her desk, crying. "She told me that someone had broken Sister Gloria's picture and her mother's picture." (Tr. 176.) He cleaned up the glass and told Murphy to get some tea and relax (Tr. 103).

It was at quitting time that day (after Murphy told Rosmini she was having a lot of pain with her arm and was going right home) when Rosmini told her to stop in his office and, as discussed below, gave her a warning letter for "insubordination or belligerent behavior" and told her, in an apparently unguarded answer to a question, that President Young "said he was going to make an example of you, that nobody would ever strike against him again."

The next day, Thursday, June 11, upon instructions from Young, Rosmini made a perfunctory investigation, taking two statements. (A third employee also gave a statement to Young's secretary, professing to report what the office boy had told him.) The statement that Rosmini took from office boy Spellane (R. Exh. 5) was obviously inaccurate. The statement claimed that Spellane "went upstairs at 8:15 to make the coffee and the bell rang. Betty Murphy came in. Approximately 8:30 I went down to wait for the people to come in." Although Rosmini never accused Murphy of destroying her own property and never took a statement from her or any of the other employees who discovered the damage, the Union could argue from this purported timing that Murphy had 15 minutes to smash the pictures of her own mother and her nun friend, to set fire to the flag (ignoring the odor from the smoke) and, after damaging the wall clock, to have the presence of mind of somehow reaching the 7-foot-high clock on the wall (Tr. 283) and setting it forward or back several hours. (Except for President Young's dubious suspicion—that the flag burning and destruction of property were "to throw the thing off," or distract attention from Murphy's June 9 conduct in his office (Tr. 377)—nowhere in the evidence is there any suggestion of a motivation for her to damage the clock and destroy her own valued property.)

Spellane's statement also asserted: "In the meantime, I came in and she said, 'Look at all this.' There was glass on the floor and the clock said something on it. I took notice the clock was *on the wall*." (Emphasis added.)

The timing was obviously wrong, because Murphy's timecard showed that she clocked in at 8:32 a.m.—not 15 minutes earlier. By the time of trial, the timing was

changed; Spellane testified that he went downstairs "around 8:30" and let Murphy in the front door (Tr. 308). (This corrected timing, however, made it even more unlikely that Murphy would be setting a fire at her desk, breaking pictures and scattering glass around, and breaking and resetting a clock in the few minutes before the other office employees arrived. As found above, Clearly arrived about 8:35—about 5 minutes after Murphy—and both Kelly and O'Brien arrived ahead of Cleary.)

Also by the time of trial, Spellane had changed another part of his story. Although asserting in his written statement (which was witnessed by Secretary-Treasurer Rosmini) that the damaged clock was on the wall, he claimed at the trial that "The clock was on the floor" (Tr. 310). Rosmini also claimed that the clock was on the floor (Tr. 176). To the contrary, Murphy and Cleary both credibly testified that the clock was on the wall when the damage was discovered. (The Union contends in its brief: "The clock sits seven feet off the floor on the wall of the reception area. . . . She intentionally damaged her own property, for what reason we can never be sure, and apparently pulled the clock down off the wall and set it at 11:00 o'clock for obvious reasons)." I find that Spellane and Rosmini fabricated the change in testimony to support the Union's cause—placing the damaged clock in a more accessible place for Murphy to reset it. (Rosmini claimed, "I concluded that [between 8:30 and 9 o'clock] the clock was moved forward [by Murphy] to indicate it was done the night before (Tr. 272–273), but testified he did not know how to change the time: "Move the hands, I guess" (Tr. 283).

Because of (a) the obviously inaccurate timing of Murphy's arrival in Spellane's statement, (b) the lack of any plausible motivation for Murphy to destroy or damage her own and the Union's property, (c) the implausibility of Murphy's setting a fire at the reception desk, destroying valued property, and damaging and resetting a wall clock at the beginning of the workday as other employees were arriving, and (d) the failure of the Union to question Murphy and other employees who discovered the damage, I deem it most unlikely that the Union actually believed two other assertions in Spellane's statement, that "the clock said 10 minutes of 8" and "nothing was disturbed" when he opened the building that morning. (At the trial, Spellane first admitted that he would have to turn his head "almost all around to see the clock" upon entering the front door, and indicated how far he would have to turn, but later indicated he would have to turn only about 90 degrees to the left (Tr. 313–315). He appeared to be less than candid.) Whether or not it was Spellane's own idea to include these assertions in the typed statement (witnessed by Rosmini and President Young's secretary, Janice Pinti), I find that the Union falsely claimed that it believed the assertions.

I find instead that President Young ordered the perfunctory investigation to discover some pretext for discharging the SIU steward, as discussed below. I discredit Rosmini's claim that he planned "to meet with Ms. Murphy and to discuss the incident and the statements taken in the investigation with her," but that he never had the occasion (Tr. 227). He later testified that. "As far as we are concerned, we had all the information we needed on the June 10th incident" (Tr. 242). Young, after testifying that he ordered the investigation, claimed that "without any evidence at this point . . . I thought Betty did it herself" (Tr. 375).

The evidence does not reveal who damaged the union and personal property. The damage was not done when the office was cleaned between 8 and 8:30 the evening before, and the night porter was not aware of anyone else being in the building between then and midnight, when he left the building (R. Exh. 4, Tr. 328). President Young testified: "I thought Betty did it herself . . . . Because I know I did not do it. . . . I know that it was not me. And I know that I did not instruct anybody to do some stupid childish thing like that . . . . I did not burn her flag, or instruct anybody to do it. (Tr. 375, 393–394, 412.)

Contrary to the Union's contention in its brief that the evidence is overwhelming "that Murphy" "committed the damage herself," I find both that she did not do the damage and that the Union did not in good faith believe that she did when discharging her.

D. *Alleged Coercion Against Steward*

1. Written warning and threat of reprisal

At quitting time Wednesday, June 10, Secretary-Treasurer Rosmini called Murphy to his office and gave her a warning letter signed by President Young (G.C. Exh. 4), notifying her that "any further display of insubordination or belligerent behavior . . . such as you exhibited in my office on June 9, 1981, will result in suspension and/or discharge." She first asked Rosmini what Young meant by "insubordination," and he replied that he did not know. Then, as she credibly testified (Tr. 40–41),

> A. I said "What seems to be Mr. Young's problem? Has he said anything to you?" And he said Mr. Young said he was going to make an example of you, that nobody would ever strike against him again.

Rosmini did not specifically deny telling her this. He claimed that when she asked how she was insubordinate, he explained that she failed to follow Young's instructions by not leaving his office and was "loud and boisterous" (Tr. 180).

The evidence is clear that President Young and Steward Murphy had a heated argument June 9 in Young's office, and that she insisted on a retraction of his strike publicity statement that the office employees were getting overtime because they missed so much time during the year. As found above, she credibly testified that when he asked, "Are you telling me how to run his office?" she said, "No, Mr. Young, but I think you should print the truth." (That was when he ordered her out and pulled her arm, injuring it.) The evidence is also clear that she was in the office longer than the 5 minutes she recalled and that she did not remember the full conversation.

I credit part of Young's testimony about what occurred. He testified that Murphy stated she felt the pub-

lished letter "was against the understanding that we had after the strike [the amnesty clause attached to the agreement], that there would be no retaliation." He gave her a long explanation about why his strike publicity letter was printed in the Union's newspaper after the strike was settled "And she did not even listen. She just kept looking up in the air . . . staring at the ceiling." (Tr. 359.) (This testimony tends to account for her failure to recall part of the conversation.)

I find, however, that his denials that he even touched her and his claim that she referred to his morality in the June 9 meeting were fabricated. According to the Union's brief, she suggested "that the Union President was promiscuously involved with two other women employed by respondent," by making a remark that Young interpreted "as a suggestion that he was having sexual relations with these female employees," and that she made another remark that Young interpreted "as a threat by Ms. Murphy to call his wife and tell her that he was having an illicit affair with Pat Scarrelli and Jackie McPeak." The brief argues that this and other conduct were "so provocative and improper as to clearly warrant her dismissal." Yet the warning letter the next day mentioned only her purported "insubordination or belligerent behavior." Even if Secretary-Treasurer Rosmini's testimony were credited that on June 10, Rosmini gave Murphy an explanation of the warning letter, he merely claimed that he told her she "failed to follow instructions by not leaving [Young's] office, and that she was acting *loud and boisterous* (Tr. 180, emphasis added). (The Union's brief misstates the record in contending that Rosmini referred to her loud and "abusive" conduct toward Young.) Although some of Young's testimony was corroborated by his secretary, Janice Pinti (who witnessed office boy Spellane's obviously inaccurate statement about the June 10 property destruction), she did not impress me as being a credible witness.

Moreover, even assuming that in their June 9 meeting on union business, Steward Murphy made the statements that President Young claimed, I find that the statements would not have been so opprobrious to be unprotected. According to him, she stated that "the only people that you listen to are Pat Scarrelli and Jackie McPeak . . . . You hate me because I am Irish . . . . Is your wife going to be home tonight?" (Tr. 361–362.) (Although Murphy could not remember the entire conversation, she positively and credibly denied making these statements (Tr. 85–86).)

I note that in falsely denying that he even touched Murphy (contrary to her credited testimony that he gripped her arm twice), he gave testimony that undermined his claim that she was insubordinate by failing to follow instructions to leave the office. He testified (Tr. 362):

> I said, ". . . Come on, get out of the office, go see your union. We are finished with this conversation."
>
> I opened the door, and I asked her to leave. And she got up and left. I did not touch her. And that whole thing is absolutely ludicrous, those pictures [of her bruised arm], absolutely ludicrous.

The Union contends in its brief that "Even if this conversation is deemed to have involved protected activity, Ms. Murphy's conduct during that meeting far exceeded any reasonable bounds of propriety. When she did not succeed in her demand for a retraction, she berated and humiliated Mr. Young, suggested that he had a sexual liaison with two other employees, and made a statement that was interpreted clearly as a threat to call his wife and relay that false accusation. Under these circumstances, Mr. Young was justified in issuing the letter of reprimand . . . . Indeed, he would have been justified, under the circumstances, in meting out a much harsher form of discipline." The union brief does not reveal, if these were true facts, why this defense was reserved for the trial and not even alluded to at the time.

I find that Secretary-Treasurer Rosmini's June 10 statement to Steward Murphy that President Young "said he was going to make an example of you, that nobody would ever strike against him again" was a threat of reprisals for engaging in the protected concerted strike activity and violated Section 8(a)(1) of the Act.

In view of this finding and the above finding that the defense that Steward Murphy "berated and humiliated" the union president was fabricated, I reject the argument in the Union's brief that the June 10 warning letter "obviously had nothing whatsoever to do with the strike" and find that it was a reprisal for her leading the strike against the Union and for her engaging in protected concerted activity in the discussion of union business with President Young in the June 9 meeting, in violation of Section 8(a)(1).

2. More onerous working conditions

On June 11, the day after Steward Murphy received the warning letter, Organizing Director Hugo McKissic wrote an interoffice communication to secretary Renee Kelly, informing her that she was not to relieve anyone on the switchboard or in any other area "unless you get my personal approval." On June 12 Murphy, as shop steward, received a copy of the communication.

The complaint alleges that the Union, through McKissic, made telephone operator Murphy's working conditions more onerous "by refusing to permit other employees temporarily to relieve her from her duties."

McKissic, however, credibly testified that neither President Young nor Secretary-Treasurer Rosmini was aware that he was sending the communication and that it had no relationship to the June 9 and 10 incidents. I therefore agree with the Union that the communication was not issued in retaliation for Murphy's union activities and that the timing was purely coincidental.

Accordingly, I find that the allegation must be dismissed.

E. *Discharge of Office Employees' Steward*

1. Her claims for compensation

On Friday, June 12, Steward Murphy began taking treatments for her arm. On June 15, with Secretary-Treasurer Rosmini's permission, she began taking sick leave (without pay). She took treatments about every

other day (Tr. 46), and she was taking "a lot of Anacin" for the pain (Tr. 288). Toward the end of June, she began having stomach and other problems. She finally received a doctor's release dated July 20, stating that she was permitted to return to work July 27 on a full-time basis. Rosmini admitted that he had a conversation with her at least once a week (Tr. 234).

On June 22 one of Murphy's friends, Sister Gloria, handed Rosmini Murphy's workmen's compensation claim form that stated that Murphy was injured while meeting with President Young in his office (Tr. 135, 192). Murphy overheard Rosmini state, "I can't sign these. Wendell [Young] would never agree with it" (Tr. 133). According to Rosmini, he said "we" did not agree that Murphy was injured in Young's office, but said he told Sister Gloria that he would mail the claim to the carrier if the doctor filled out his part (Tr. 192). He admittedly advised that Murphy was entitled to file a claim on the health and welfare fund, which provides compensation for "two-thirds of pay" (Tr. 196).

On June 26, Rosmini sent Murphy some health and welfare fund forms. She submitted a disability claim that same day for "Personal injury sustained June while on the job in the President's Office" (G.C. Exh. 14). On July 2 the claims supervisor, with a copy to President Young, rejected the claim because it was work related (G.C. Exh. 13).

About August 18 (Tr. 195, 232), Steward Murphy again submitted a workmen's compensation claim form, which Rosmini this time sent in. On the form Murphy made the following assertions (G.C. Exh. 15):

> During conversation with [Pres.] Young, he became angry and gripped me by the arm, physically ejecting me from his office.
>
> . . . .
>
> Arm pulled out of socket affecting chest cavity.
>
> . . . .
>
> There has been great bitterness against me as shop steward in Seafarers International Union since a strike was launched against Mr. Young's Local last May 9, 1981 when our contract expired. The media attention it gained was a great embarrassment to him and our conversation that day was concerning a newspaper article he sent to the Daily News and printed in the Dialog.

Thus, in all three claims—her June 22 workmen's compensation claim (which Secretary-Treasurer Rosmini refused to send in), her June 26 disability claim, and her August 18 workmen's compensation claim (which she submitted shortly before her August 21 formal notice of termination)—she asserted that her injury was sustained on the job, in President Young's office.

Young was most concerned about this assertion (which I find to be truth). He testified (Tr. 385)

> A. One of the problems that we were having is what Betty was going to put on that form. . . . we told . . . the [SIU] . . . if she put on the form that I touched her . . . I was going to sue her, absolutely sue her.
>
> And I let that be known. And that is why we did not get any forms for a while. . . . she knew that I was waiting for that report to come in. And I was immediately going to go down and sue her for that incident.
>
> But we did not get a form. I called down to health and welfare. . . . and said all I want to do is review what she puts down for her sickness.

He was referring to the disability claim that she submitted June 26, asserting "Personal injury sustained while on the job in the President's office." He did not sue her but, according to the General Counsel, he in effect discharged her July 14 when he refused to let her work (although the formal notice of termination was not given her until August 21).

2. Her suspensions and notice of termination

On Monday, July 13, when Steward Murphy made her usual Monday morning telephone call to Secretary-Treasurer Rosmini to report her continued doctor's treatment, Rosmini told her (as she credibly testified), "Mr. Young said as soon as you are better—as soon as you get better, Betty, that you are fired" (Tr. 49, 139–140). According to Rosmini, he told her "she was going to be suspended" (Tr. 205).

The next day, July 14, in an apparent effort to retain her job, she reported to work despite her feeling "really sick" (Tr. 144). She clocked in, opened the switchboard, and started to work. About 9:15, President Young called in, recognized her voice, and told her, "Get off the board, Betty, and do what you are supposed to be doing" (Tr. 49). She left the board, went upstairs, and waited for Rosmini. When asked "what was I supposed to be doing," Rosmini "shook his shoulders" and later told her, "Get yourself well, Betty, get strong, and get a release from the doctor" (Tr. 50).

On July 27, Murphy returned to work with a doctor's release that read: "Ms. Betty Murphy is permitted to return to work on July 27, 1981, on a full-time basis. Ms. Murphy will be treated at our facilities during our evening hours" (G.C. Exh. 7). Rosmini directed her not to clock in and, after conferring with President Young (Tr. 211), gave her a letter stating "please be advised that you are being held out of service until we complete the appropriate investigation. Your recent absences and the facts and allegations surrounding them have raised certain serious questions which indicate that there may be reason requiring further action on our part" (G.C. Exh. 8). He admittedly refused to give her any explanation (Tr. 212).

On August 4, Rosmini sent Murphy a letter, advising her of an appointment on August 12 with a psychiatrist and a consulting psychologist. The letter explained (G.C. Exh. 9)

> A thorough consideration of all of the facts has convinced us that in order to make a responsible and informed decision [concerning her future employment], it will be necessary for us to receive a full psychiatric and psychological evaluation. This step is necessary for us to be advised whether there

> are mental health problems which would dictate that the resolution of your employment question be dealt with in that sphere.

On August 6, Rosmini wrote Murphy another letter, stating that the appointment was postponed until August 19. She contacted her union, which advised her to completely ignore the letters (Tr. 153). Instead, she telephoned the psychiatrist and told him she did not want to waste his time or the Local's money. Then on August 11, Rosmini wrote Murphy another letter, advising her that the appointment was not for treatment. "It is solely for the purpose of guiding us in determining what the appropriate action should be in response to your past conduct. You are obliged to keep the appointment." The letter warned, "A failure to do so will be dealt with as a deliberate and willful disregard of orders and intentional insubordination." (G.C. Exh. 11.) The SIU again advised their steward to ignore the letters, and she did, missing the appointment.

About August 18, as indicated above, Murphy submitted her workmen's compensation claim to the Union, asserting that President Young "became angry and gripped me by the arm, physically ejecting me from his office." On August 21, Rosmini sent her the formal notice of termination, explaining (G.C. Exh. 12)

> You were specifically instructed to appear for an examination on Wednesday, August 19, 1981. You were warned that a failure to appear would result in disciplinary action. Despite this warning, you did not appear and this offense coupled to all attendant circumstances presents just cause for discharge.

3. Shifting defenses

Secretary-Treasurer Rosmini, Steward Murphy's immediate supervisor who signed her August 21 termination notice, positively testified at the trial that there were three and only three reasons for her discharge. He listed them as "insubordination" (failure to appear for the psychiatric examination), her "conduct of June 10th" (burning the flag and destroying other property), and "making slanderous statements about Mr. Young" (claiming, and stating on her August 18 workmen's compensation form, that the union president on June 9 injured her arm). (Tr. 262–264.)

President Young, the Union's chief executive officer for 20 years, stated that he made the final decision to discharge Murphy (Tr. 353). He testified that his "initial reaction was to dismiss her because of that [June 10 flag-burning] incident" (Tr. 413), that he "spent almost literally the gosh damn summer, at least an hour or so a day, discussing this damn Betty Murphy situation" (Tr. 394), that the major reasons they had decided to hold her out of service were the June 10 flag burning and the accusation that he had injured her arm (Tr. 405), and that when Murphy did not make the psychiatric appointment, "that was the final straw that broke the camel's back. We notified her that she was dismissed." (Tr. 396).

Thus at the trial, Rosmini claimed that the accusation against Young, the June 10 incident, and the refusal of psychiatric examination were the sole reasons, and Young claimed they were the primary reasons, for Murphy's discharge. Young specifically denied that her discharge had "anything at all to do with her functioning as shop steward" (Tr. 354). Both Rosmini and Young claimed that the decision to discharge her was not made until after she refused the psychiatric examination, but admitted that they had previously decided not to let her return to work until their "investigation" was completed.

In light of the evidence at the trial, however, these three purported reasons for the discharge were obviously suspect. One claim was that the Union was discharging the office employee shop steward for asserting that the union president injured her arm when ejecting her from his office, despite the evidence that her assertion was true. Another claim was that the Union believed, after a perfunctory investigation, that the steward herself burned her own flag and smashed two of her own valued pictures at starting time, despite the evidence indicating that the Union did not in good faith have that belief. The third claim was that the Union discharged the SIU steward for insubordination when she refused to obey a demeaning order to take a psychiatric examination for a possible mental problem—which the Union contended it suspected she had primarily because she asserted (truthfully, as found above) that the union president injured her arm and because she destroyed her own property (something, as found, she did not do).

In its brief, the Union listed other purported "major factors" involved in the Union's ultimate decision to terminate Murphy's employment (as well as its decision to seek a psychiatric evaluation). The first two were purported reasons that neither Rosmini nor Young claimed as a basis for the discharge. They were Murphy's "suggesting that the Union President was promiscuously involved with two other women employed by respondent" (found above to be a fabrication) and her "threatening to call the Union President's wife to report on the alleged illicit affairs if the Union President did not accede to Ms. Murphy's demands for a retraction of a newspaper article" (also found to be a fabrication).

Some of the other purported "major factors," contended in the brief but not claimed by either Rosmini or Young to be a basis for the discharge, were "blaming the mischief [destroying property June 10] on unspecified 'others' in the Union office" (something she did not do); "reporting to work on three consecutive days [June 10-12] and spending most of her time in the office lying on a couch in the ladies' lounge" (failing to point out that she did so with Rosmini's permission); and "reporting off sick for a period of six weeks and offering contradictory reasons concerning the nature of her alleged illness" (a clear pretext).

I find that these shifting defenses—particularly the first two purported "major factors"—detract from rather than bolster the Union's defense that it was lawfully motivated.

4. Concluding findings on discharge

After weighing all the evidence, I find that this is a bizarre case in which a local union president, seeking a mechanism to discharge a suspended office employee

shop steward for her protected concerted activity, ordered her to submit to a psychiatric evaluation as a condition of employment and discharged her when she refused to comply with the demeaning order.

In its brief, the Union contends that it could have discharged SIU Shop Steward Murphy "immediately after the June 10 property destruction incident" and could have discharged her "following the false accusation against President Young," but that "she was a long-term employee, a virtual fixture in the office," and although she had engaged in this "serious misconduct," the Union decided it "should first attempt to determine whether her problem was due to emotional or mental distress" by requiring her to take the psychiatric evaluation.

To the contrary, as found, Murphy did not engage in the June 10 property destruction, the Union did not have a good-faith belief that she did and, in fact, ordered the perfunctory investigation to discover some pretext for discharging the SIU steward who had embarrassed President Young by her protected concerted strike activity. Also, as found, Murphy's accusation against Young was true; he had injured her arm in the June 9 meeting when she, as shop steward, was engaging in protected concerted activity.

I agree with the General Counsel that before July 14, when President Young suspended Murphy from work by ordering her off the switchboard, the Union had already decided to terminate her "and was only attempting by further investigation and delay to find some basis or mechanism—the psychiatric evaluation—to achieve this end."

I therefore reject the Union's contention that "Not one action taken against [SIU Shop Steward Murphy] had any relationship to her functioning as shop steward or her participating in the strike," and its contention that even if President Young acted in "retaliation for her strike activities . . . a discharge would have been proper, and occurred, even absent such a hostile motivation." I find that the Union unlawfully discharged her for engaging in protected concerted activity during and after the strike in violation of Section 8(a)(1) of the Act and that, as alleged in the complaint, she was in fact discharged July 14, after which the Union refused to permit her to work. (I find it unnecessary to rule whether the discharge also violated Section 8(a)(3).)

I also find that the Union required Shop Steward Murphy to undergo a psychiatric and psychological examination August 19 as a condition of employment, to provide a pretext to discharge her for engaging in protected concerted activity, further violating Section 8(a)(1).

CONCLUSIONS OF LAW

1. By discharging Elizabeth Murphy July 14, 1981, for engaging in protected concerted activity, the Union engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing SIU Shop Steward Murphy a warning letter in reprisal for her engaging in protected concerted activity, the Union violated Section 8(a)(1).

3. By threatening the shop steward with reprisals for engaging in protected concerted strike activity, the Union violated Section 8(a)(1).

4. By requiring the shop steward to undergo a psychiatric and psychological examination as a condition of employment, to provide a pretext to discharge the shop steward, the Union further violated Section 8(a)(1).

5. The Union did not make the shop steward's working conditions more onerous in reprisal for her protected concerted activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, United Food and Commercial Workers International Union, Local 1357, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging or disciplining any employee for engaging in protected concerted activity.

(b) Issuing any employee a warning letter in reprisal for engaging in protected concerted activity.

(c) Threatening any employee with reprisals for engaging in protected concerted strike activity.

(d) Requiring any employee to undergo a psychiatric or psychological examination as a condition of employment, to provide a pretext for discharging the employee.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Elizabeth Murphy immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of her discharge, in the manner set forth in the remedy section of the decision.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Remove from its files any reference to the unlawful discharge and to the June 10, 1981 warning letter and notify the employee in writing that this has been done and that the discharge and warning letter will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its union offices in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees arecustomarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Walker Boat Yard, Inc. *and* District 2, Marine Engineers Beneficial Association, Associated Maritime Officers, AFL–CIO, Petitioner. Case 9–RC–14191

14 December 1984

DECISION ON REVIEW

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 16 February 1983[1] the Regional Director for Region 9 issued a Decision and Direction of Election in this proceeding.[2] Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review.

By telegraphic order dated 15 April 1983 the Board granted the Petitioner's request for review on the unit issue. The election was stayed pending decision on review.[3] The Employer filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the entire record, including the submissions of the parties in this case, and has decided to affirm the Decision and Direction of Election by the Regional Director for the following reasons.

The Employer is a Kentucky corporation primarily engaged in the repair and overhaul of boats and barges. The Employer's repair operations are conducted in the Walker Boat Yard facility (the boatyard), a self-contained compound located on the banks of the Tennessee River in Paducah, Kentucky.

Encompassed within the boatyard is the drydock area, machine shop, diesel engine shop, and electrical shop. Each is located within several hundred feet of the other. The drydock is an open area along the river with the electrical shop adjacent to it. The machine shop and diesel shop are located in separate buildings.

The Employer's boatyard business is a functionally integrated operation with a significant level of interdependence between employees assigned to various repair functions. Normally boats are docked for repairs alongside the boatyard on the river and the employees work together to repair the vessel.[4] The drydock employees repair the hull or bottoms of the boats. Diesel shop employees repair, maintain, and overhaul or rebuild the boat engines. The machine shop employees resurface or reshape salvageable engine parts used by the diesel shop employees. The machine shop employees also work on parts of the tail and rudder shafts. The electrical shop employees perform electrical work, including disconnecting and rewiring the boat generators.

In preparing for their repair functions, the diesel shop employees and machine shop employees rely on the drydock employees for assistance. Thus, if an engine must be removed from the boat for repairs, the drydock employees may operate cranes to perform this task. Other drydock employees may assist in the removal process and in the transporting of the engine to the diesel shop. Drydock employees also may be called on to cut away obstructions which block the diesel shop employees' access to the engines to be repaired. Machine shop employees are assisted by the drydock employees when removing shafts and propellers from boats for repair in the machine shop.

We find therefore, in agreement with the Regional Director, that in the context of the overall boatyard operation, the work of the diesel shop employees is not functionally distinct.[5] Rather, we conclude that the diesel shop employees' work is necessarily integrated with and dependent on work performed by other boatyard employees in the unit found appropriate by the Regional Director.

The bargaining history here further supports the inclusion of the diesel employees in the broader unit found appropriate. The unit employees have been covered by a series of collective-bargaining agreements dating back to 1968, except for a brief period from 1969 to 1972.[6] The earlier agreements

[1] Plant Bargaining Committee for the Employees of the Dry Docks and Repair Operations, for Walker Boat Yard, Inc. was allowed to intervene in this proceeding.

[2] The unit found appropriate by the Regional Director consists of: all production and maintenance employees, including all dry dock, machine shop, diesel repair and electrical shop employees employed by the Employer at its Paducah, Kentucky facility, excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act. The Petitioner by its petition sought to represent a unit limited to approximately 11 employees, including all mechanics, mechanics helpers, and diesel repairmen employed by the diesel repair division at the Employer's Paducah, Kentucky facility. Alternatively, the Petitioner indicated its willingness to proceed to an election in any unit found appropriate. The Employer and Intervenor contended that only an overall unit of the diesel shop, machine shop, electrical shop, and drydock employees was appropriate.

[3] The Board denied the Employer's request for review of the Regional Director's finding that there is no contract bar to the filing of this petition.

[4] Boats may also be raised out of the water or "dry docked" to be repaired.

[5] While our dissenting colleague notes that there is no interchange of function between the diesel shop employees and the other unit employees, it is quite clear from the record that the diesel shop employees could not perform significant parts of their work without the assistance of the drydock and machine shop employees. Although the diesel shop employees are primarily concerned with repair and overhaul of the diesel engines, they rely on the work of the machinists and on others in successfully carrying out the overall functions of the Employer's boatyard.

[6] As found by the Regional Director the bargaining unit was represented by the UAW in 1968 and 1969 and encompassed all hourly em-

Continued

with the Intervenor made specific reference to diesel engine mechanics, while the latter agreements contained wage levels for "mechanics." Various provisions make reference to all "employees" and it is undisputed that the contractual benefits for vacation, holidays, and insurance coverage are received by all employees.[7]

In view of the foregoing, and based on the record as a whole, we conclude that the Regional Director's finding that the diesel shop employees lack a sufficient separate community of interest to justify separate representation must be affirmed.[8]

Accordingly, the Decision and Direction of Election is affirmed.

The case is remanded to the Regional Director for Region 9 for the purpose of conducting an election pursuant to his Decision and Direction of Election.[9] Those eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of the issuance of this Decision on Review.[10]

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I do not find the Employer's Walker Boat Yard (the boatyard), including a drydock area, machine shop, diesel repair shop, and electrical shop, to constitute a functionally integrated operation with such a significant degree of interdependence between employees as to render inappropriate the separate diesel repair shop unit sought by the Petitioner. Accordingly, on the facts discussed below, I would reverse the Regional Director and direct an election in the petitioned-for diesel repair shop unit.

The diesel repair shop was identified by the parties at the hearing as a separate department. It is physically situated in a separate building located in the boatyard compound. Its employees, including mechanics, mechanics helpers, and diesel repairmen, are separately supervised by the diesel department manager and two supervisory foremen. Diesel department employees are specially trained to repair diesel engines. They are the only employees of the Employer who repair, maintain, overhaul, and rebuild diesel and other engines for the Employer and its customers, including diesel engine manufacturers for whom diesel department employees do warranty work. They spend most of their time working on engines aboard boats in drydock, but do more serious repairs in the diesel shop. They also travel to vehicles broken down on the road or at construction sites, and go on board ships traveling upriver to do engine repairs. The diesel department repairs most parts itself, sends others out to a local contractor, and sends limited types of parts to the machine shop for resurfacing. The diesel department at times engages drydock employees to perform major welding and cut away work on drydocked vessels. The record does not clearly establish that the diesel department's reliance on other segments of the Employer's operation is regular or substantial. In addition, there is no evidence of employee transfer.

As to terms and conditions of employment, the record establishes that diesel department employees work a day shift, while the drydock and machine shop employees work both a day and afternoon shift. Diesel department employees punch a separate timeclock, wear distinct uniforms, have a separate lunch area (as do the other departments), and have their own Christmas party. All employees are paid out of the same payroll. Insurance and leave benefits are uniform. Seniority is supposedly companywide, but no instance of its application exists on the record. Diesel department employees' wages, discussed in detail infra, are 8 to 10 percent higher than those of drydock employees and comparable to those of machine shop employees.

The majority finds that the similarities in terms and conditions of employment between the various departments of the Employer are the product of a series of collective-bargaining agreements covering all of the Employer's employees, including those in the diesel department, and that any deviation from the contractually proscribed terms with respect to the diesel department is not indicative of the fact that the diesel department should not be part of the broader unit they find appropriate. The facts which

---

ployees, including those in the diesel shop. In 1972 the Employer recognized the Intervenor and since then has executed a series of agreements, all of which, in our view, covered the overall unit including mechanics, a classification which embraces the sought diesel shop employees.

[7] While the record shows that the wage schedules have not always been followed for diesel mechanics and that some discretion in this area has been left to the diesel shop manager, it is clear that diesel as well as machine shop employees enjoy wages that are 8 to 10 percent higher than those received by drydock employees. This divergence from the contractual rates does not, in our opinion, demonstrate that they have not been part of the contractual bargaining history.

[8] Since we, contrary to our dissenting colleague, have found that the series of collective-bargaining agreements did not exclude the diesel shop employees from coverage, we view the Petitioner's request for a separate unit of diesel shop employees as a petition for severance. In addition to the factors enumerated above, severance is further unwarranted in view of the Regional Director's finding that the diesel shop employees' skills are not sufficiently specialized to justify the establishment of a separate craft unit. Moreover, despite the limited contractual variances applicable to the diesel shop employees noted in the dissent, the long bargaining history on a yard-wide basis favors inclusion of these employees in the broad historical unit found appropriate by the Regional Director rather than the narrow petitioned-for unit. *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). In agreeing with his colleagues that the employees sought here are not severable as a separate craft unit, Member Hunter does not endorse *Mallinckrodt Chemical Works*, supra, in its entirety.

[9] As indicated in the Regional Director's decision, further processing of this case to an election is contingent on the Petitioner submitting an additional showing of interest for the unit found appropriate. Accordingly, the Petitioner must submit a sufficient showing of interest within 10 days of this decision or the petition will be dismissed, absent withdrawal.

[10] [*Excelsior* footnote omitted from publication].

follow, however, show that for some time the diesel department has not been treated as covered by any collective-bargaining agreement.[1] The absence of such coverage, while all other boatyard departments are covered by the contract, further supports a finding that a separate diesel department unit is appropriate.

In 1968, the United Auto Workers (UAW) was certified by the Board as the representative of a unit of all production and maintenance employees in the boatyard. A contract of approximately 1 year was executed, but shortly before its expiration the UAW went on strike. In 1969, the UAW disclaimed interest in representing the boatyard employees. In 1972, the Employer voluntarily recognized the Intervenor.[2] A series of four similar collective-bargaining agreements between the Employer and the Intervenor followed, the latest expiring on 1 July 1982. The contracts contain no recognition clause describing the bargaining unit, and while many benefit provisions, by their terms, apply to "employees" generally, noticeably absent from both the 1976 and 1979 agreements are earlier included references to "diesel engine mechanics." The wage scale included is one for mechanics, grades 1 through 6. But, any argument that this reference to mechanics is an abbreviation for the diesel engine mechanic classification is undermined by the Employer's testimony that all employees are classified as "mechanics."

Beyond the Employer's own admission that the contractual wage schedule and increase provisions have not always been followed to set the wages of diesel department employees, there is evidence that diesel department wages are set directly by the diesel department manager. This may explain why several in the department receive wages at or above the contractual maximum even though they do not possess the contractually enumerated skills of fitting, burning, and welding requisite to receiving such high wages. Further, the Employer's claim that the contractual wage scale represents the minimum to be paid diesel department employees, and is to be supplemented by unspecified merit increases and increases to keep department employees 10 cents above local "like-type" industry, is totally unsubstantiated.

Other provisions also indicate that the contract was not designed to apply to diesel department employees. Thus, the contract provides for three shifts, the first to run from 6 a.m. to 2:30 p.m.—the diesel department works one shift beginning at 7 a.m. and ending at 3:30 p.m. There is no evidence that the companywide seniority provision has ever been applied. The contract provides for a committeeman to serve the entire Company, but the designated individual never solicited the views of diesel department employees concerning proposals in advance of contract negotiations and has not been involved in diesel department grievance meetings. Also significant is the fact that diesel department employees were never involved in contract negotiations or ratification of the latest contract.

In sum, considering the Employer's identification of the diesel department as a separate department; the separate supervision; the distinct job functions of the diesel department employees; the lack of employee interchange between diesel department employees and other yard operations; and the limited applicability of the collective-bargaining agreement to diesel department employees evidenced in part by their many different terms and conditions of employment, I conclude that the diesel department constitutes an identifiable and homogeneous group with a community of interest separate and distinct from other boatyard employees.[3] Accordingly, I find that the diesel department constitutes a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

[1] The Board denied the Employer's request for review of the Regional Director's finding that there is no contract bar to the filing of this petition.

[2] See *Walker's Fuel & Service Co.*, 208 NLRB 158 (1974).

[3] In view of my conclusion that the terms and conditions of employment enjoyed by diesel shop employees have not been determined by collective bargaining for the broader unit, I do not view this as a severance case which would be controlled by application of the criteria of *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).

Borman, Inc. *and* Michael Domke *and* Jerry Bliss.
Cases 7–CA–22182 and 7–CA–21795

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 6 June 1984 Administrative Law Judge Thomas A. Ricci issued the attached decision. The Charging Parties filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order.

The Charging Parties and the General Counsel except to the administrative law judge's credibility resolutions based on certain factual misstatements made by the judge and the judge's failure to discuss certain relevant testimony. We have reviewed the decision in light of the record evidence and the General Counsel's and Charging Parties' contentions and make the following factual corrections.

1. The judge found that 5 days prior to the arbitration of employee John Montiero's grievance, Charging Party Michael Domke had a conversation with Supervisor Willie White regarding Domke's participation in the arbitration. However, the record reveals that Domke's conversation with White actually took place approximately 4-1/2 months prior to the arbitration. Additionally, the judge stated that Domke was given a written reprimand on 3 January 1983 for violating a company rule. Although the Respondent prepared a written reprimand for Domke, the discipline was never actually issued to him. Further, the judge was incorrect in stating that the General Counsel contended that this alleged 3 January reprimand was issued to Domke only to justify a reprimand previously issued to Domke.

In addition, the judge erroneously stated that the Respondent had a rule prohibiting employees and stewards from discussing union business during work time. The rule in fact allowed such discussions if permission was first obtained from the supervisor. Finally, the judge found that Charging Party Jerry Bliss had knowledge of the "punching out" rule based on the fact that he was a steward at the time employee Nelson Orr was reprimanded for violating the same rule. However, the record reveals that Bliss was not a steward at the time the reprimand was issued to Orr.[4]

Notwithstanding the aforementioned factual errors, we find that they are insufficient to overturn the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We are satisfied here that the judge's credibility resolutions are supported by the record, and thus no basis exists for disturbing them.[5]

2. The complaint alleges that the Respondent unlawfully threatened Bliss with discharge when it issued to him a written warning on 7 March 1983. The judge failed to rule on this allegation. The record reveals that subsequent to the 21 February 1983 discharge of Bliss, the Respondent on 4 March 1983 decided to reinstate him without backpay. On 7 March 1983 the Respondent sent a letter to Bliss explaining its reasons for reinstating him without backpay and notifying him that, with respect to the company's disciplinary procedure, any subsequent violation would warrant a discharge. The Charging Parties and the General Counsel contend this letter constituted a "new" discipline.

We disagree. Having concluded that the 21 February 1983 discharge was not unlawful, the Respondent was neither required to reinstate Bliss nor to provide backpay for the period between the discharge and the reinstatement. We therefore conclude that the reasons given for reinstatement with-

[1] Both the General Counsel and the Charging Parties contend that the judge's interpretation of the evidence and his credibility findings showed bias and prejudice against them. Upon careful examination of the administrative law judge's decision and the entire record, we are satisfied that the contentions of the General Counsel and the Charging Parties in this regard are without merit.

[2] In agreeing with the judge that the Respondent lawfully and uniformly enforced against Bliss its prohibition against unauthorized entry into unassigned buildings, we do not rely on the mere existence of the posted notice prohibiting such activity but rather on the credited testimony that the Respondent similarly disciplined other employees who violated this rule.

[3] The judge specifically noted that Teamsters Local 337, the employees' bargaining representative, did not participate in this case, concluding that if the Union believed the Respondent had engaged in unlawful conduct, the Union "would have been present to correct the wrong." We draw no conclusions from the Union's absence and disavow the judge's remarks in this regard.

[4] Bliss did have knowledge of the rule, however, based on his testimony admitting that a "punching out" rule existed.

[5] The General Counsel and Charging Parties further assert in their briefs that the judge erred in "ignoring" certain testimony which conflicted with his findings. As the Board stated in *Walker's*, 159 NLRB 1159, 1161 (1966), "The failure of [an administrative law judge] to detail completely all conflicts in the evidence does not mean . . . that this conflicting evidence was not considered."

out backpay were not unlawful and the Respondent lawfully advised Bliss that any subsequent violation of company policy would lead to discharge. Therefore, we find no "new" discipline was issued and, accordingly, we dismiss this allegation of the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held at Detroit, Michigan, on April 4, 5, and 6, 1984, on complaint issued by the General Counsel against Borman, Inc. (the Respondent or the Company). The complaint issued on March 2, 1984, based on separate charges filed on February 24, 1983, and on June 1, 1983, by Jerry Bliss and Michael Domke, respectively (the Charging Parties). The issues presented are whether the Respondent discriminatorily applied and enforced its work rules against the Charging Parties in order to retaliate against them for exercising protected concerted activities, in violation of Section 8(a)(1) and (3) of the statute. Briefs were filed by the General Counsel and the Respondent.[1]

On the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

This Company, a State of Michigan corporation, is engaged in the retail sale and distribution of groceries, meats, produce, and related products, and has its principal office and place of business in Detroit, Michigan. During the 12-month period ending December 31, 1982, and December 31, 1983, representative periods, its gross revenues from all sources exceeded $500,000, and in the course of its business it purchased and caused to be transported and delivered to its Michigan facilities foods and other products valued in excess of $50,000 which were transported and delivered to its facilities from out-of-state sources. I find that the Respondent is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[1] A posthearing motion by the General Counsel to strike the Respondent's brief or to reopen the record is denied.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Picture of the Case*

The background of this case tells a revealing story. Among the 600 to 700 employees working in this Company's warehouse and food distribution center, about 400 have long been represented by Local 337 of the Teamsters International Union. In 1979 and earlier, there developed a movement among its members to combat the policies and practices of the officers and elected officials of the Teamsters, to protest what was called undemocratic action by the Union as such. The very vocal dissidents in this Company joined forces with like complainers, both members of Local 337 and of other locals of the International Union, working in other companies, including employees of competitors of this Respondent in the Detroit area, such as the A & P and the Kroger stores. In fact, there came into being an organization called Teamsters for Democratic Union (TDU), formed for the purpose of changing the practices of the Teamsters Union as a whole, to make it more democratic and more sensitive to the needs and desires of its members. This internal dissension within the Teamsters was widely publicized, the TDU printing a periodical called "Rank and File Speaks," and distributed widely. There were meetings and discussions everywhere. One of the activists, a man named Jerry Bliss, involved in this very case, was even scheduled to testify before the United States Senate Labor Committee on labor racketeering. The other Charging Party, Michael Domke, was equally active in distributing TDU literature throughout the plant.

What brought about the complaint in this proceeding was something that happened in this Company's plant in March 1982. Its contract with Teamsters Local 337 was due to expire in October 1982. In March the Company proposed to the Union extension of the contract for a further fixed period of years, with all wages to remain as they were in March 1982. Whether this meant withholding of raises due on the unexpired contract, I do not know. But clearly it meant no increase in wages throughout the period of the new contract to take effect in October 1982. The witnesses for the General Counsel, all dissidents and members of TDU, referred to the proposal of the Company, eventually accepted by Local 337, as the "concessions." There was a great to-do among the employees, whether to accept the Union's approval recommendation. In a first vote the employees refused to ratify the agreement. A second vote, in March, they agreed, and the contract was extended accordingly, as the Company desired.

There is also repeated testimony by the employee witnesses that about the same time—starting late in 1981—the Company began a "speed up" system, aimed at getting more work from the employees. Although the Respondent's officers did say that due to economic necessity—especially the pressure of competition in the area—it had no choice but to get more efficient performance from its employees and keep its expenses down, they took issue with the phrase "speed-up." In any event, that development—the "speed up"—plus the so-called con-

cessions which precluded all raises for quite a period, served to generate an even greater friction between the dissident members and their duly elected union officials.

The essential question presented here is whether the Company, in enforcing its work rules against the two principal activists in that TDU movement, was motivated by a desire to squelch the dissident movement which went counter to its economic position—or merely applying work rules agreed to by the collective-bargaining agent, which certainly was the Employer's right.

A number of disciplinary warnings were issued, two men were discharged, and other steps taken in keeping with the work rules. Grievances were filed, some were settled at one step or another, and some went to arbitration according to the Union's contract. The officers and business agents of the Union participated in all these grievance steps, winning a number of them to the advantage of the employees. There is no charge that the Union ever failed in its duty fairly to represent all the employees. What I think is the main allegation of the General Counsel now is that Jerry Bliss, the big TDU activist, was unlawfully discharged in February 1983. When Bliss' grievance was discussed at the first step of the grievance procedure, only 2 weeks after his dismissal, the Union persuaded the Company to reinstate him, and he did get his job back. The Company nevertheless refused to pay him for the time off he had lost—9 days' pay. With the Union still pressing his grievance and preparing for the next step in the grievance procedure, Bliss voluntarily withdrew his grievance, and came to the National Labor Relations Board instead, with the hope of having a better chance here of getting his 9 days' pay.

A very significant aspect of this case must be kept in mind at this point. The Union, Local 337, did not participate in this hearing. It entered no appearance and none of its officers came to the hearing. This means that in the opinion of the Union—i.e., its elected officials, for they are the ones who speak for the Union, and not a disagreeing minority—there was nothing wrong in any of the warnings, criticisms, or even suspensions imposed by management. Were the Union itself of the opinion that this employer violated the statute in its treatment of its members, surely it would have been present to correct that wrong. Whenever an employee chose to file a grievance, the regular union officials did their best to win it. Not once, insofar as this record shows, has it failed to represent all as was its duty. And if it did not go to arbitration over the 9 days lost by its principal critic, it was only because he, Bliss, chose to withdraw his grievance.

In sum, what emerges from all this is a dispute between the Union and some of its members on the question of how the employees should be treated by their employer. As will appear below, there were even instances where the employee felt he had a right to arrange his own understanding with the Company as to what his "conditions of employment" should be, to use a classic phrase. Indeed, as to what work rules should or should not apply, these particular employees had their own ideas, and never mind either the precise terms of the exclusive collective-bargaining agreement or the regularly posted work rules entirely acceptable to the exclusive bargaining agent.

B. *The Facts of Record*

1. Jerry Bliss

There is a marked question of credibility running through the entire record, the General Counsel's witnesses (all employees), giving the straight lie to the Respondent's witnesses (all management representatives). As stated, the main witnesses for the prosecution were Bliss and Domke, both stewards most of the time during their employment. Again and again the question was whether the employees were or were not permitted certain liberties in the course of their employment, the employees insisting they were always free to do this or that, to move from building to building throughout the very large work area without having to clear with their supervisors, to talk instead of working during their work hours, to use the public telephone at will, etc. Against all this, the supervisors testified there were rules governing what liberties could be taken during work hours, restrictions upon leaving the work area without signing out on the timecard, or going from building to building in the vast property without permission of supervisors. A number of oral warnings, written reprimands, and suspensions are listed in the complaint as having been caused by the employer's desire to curtail the concerted movement among some of the employees to push the cause of the TDU. In some instances the employee involved denied having committed the offense for which he was criticized; at other times he defended on the ground there was no such rule as the supervisor at the moment said he was enforcing. In most instances, the question was the latter.

Sometimes credibility resolutions turn on what is called the demeanor of the witnesses, evasive answers to direct questions, refusals to reply, arguments in response to straight inquiries, etc. Sometimes the disagreement between the witnesses is put at rest by objective evidence as to which there is no question—documents, admissions, logical inferences that are inescapable. In this case, both of these elements come into play. If ever there was a case in which the credibility resolution is put at rest beyond question by both the demeanor of the witnesses and objective evidence, this is it. I cannot credit the employees against their supervisors where they are contradicted on this record.

One of the incidents of which the witnesses spoke at length will make the point very clear. In fact it involves the principal allegation in the complaint. In consequence of a general laxity in the enforcement of work rules before the concessions demanded and won from the Union in early 1982, and, of course, as part of its policy to "speed up" the work and increase the efficiency of its entire operation, on August 9, 1982, the Company posted a notice which, admittedly, came to the attention of all the employees. It reads as follows:

> Employees will *not* be permitted to enter buildings they are *not* assigned to work in without the express approval of their supervisor. (This includes all lunchrooms and restrooms.)

> Needless to say, this policy is in effect during *both* working hours and non-working hours.
>
> Violation of this policy will result in disciplinary action up to and including discharge.

On February 21, 1983, Bliss, the steward, left the grocery warehouse, where he worked, during his lunch hour and went to the produce warehouse, and distributed TDU literature among those employees. This grocery warehouse is a very large place, where 260 employees work, coming in different shifts starting at various hours throughout the day. They stack large amounts of food for the Respondent's 83 retail stores, move it about as ordered, take it on carts to many docks, and load trucks continuously throughout the day. There is a lunchroom there for their use and, as the shifts keep changing, there are very different lunch periods and break periods throughout the day. The produce warehouse is also a large building, with about 120 employees. Bliss admitted he did not punch his timecard when leaving his assigned building during his lunch hour, and did not ask permission of any supervisor to enter the produce warehouse, both actions violative of established work rules. He was given a written reprimand notice for the first offense, and a reprimand notice reading "Suspension pending advisability of discharge" for the second offense. In the office, when being given those two reprimands, Bliss denied having done anything wrong, insisting he had not violated any rules of conduct on the job. Confronted with the August 1982 notice, his argument became more clear. His position was, as he repeated at the hearing a year later, that the rule did not apply to him. And to prove his assertion he produced a letter written in 1979 by the lawyer for the TDU to the Company, and the Company's response at the time. The TDU lawyer wrote to the Respondent about employees rights to distribute literature on company property and warning it against commission of possible unfair labor practices for interfering with such rights. In response the Company had written to her that it intended to abide by the law as written and as interpreted by court decisions.

This attitude by Bliss, reflected throughout his testimony at the hearing, shows clearly a pervasive intent to change the facts, to put the Employer in a bad light and to further his disagreement with how his Union, Local 337, chooses to carry on its bargaining authority vis a vis the Respondent. There is no contention by the General Counsel that the rule of conduct, as posted in August 1982, was improper, or illegal in any way. Certainly even in the opinion of the Union, it conformed with the terms of the written collective-bargaining agreement. The contract contains the following provision:

> The employer shall have the right to establish reasonable rules and regulations and penalties for their violations; provided such rules and regulations and penalties are first approved by the Union.

At the hearing Bliss said he had always, before February 1983, gone from building to building to distribute his literature. How can I believe him with the posted notice so clearly prohibiting such action? Significantly, he also admitted, in agreement with the manager's testimony, that he had always been granted permission, when he asked for it, to go into the produce department to give out his TDU literature. What better proof than this that the Company was not opposed to what he was doing provided he conformed with the rules? Had the supervisors been instructed, as the employee witnesses kept arguing, to put a stop to the TDU activity, management would surely have denied such request, as the Company had a right to do under the rules.

Only 2 months before his reprimand for leaving his assigned building without clocking out, another man, Orr, was given a written reprimand for exactly the very same rule violation. That notice bears the signature of a union steward; Bliss was a steward and he therefore certainly knew the rule was being enforced. For him to say at the hearing, as he did several times, that he always left the building without clocking out—implying, although not proving, that any supervisors saw him do that—marks Bliss as an absolutely discredited witness. For sure the August 1982 posted notice, and the reprimand given Orr 10 days before Bliss got his, are all the affirmative defense needed by the Respondent. Bliss may be living in a dream world, but that he was lying as a witness is a fact. Wherever he is contradicted by a management witness, I do not believe a word out of his mouth.

Instead of arguing that the rule against entering another building without permission was improper, the General Counsel contended that the reason it was enforced against Bliss was because of his pro-TDU activity. But the proof is no more than his assertion. The answer to the question of permission whenever he asked for it is enough to wash that argument away completely. But there is more. When Bliss filed a grievance over the discharge which immediately followed, the Union went to bat, and at the first-step discussion won his job back for him. The Company could not have been so adamantly opposed to the man's activities if it yielded so quickly. The Union was prepared to take the matter further, and get him his 9 days' pay. It was Bliss who chose to withdraw the grievance instead. This was Bliss fighting the Teamsters, not the Respondent.

I find that the discharge of this man in February 1983 was not an unfair labor practice. An employee is not immune from discipline for an admitted violation of the work rules merely because he is engaged in concerted activity, whether in favor of a regular labor organization, or to further a disruption within that union. At the hearing the Respondent did not move to defer this issue to arbitration, as the contract called for. Had it done so, its motion would have been a perfectly good one. I therefore do not pass on the question whether, under the circumstances of this case, *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), applies.

But the General Counsel's stated reason why this man could not be deferred only sheds further light on the case as a whole. She offered to prove that the Union—again, that is, the duly elected officials who run the Union—do not like this man, Bliss, and his intimates, and that the reason is because he, and his friends, are very active in the TDU movement. She may be right; I do

not know. But the fact is, like them or not like them, the Union always stood by them as any union does when any of its members get into trouble with the boss. It always represented them and did its best to protect their interest, as it was prepared to go to arbitration in Bliss' discharge. The real quarrel here, therefore, is not between the Charging Parties—Bliss and Domke—and the Respondent, the true nature of any complaint case before the Board. It is, instead, a quarrel between the TDU—represented by Bliss and Domke and the TDU lawyer, Thompson—and Local 337, or the entire Teamsters International. That dispute came to a head in this particular company when the Union gave the concessions in 1982, and when the Company instituted its "speed up" system at about the same time. And in order to create the impression that the dispute is with the Company instead, the witnesses kept talking about the employer's enforcement of the rules which implemented the concessions and the "speed up" as improper, not because it was not nice to get the Union's approval, but because the National Labor Relations Act was violated!

2. Michael Domke

Considering the testimony of Steward Domke in his entirety, he appears even a less credible witness than Bliss. He kept changing his answers as he went along, he evaded coherent replies again and again, he argued the correctness of his factual assertions when asked to speak instead of what happened. And, equally revealing, his testimony was at odds with unquestionable facts. A few examples will suffice.

Respondent has a rule that when an employee is supposed to be working he may not use the pay telephone without permission of a supervisor. On May 11, 1983, Domke did that and was issued a written warning for breaking the rule. As a witness time and again he kept repeating that there was no such rule, that employees had always used the phone at will, and that they still do so. There was then received in evidence four recorded written reprimands issued because employees had used the phone without permission. One is dated June 6, 1982; one is dated August 13, 1982, one is dated February 2, 1982; and one is dated July 14, 1983. The first three of these bear Domke's signature as witness, which means he was present as steward when the reprimands were issued. In his prehearing affidavit, after the events, Domke also said, "The employees used the telephone on a regular basis without getting permission." Can there be any question but that he was lying as a witness in this case? I think not.

In complete inconsistency with the above story, Domke defended his use of the telephone in May 1983 by saying he did have permission that day. He said the office girl, Miller, had handed him a note saying that Lloyd Williams, the Union's business agent, had called him and wanted him to call back. He quoted Miller as telling him, in the presence of Supervisor Daniel, "Call the guy right away." His position was, both to Daniel while getting the reprimand and at the hearing, that he had a right to presume that the clerk had been given permission to call him at the time. Miller did not testify. Daniel's version of this incident is that he did hear Miller say there was a message for Domke to "call 500," and that Domke then went outside the office to a pay telephone, and that while Domke was talking another supervisor saw him and asked Daniel had he given the man permission? With this, still according to Daniel, he went outside and asked Domke had he obtained permission from anyone, and Domke answered, "No." Daniel then ordered Domke off the phone, took him into the office, and wrote him up. As to what Domke argued then, Daniel said he only said he was "sick," and wanted to go home. When Daniel told him to wait until the written reprimand was finished, Domke threatened to file NLRB charges for being refused permission to leave immediately. According to the supervisor, therefore, Domke did not even claim, at that time, he had implicit permission to use the telephone. Miller was also given a written reprimand that day for having called the employee to the office without permission; she had been reprimanded for the same offense once before.

All I see in this is but another instance of a union steward believing that the rules in a work place applicable to ordinary employees do not apply to him. Domke started his very extended testimony by generalizing about how at the time of the concessions and speed up in early 1982, the number of disciplines increased greatly, how he always appeared at many grievance meetings about them, how he always argued against the speed up and stricter work rules. I think he just went to the phone that day and made his personal call because he still felt the rules he knew to be in effect were too stringent. This was a bone of contention between the TDU and the Teamsters, in which he was a principal activist. I credit Daniel. I find Domke violated the "don't use the phone" rule knowingly, that he did not even claim to have implied permission, and that the only reason he was given the reprimand was for the direct rule violation. I find nothing wrong in the Company having issued that reprimand that day. As to the complaint allegation that the Respondent enforced the rule "disparately" against Domke, it rests essentially on the steward's conclusionary assertion to that effect, which is destroyed both by the documents in evidence and by the very, very poor demeanor of Domke at the hearing.

As to the next incident, which I deem very revealing on the general question of credibility between the two groups of witnesses, the doubletalk which does no credit to Domke's testimony, is tied with like doubletalk in the General Counsel's complaint. On December 29, 1982, management asked Domke to come to the office so he could be present when five reprimands were to be handed to five employees, each for the same offense. All five of the men had left their work stations before the buzzer sounded for the lunchbreak. The very fact of management itself inviting the steward to the office then indicates a total absence of anti-Domke, anti-Teamsters, or TDU animus. One of the five men was VanWalthausen, who had several times already been reprimamded for the same offense. For the other four, it was the first time they had violated that rule. For this reason the manager had decided to issue a suspension notice to VanWalthausen, and only a reprimand to the others.

When Domke arrived at the office, he entered the room where the four employees were with the supervisors. VanWalthausen was asked to wait outside. For 15 or 20 minutes the supervisors discussed the offense with the men and with Domke. The employees and the steward, while admitting the offenses, tried to soften the blow. The reprimands were issued and the four left. When VanWalthausen was called in, Daniel started to write the suspension notice. Domke and VanWalthausen then began to talk between themselves about what they should do. Daniel told them to be quiet while he finished writing, because he had already decided what to do. In a matter of a few minutes he gave the employee the notice and ordered him out. Outside the office Domke and VanWalthausen continued to discuss what to do. When Daniel emerged and saw them so occupied he ordered Domke to return to work. Domke insisted he had a right to talk union business on working time.

Judging from what I heard, it is not at all clear just what the unfair labor practice was that is alleged to have occurred at that moment. At times Domke made it sound like a *Weingarten* case, where the employer refuses an employee's request to be represented by his union steward during a disciplinary interview or investigation. But there was no interview, or investigation conversation here. The decision to suspend VanWalthausen had definitely been made in advance. That is why he was told to wait outside while the proposed reprimands to the other four employees were being discussed. The manager saw no point in disconcerting the other four employees by having them watch while another man was discharged. This was only because it definitely had decided with finality what was going to happen with VanWalthausen.

The complaint puts it differently. It says that that day the Respondent "interfered with employees" right to process grievances by denying an employee access to the union steward at the close or immediately after a disciplinary interview." Asked, at the hearing, did this mean "that the unfair labor practice was committed by this company based on this man's testimony that they refused to permit him to permit his union representative to participate in a disciplinary, investigatory interview?" the General Counsel answered "Correct." But if Daniel's and VanWalthausen's testimony be taken in total, what they were saying is that Daniel refused them permission to decide—between themselves—what to do about all this. What did management have to do with any conversation that was to take place between an employee and his union representative about whether, or how, to file a grievance?

At one point VanWalthausen said the supervisor refused to permit him to ask the steward for a grievance form. There is a rule in this place that employees, and especially stewards, are not to discuss union business during working time. Domke was on the clock; he was engaged in union business while being paid by the Company only because the manager had asked him—given permission?—to come to the office on behalf of the four reprimanded employees. And again we return to the basic question of credibility running throughout this case. Domke, and Bliss, said that they could talk union business at will; the manager said otherwise. I just do not believe the unsupported testimony of the employees.

In sum, there was absolutely nothing wrong in anything the supervisors did that day. The details about it all by the employees served only to again show how the witnesses were trying to build a story with words but adding nothing of substance to the record. They were not credible witnesses.

On this same question of what the rule about talking instead of working during pay time really was, there are separate additional paragraph allegations in the complaint. In support of those allegations, Domke testified that in March 1983 Supervisor Daniel told him "not to solicit grievances" and that "if he caught me soliciting or recommending the employees at Borman to file grievances that he would discharge me." Domke also said that Daniels repeated the warning to him the following month, "not to solicit or recommend the employees to file grievances." Each of these conversations took place, according to Domke, on occasions when Daniels had called him to the office so he could speak on behalf of employees who were being reprimanded.

Daniel's testimony is different. When Domke became steward, in 1982, he told the man to stick to his work and that he could only talk to employees when "they would stop and maybe ask him about an insurance form or eye forms or something of that nature . . . as long as it was something that took a minute or two and, you know, didn't tie anyone up."

Daniel's testimony continues that because Domke felt the rule applicable to others could not apply to him, there was a later meeting with both Domke and Williams, the Local 337 business agent, present, when again Daniel restated the rule that union stewards were not to talk business during working hours without first asking permission of a supervisor. Williams agreed with Daniel, but Domke did not, and kept arguing with the business agent. And on January 3, 1983, Domke was given still another written reprimand that reads as follows:

> Failure to follow instructions on the above date. At approximately 3:15 p.m. you were observed in your work area having conversation with another employee (Don Pierce). You have been instructed several times that if another employee wishes to speak with you that he must have authorization from his supervision. Due to your failure to follow instructions I find it necessary to issue you this warning.

For the General Counsel to argue that this January 3, 1983 reprimand was issued only to justify the December 29, 1982 reprimand will not do. It is a form of inverse reasoning. The second reprimand was consistent with the overall testimony of many witnesses. In any event, no charge was filed in this proceeding until February 24, 1983!

The principal witnesses kept talking about things that happened in the work place, conversations with supervisors, which only cluttered the record and have nothing to do with this case—things that are not mentioned in the complaint. All the witnesses proved is that they disagreed with management as to what the conditions of

employment should be. With the General Counsel asking all these questions of her witnesses, she did so on the theory that if management thinks an employee is wrong as to what the collective-bargaining contract says, or what the work rules are, this is proof of illegal animus against that employee. It is a very poor argument to make.

Again, an example: There is a rule applicable to working on Christmas Day. A notice is posted days in advance; anyone who wishes to work on Christmas Day must sign his name on the notice at least 48 hours in advance of the holiday. Bliss spoke of Christmas 1982, saying he was planning something else for that day and therefore did not sign up. He changed his mind and, the day before Christmas, said he was going to work. He was refused the opportunity. His position at the hearing, and as argued to the supervisors at the time, was that the rule did not apply to him because he was normally scheduled to work that day of the week anyway. "I informed the Company that you didn't have to sign the list to be able to work." Bliss even filed a grievance over the matter, which is still pending unresolved. I do not understand why I heard this story.

A better example of pure argument by the witnesses, intending again, I suppose, to prove animus against these men, is something that happened in connection with an arbitration that was scheduled one day. A man named Montiero was disciplined for low production, in fact discharged, on September 16, 1982. When he was to be given the reprimand the supervisors called Domke to the office so he could represent the man at the disciplinary interview, because the regular steward for that department was not available. After much discussion about the matter Montiero was suspended and Domke signed the reprimand notice. The matter went to arbitration, originally scheduled for January 4, 1983. Domke decided he wanted the production records applicable to Montiero and asked Zafarano for them one day while at work; Zafarano told him he did not have them. With this Domke left his work station and went to the pay telephone to call his business agent. When a supervisor asked did he have permission to go to the phone, Domke refrained from making the call and returned to his work.

The story thus far about the Montiero discipline and arbitration is from Domke's direct testimony. It spans a number of pages of transcript and must be read to be believed. He answered almost every question with an irrelevant comment about the Company's improper imposition of work rules, about all the liberties he had always been permitted in the past, and about the Company's antagonism towards him. Even the General Counsel had difficulty obtaining direct replies. After repeating a number of times that he always used the phone while at work and that nobody ever stopped him, he ended by saying he did not make the call when asked had he obtained permission that day, because "I felt I would be disciplined." If he knew he would be disciplined, he certainly knew the rule was he had to obtain permission first. It is not possible to believe one word this witness uttered.

Domke went on to say that when he asked for production records about Montiero's work to prepare for the arbitration about that man's discharge, which was scheduled for January 4, he was denied the opportunity to see them. The Respondent then offered a letter it sent to the Union's lawyer on January 4, reading in part:

> John Montiero and persons claiming to be his representatives have made two separate appointments with Borman's management to review Mr. Montiero production records. Although in each instance, the records and Borman's management personnel were available, Mr. Montiero or his representatives failed to appear.

Domke was Montiero's representative, present at both the disciplinary interview and at the arbitration hearing later. There is a rule that a steward desiring to attend an arbitration hearing must give 48 hours advance notice. Domke did not do that, but demanded the right to attend Montiero's arbitration anyway. At first Supervisor Daniel said he could not leave, but, when a union officer apologized for not having given the requisite advance notice, Daniel let Domke off and permitted him to go to the arbitration. With this being Respondent's attitude towards Domke's steward activities, how can I believe his story that the Respondent was determined to put a stop to his handling of grievances, or assisting the employees? The Company's January 4 letter in evidence proves without doubt he was offered the records, and if he did not see them in advance of the arbitration it was only because he himself was negligent. More importantly, this matter is further proof of the complete falsity of his entire testimony. Domke even testified that 5 days before he was so graciously given permission to attend that arbitration, Supervisor White told him he would be discharged if he became involved in that particular arbitration! Another perfect example of false testimony by Domke.

Wherever Domke is contradicted by the company witnesses, especially with respect to his testimony about being threatened by Supervisor DeMay or Daniel, I do not credit Domke.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

I recommend that the complaint be dismissed in its entirety.

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

National Union of Hospital and Health Care Employees, District 1199E, Retail, Wholesale and Department Store Union, AFL–CIO *and* Johns Hopkins Hospital. Cases 5–CB–3533 and 5–CB–3585

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 31 August 1982 Administrative Law Judge Mary Ellen R. Benard issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with this decision, and to adopt the recommended Order as modified.

The Respondent (Union) and the Charging Party (Employer) have been parties to a series of collective-bargaining agreements requiring the Employer, among other things, to contribute to the National Benefit Fund for Hospital and Health Care Employees (the Fund), a trust subject to Section 302(c)(5) of the Act. In 1980 the parties negotiated a new agreement to succeed one that expired 1 December of that year. Anticipating those negotiations, the Employer wrote the Union requesting certain information about the Fund that the Employer thought would allow it to determine whether it was getting its money's worth in benefits to its employees. The Union forwarded this request to the Fund, and the Fund eventually informed the Employer that it was preparing the requested information. Contract negotiations began before the requested information was provided.

On 6 November the Fund provided the Employer with certain requested information, but some of the information was omitted. The Fund expressly declined to correlate the information with names and addresses of the individual employer-contributors to the Fund, as the Employer had requested, the Fund trustees having voted to make that information confidential. On 14 November the Employer informed the Union that the information provided by the Fund was inadequate, and specified the additional information it was still requesting. On 1 December, the day the contract expired, the parties reached impasse and the Union began a strike which lasted until a contract was signed on 16 December. A principal issue causing the impasse and strike was the parties' disagreement over whether the Employer would continue contributing to the Fund and, if so, on what terms.

For the reasons to be discussed we do not agree with the judge that the Union violated Section 8(b)(3) by virtue of any action or inaction by the Fund. We agree with her, however, that the Union did violate the Act when it failed to explore alternative means of providing the requested information, and when it struck while refusing to provide information relevant to the outstanding issues in contract negotiations.

In finding that the Union was required, under Section 8(b)(3), to direct its representatives among the Fund trustees to provide the information, the judge relied on *Hospital Employees (Sinai Hospital)*, 248 NLRB 631 (1980). In our recent decision in *Food & Commercial Workers (Layman's Market)*, 268 NLRB 780 (1984), we overruled that aspect of *Sinai Hospital*. Holding that trustees of Section 302(c)(5) trusts are not agents of the parties who appoint them, for purposes of collective bargaining, we decided that the actions of trustees could not be the basis for finding bad-faith bargaining under the Act unless "a collective-bargaining representative demonstrates that it is in de facto control of a nominally independent trust fund." Slip op. at 5.

We find that the Respondent was not in control of the Fund at any time relevant to this case. We note that control of this Fund by this Union was demonstrated in *Sinai Hospital*, as we reiterated in *Layman's Market*. Since *Sinai* was decided, however, the relationship between the Union and the Fund has changed. Then the Fund's director was a union officer, and it was in effect the director's decision at issue in that case because the Fund trustees were deadlocked. In this case, the Fund director was not and never has been associated with the Union. Furthermore, the decision to make the disputed information "confidential" was at the initiative of the employer trustees of the Fund. In these circumstances, we cannot find that the union-appointed trustees had any duty, under Section 8(b)(3), to oppose that decision as Fund trustees. We will therefore dismiss that portion of the complaint.

[1] The Respondent has moved to reopen the record to show that the requested information has been provided to the Charging Party and that the National Benefit Fund has changed its policy with respect to "coding" the information. Both the General Counsel and the Charging Party oppose the motion. We find the motion is untimely because it could have been made to the judge before her decision issued; moreover, not all the violations found in this decision would have been cured by the belated provision of information. We will therefore deny the Respondent's motion and leave to the compliance stage the determination of the Respondent's efforts to cure the violations found.

We will not, however, dismiss the entire complaint because we agree with the judge that the Union was obliged to investigate alternative sources of the requested information, or to explain its unavailability, and it had failed to do either. While we stated in *Layman's* that the requested information was equally available to both bargaining parties, we were addressing only the question of the union's obligation to obtain information from the fund. In that case the fund eventually provided or offered to provide all the requested information. Here, the Employer informed the Union on 14 November that it needed information the Fund had failed to provide. We do not need to determine whether the Union had access to that information through other means because the Union did not offer to investigate other means, nor to show the Employer that there were no other means. As we stated years ago, "minimum standards of good faith required" that the Union do at least that much. *General Electric Co.*, 150 NLRB 192, 261 (1964).

Except as it requires the Union to request action by the Fund, we will adopt the judge's recommended remedy.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, National Union of Hospital and Health Care Employees, District 1199E, Retail, Wholesale and Department Store Union, AFL–CIO, Baltimore, Maryland, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make reasonable efforts to obtain, from its own records or other sources, the information requested by Johns Hopkins Hospital in its letter of 16 May 1980, to the extent that the information has not already been supplied, or document why it cannot obtain the information."

2. Delete paragraph 2(b) and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to make reasonable efforts to obtain and provide to Johns Hopkins Hospital information pertaining to contributions to the National Benefit Fund for Hospital and Health Care Employees.

WE WILL NOT bargain to impasse or strike over subjects of bargaining about which we failed to supply relevant and necessary information.

WE WILL NOT in any like or related manner refuse to bargain with Johns Hopkins Hospital concerning contributions to said Fund.

WE WILL in the event the Fund refuses to make the information available, make reasonable efforts to obtain the information from our own records or other sources or document why we cannot obtain the information. If that information is not supplied, Johns Hopkins Hospital will not be required to bargain with us with respect to its contributions to the Fund until such time as the Hospital is provided with the information.

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, DISTRICT 1199E, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL–CIO

DECISION

STATEMENT OF THE CASE

MARY ELLEN R. BENARD, Administrative Law Judge. The charge in Case 5–CB–3533 was filed on October 3, 1980,[1] by Johns Hopkins Hospital (Hopkins or the Hospital) against National Union of Hospital and Health Care Employees, District 1199E, Retail, Wholesale and Department Store Union, AFL–CIO (Respondent). On November 24 a complaint issued alleging, in substance, that Respondent violated Section 8(b)(3) of the Act by refusing to supply Hopkins with requested information which was relevant for purposes of collective bargaining. On December 2 the Hospital filed the charge in Case 5–CB–3585 against Respondent and on December 10 a complaint issued which, as amended on December 15, alleges that since about October 1 Respondent insisted to the point of impasse over a subject about which it refused in bad faith to provide relevant information requested by Hopkins, and that since about December 1 Respondent had commenced and continued a strike to compel agreement concerning a subject about which it was refusing to provide relevant information. Respondent filed answers to the complaint in Case 5–CB–3533 and to the amended complaint in Case 5–CB–3585 in which it denied the commission of any unfair labor practices.

A hearing was held before me on October 19, 1981, in Baltimore, Maryland. Thereafter, all parties filed briefs, which have been considered.

[1] All dates are 1980 unless otherwise indicated.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE EMPLOYER

Johns Hopkins Hospital is a Maryland corporation engaged in the operation of a private nonprofit hospital in Baltimore, Maryland. During the 12-month period preceding the issuance of each of the complaints, a representative period, the Hospital received gross revenues in excess of $250,000 and purchased and received, in interstate commerce, materials and supplies valued in excess of $50,000 from points located outside the State of Maryland. The answers admit and I find that the Hospital is an employer engaged in commerce within the meaning of the Act and I find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Respondent is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent has represented Hopkins' service and maintenance employees for an undisclosed number of years and has been party to a series of collective-bargaining agreements with the Hospital. The most recent agreement prior to the events at issue here was effective December 1, 1978, to December 1, 1980. This agreement, called the 1978 contract, required the Hospital to, among other things, contribute monthly a sum equal to 10 percent of the gross payroll of unit employees to the National Benefit Fund for Hospital and Health Care Employees (the Fund).

The Fund is a trust fund subject to the provisions of Section 302(c)(5) of the Act and provides health and welfare benefits to employees represented by Respondent and to employees represented by the National Union of Hospital and Health Care Employees, Division of RWDSU, AFL–CIO (the National Union) with which Respondent is affiliated. There are approximately 40 trustees of the Fund; half of the trustees are selected by employer-contributors and half are selected by the National Union and/or its districts. Both the employer and the union trustees are selected according to a formula which is based on geographical area. The union trustees in the aggregate have one vote, as do the employer trustees; the vote of each bloc of trustees is determined by a majority within that bloc.

The trustees meet annually; there is also an executive committee comprised of six union and six employer trustees who meet once a month and have the authority to act for the trustees in between the trustees' annual meetings. The executive committee also votes by bloc; in the event of a deadlock of the executive committee the issue is referred to the full board of trustees. If the full board is deadlocked, the issue is submitted to arbitration.

B. *The Hospital's Request for Information and Respondent's and the Fund's Response*

Charles Johnson credibly testified that he became Hopkins' manager of employee and labor relations in April and at that time began to prepare for the upcoming contract negotiations. As part of this preparation, Johnson reviewed experience reports the Hospital had received from the Fund for the period 1976 through 1978. These reports are prepared by the actuaries of the Fund and list an employer's contributions to the Fund and the benefits paid to the contributing employer's employees, including a detailed breakdown for each claim. On the basis of the experience reports, Johnson determined that the Hospital had paid more in contributions to the Fund for the years 1976 through 1978 than its employees had received in benefits.[2] Johnson also discovered in the course of his review of the Hospital's files that his predecessor had brought a suit against the Fund and the Union charging mismanagement of funds.[3] Realizing that the Hospital's contributions to the Fund would be an issue in the negotiations for a new collective-bargaining agreement, Johnson wrote to Ronald Hollie, Respondent's president, on May 16, stating, inter alia, that "in order to prepare for negotiations for a successor agreement and to bargain intelligently concerning the provision of health care benefits," the Hospital requested the following information for the calendar years 1978 and 1979 and the first 3 months of 1980: (1) The name and address of each employer or other person who made contributions to the Fund; (2) the business or occupation of each contributor; (3) the formula by which the amount of the required contribution was determined; (4) the date and actual amount of the contribution made on the most recent date prior to December 1, 1978, for 1978 listings, December 1, 1979, for 1979 listings, and April 1 for 1980 listings; (5) the number of employees eligible to receive benefits from the Fund on the dates stated in response to item (4); (6) the plan in which the covered employees were eligible to participate on the specified date;[4] (7) the benefits provided if the plan listed in response to item (6) was other than Plan A, Plan B, or Plan C; and (8) the total annual contribution. Hollie responded by letter dated June 3, stating that he had forwarded Johnson's letter to Mortimer Lewart, the director of the Fund, and that Lewart would forward the requested information to Johnson "as soon as possible." Lewart also wrote directly to Johnson on June 11, acknowledging the request for information and stating that similar requests for information had been

[2] The Fund had not yet provided Hopkins' experience report for 1979.

[3] The record does not indicate whether the Union which was a party to that suit was the National or Respondent, nor does the record disclose the subsequent history of the litigation.

[4] At material times there were three major plans, known as Plan A, Plan B, and Plan C, pursuant to which the Fund provided benefits—Plan A provided the most benefits and Plan C the least. The Hospital's employees were covered by Plan B. There is also another benefit plan known as the "direct pay" plan, which provides benefits for individuals who have lost coverage under the other plans because they have retired or otherwise left the employ of a contributing employer, but who make contributions on their own behalf into the Fund. Presumably, the request in the Hospital's May 16 letter for information regarding "each other person who made contributions to the National Benefit Fund" as well as employers referred to the direct pay contributors.

received and that the trustees had directed him to establish a format for data to be forwarded whenever such requests were made to the Fund, and that he would notify Johnson as to the date when a report would be available and its cost. However, as of October the requested information had not been supplied and, in consequence, Hopkins filed the charge in Case 5–CB–3533 on October 3.

On November 6 Lewart sent N. Peter Lareau, Hopkins' counsel, various statistics relating to contributions to and payments by the Fund in 1978 and 1979. Specifically, Lewart sent a list of all employers who had made contributions to the Fund for those years and their addresses, and in separate documents sent a listing of contributors, identified only by a code number which was not correlated with the names on the other list; the type of business in which the contributor was engaged; its average number of employees; its annual gross payroll, its average gross payroll per employee; its annual contribution; the percent of payroll contributed; percent of payroll contributed for each contract;[5] the type of benefit plan, listed as A, B, C, or O; and the amount in dollars of benefits paid by the Fund to employees of that employer. Not all the information was provided with respect to every contributor. For "type of business," for example, a number of entries list only "othr," apparently meaning "other," and some entries are confusing and/or internally inconsistent.[6] No data was supplied for any part of 1980.

After the information was received, but prior to November 14, Lareau had a telephone conversation with Robert Moore, Respondent's administrative organizer, and told him that the information provided was inadequate because the Hospital needed: (1) statistical information correlated to the specific contributor by name and address; (2) the occupation or business of every entry listed as "other"; (3) the formula utilized to determine the amount of contributions; (4) the specific description of the benefits provided for those beneficiaries whose plan type was not A, B, or C; (5) for those entries which showed that the contributor changed the contribution rate in the course of a calendar year, the length of time for which each of the different percentages was in effect; (6) the rest of the statistical information for those entries as to which some data was not supplied; and (7) all of the information for the first 3 months of 1980. There is no evidence of what response, if any, was made to Lareau in that conversation. There is also no evidence that any of the alleged defects in the information supplied were ever remedied.

[5] Apparently this item applies to those employers who had more than one collective-bargaining agreement requiring contributions to the Fund.

[6] For example, in the statistics provided for 1979, Employer 057157 is listed as having an annual gross payroll of 0, an average gross payroll per employee as 0, and 00 percent of payroll contributed, but the employer contribution is listed as $120,486. In the 1978 statistics, Employer 057157 is similarly listed as having no annual gross payroll, average gross payroll per employee, or percent of payroll contributed, but is also listed as having made a contribution of $116,010. The entry in the 1978 statistics for Employer 012021 lists 0 for its annual gross payroll, average gross payroll per employee, percent of payroll contributed, and percent of payroll per contract, but also lists a contribution of $87,322 and benefits in the amount of $94,494.

C. *The Bargaining*

The first bargaining session for a successor to the 1978 contract was held on October 6. Around September 29 Respondent had sent its initial proposals for a new contract to the Hospital, including an increase in the contributions to the Fund to 11.5 percent of gross payroll. Hopkins mailed its first proposal to Respondent on October 13 and included in that proposal an amendment to the section of the contract regarding the Fund which stated that the Hospital would provide health, medical, hospitalization, and life insurance benefits to its employees; i.e., that the Hospital could withdraw from the Fund altogether. There were a total of approximately 13 bargaining sessions; until the seventh session on November 28[7] there was no change in the position of either party regarding the Hospital's contribution to the Fund. However, at that session Sam Cook, one of the Hospital's attorneys, told Respondent's negotiators that the Hospital was willing to retreat from its original position and proposed that Hopkins participate in the Fund but at a contribution rate of 8 percent of gross payroll. Cook also proposed language which would require the Fund to use Hopkins' contributions for the sole purpose of providing the Hospital's employees with their current level of health, medical, hospitalization, and life insurance benefits, and specifying that none of the Hospital's contributions would be utilized for the purpose of providing benefits to any other persons. At this point both Respondent's and the Hospital's negotiating teams caucused; after the caucus, according to Johnson, Hollie said that Respondent was not stupid enough to strike over the Fund contributions or the cost-of-living clause (another major item in the negotiations), and that there would be no contract if those two provisions "were tampered with." Apparently, there was no response to this comment; the negotiations continued but no agreement was reached that day.

The next bargaining session began in the morning of Sunday, November 30, and concluded at 5 a.m. the next day but no agreement was reached. The Hospital proposed a new index on which to base the cost-of-living allowance and reintroduced its proposal on the Fund. According to Johnson, Hollie again said that there would be no contract if these two items were changed,[8] apparently referring to the clauses as they existed in the contract that was about to expire. At approximately 3 a.m. on December 1, Respondent suggested maintaining the status quo; i.e., a 10-percent contribution rate with no restrictions on the Fund's use of the money. The Hospital, however, rejected that suggestion and continued to insist upon its proposal. At 5 a.m. the Federal mediator involved in the negotiations declared an impasse and the strike began 2 hours later. The entire bargaining unit of some 1400 employees participated.[9]

[7] The Union notified the Hospital on November 19 that a strike would begin at 7 a.m. December 1.

[8] I credit Johnson. He appeared to be a straightforward witness and Hollie, although called as a witness by Respondent, did not deny making the statements Johnson attributed to him.

[9] The charge in Case 5–CB–3585, alleging that Respondent had unlawfully refused to bargain with the Hospital, was filed the next day.

Negotiations continued during the strike and in the course of a bargaining session which began on December 15 the parties reached agreement about 3 a.m. on December 16. That agreement provides that the Hospital will contribute a sum equal to 9 percent of gross payroll of employees who have completed their probationary period to the Fund and that "such payments shall be used by the trustees of the Fund for the purpose of providing said employees with health, medical, hospitalization and life insurance benefits and will remain at the level of benefits provided as of December 30, 1980, under the Fund's Plan B."[10] The strike ended that same day.

Johnson testified that at the November 10 bargaining session, which was the first held after the information described above was received, Respondent contended that the Hospital had not provided requested information on the pension plan and the Hopkins' negotiators responded that the information was being forwarded. At that point Cook or another Hospital negotiator stated that the information which had been provided to the Hospital by the Fund was inadequate. Although the Hospital did not again contact the Fund to request the information, Hollie, a member of the Fund's executive committee and an officer of the National Union, was present at this bargaining session.[11] However, it is undisputed that the Hospital negotiators never said that they could not bargain unless they had more information from the Fund and, according to Hollie's uncontradicted testimony, when the Hospital negotiators made their proposals as to what the contribution rate should be they produced figures which they said were based on information from the Fund.

D. *The Board's Decision in Sinai Hospital;*[12] *Actions Subsequently Taken by Respondent and the Fund Regarding Requests for Information*

About 2 months before Hopkins' request for information the Board had issued its decision in *Sinai Hospital of Baltimore*, supra, which involved a request by Sinai Hospital of Baltimore, Inc. (Sinai), for various statistical information similar to that at issue in the instant case; i.e., the names and types of business of all contributing employers, their gross payroll, the amounts contributed, contribution rates (both actual and required by contract), the number of employees covered, average annual payroll per employee, and the type of plan under which benefits were provided by the Fund. Sinai, whose employees are represented by Respondent and who is a contributing employer to the Fund, had requested the information from William Taylor, who was then and had been since 1950 the Fund's executive director, and who had also been the National Union's executive vice president for a number of years.[13] Taylor denied the request on grounds that the information was confidential and that too much time, effort, and cost would be required to provide it. Sinai offered to reimburse the Fund for preapproved costs of assembling the information and had expressed in its initial request a willingness to accept identification numbers in lieu of employers' names, but Taylor nonetheless refused to supply any of the requested information. Subsequently, Sinai wrote to Hollie and to Leon Davis, who was then both president of the National Union and chairman of the Fund's board of trustees, requesting them to instruct the Fund to provide the data, but they replied that the request should be addressed to the board of trustees. Thereafter, there was a vote by the trustees and the management trustees voted to supply the information and the union trustees voted not to; thus, the request was in effect denied.[14]

The administrative law judge found, and the Board agreed, that the information requested was relevant and necessary for Sinai's collective-bargaining purposes, that Taylor did not have a legitimate business justification for refusing to furnish it, and that his responses to the requests were not made in good faith. However, the administrative law judge further found that because neither the Fund nor its trustees were labor organizations within the meaning of the Act nor partisan agents of a particular principal, the Fund had no obligation to respond to a collective-bargaining obligation of the union by furnishing the requested information, and that the Board did not have jurisdiction over the Fund. The administrative law judge therefore recommended that the complaint be dismissed. The Board disagreed, finding that Taylor was not acting solely in the interest of the beneficiaries of the Fund when he denied the request and that he was thus not refusing to furnish the information in his fiduciary capacity, or if he was acting in a fiduciary capacity, that that fiduciary duty did not preclude the furnishing of the information, and that Taylor, Davis, and Hollie "violated their affirmative obligation to make a reasonable effort to obtain the information, or to investigate reasonable alternative means for obtaining it, or to truthfully explain or document the reasons for its unavailability, in violation of Section 8(b)(3) of the Act."[15] Thus, the Board held that "although Section 302 trustees may be expected to champion the interest of their respective principals, they must do so in a manner which is consistent with their fiduciary obligations rather than utilizing their alleged fiduciary capacity as a pretext to circumvent bargaining obligations under the Act."[16]

It is undisputed that, in response to the complaint issued in *Sinai Hospital*, supra, in November 1978 employer trustee William Abelow offered on behalf of 10 other management trustees and himself a resolution that

[10] The printed version of this portion of the agreement refers to benefits provided as of "November 30, 1980" but is otherwise the same as the handwritten agreement signed by the negotiators on the morning of December 16.

[11] Johnson was substantially corroborated on this point by Hollie, who testified that he thought that the comment about information on the pension fund and the Hospital negotiators' comment that the Hospital had not received all the information it wanted from the Fund was made on November 27, but it may have been sooner.

[12] *Hospital Employees (Sinai Hospital of Baltimore, Inc.)*, 248 NLRB 631 (1980), enfd. in an unpublished decision by the United States Court of Appeals for the Fourth Circuit, December 10, 1981.

[13] Taylor was paid by the Fund in his capacity as its executive director but served as the National Union's vice president without pay.

[14] At the time of the hearing in that case, the issue had not been submitted to arbitration.

[15] 248 NLRB at 633. (Footnote omitted.)

[16] 248 NLRB at 634. (Footnote omitted.)

the Fund provide to either Respondent or Sinai the information the latter had requested, "in a manner which will preserve the confidentiality of each item with respect to any individual contributing employer," and provided that the entity requesting the information reimburse the Fund for all costs incurred in providing it. Thereafter, as found by the Board in *Sinai Hospital*, supra, management trustees voted for, and the union trustees voted against, supplying the information. There is no evidence in this record of any further actions by the Fund's trustees in determining how to respond to such requests until May 20, 1980, when, at an annual meeting of the full board of trustees, the employer trustees moved that the trustees adopt the resolution proposed by Abelow. The resolution was tabled at the request of the union trustees pending further opinion from counsel.

Thereafter, on June 10 the executive committee of the trustees met and, noting that there were several pending information requests from employers asking for different versions of essentially the same data, voted to request a committee consisting of Abelow, Lewart, and Donald Klein, counsel to the Fund, to develop a proposal to respond to all requests for data uniformly. On August 7 Lewart approved a computer job request for a Fund-wide statistical report at a cost of some $17,000, and at an executive committee meeting on September 9 Lewart reported that programing for a report on Fund-wide data was proceeding and that delivery was scheduled for November. The $17,000 for the computer programing was approved by the executive committee at its meeting of October 14; at that same meeting the committee approved a charge of $200 for each report to amortize the total cost of preparing the reports over the anticipated number of requests.

At the November 11 executive committee meeting, Klein reported that representatives of the Board, apparently in the compliance stage of the *Sinai Hospital* case, had questioned him regarding the information furnished to Sinai Hospital with respect to the lack of information the Hospital had requested for the years 1976 and 1977, a more detailed breakdown of the category of "other" of contributing employers, presumably the same problem faced by Hopkins in the instant case, and an identification of employers by location. The trustees unanimously directed that information for 1976–77 and a more detailed breakdown be provided to Sinai if it were willing to pay the higher cost of developing this information, but the trustees—also unanimously—declined the request that employers be further identified by location, according to the minutes, "consistent with the principle of confidentiality with respect to the identity of individual employers."[17]

[17] In accord with this position, Lewart, in a letter dated November 12 to Richard Dorn, an attorney who represented the National Union in *Sinai Hospital*, supra, and is a member of the same firm as Klein, stated:

> As to [Sinai's] request for additional identification of employers by location, the Trustees adopted the principle of confidentiality with respect to the identity of individual employers as a premise and prerequisite for making such a report available. They are of the view that adding the location of each employer to the report would violate that principle of confidentiality.

In the meantime, the Board had filed an application for enforcement of its order in *Sinai Hospital*, supra, and the United States Court of Appeals for the Fourth Circuit granted enforcement of the Board's order in an unpublished decision dated December 10, 1981, in Case 80-1499. There is no mention in the court decision of the confidentiality issue other than a reference to Taylor's denial of the request for information on grounds that the data sought was confidential and the employer trustees' position that the information should be supplied with provision for protection of its "confidentiality."

E. *Analysis and Conclusions*

1. The parties' contentions

The General Counsel and Hopkins contend at the outset that all of the information requested by Hopkins, including a matching of employers' names and addresses with the statistical information regarding their contributions to the Fund, was relevant and necessary for purposes of collective bargaining. The General Counsel and Hopkins further contend the information supplied was inadequate because (1) there was no way Hopkins could identify which data referred to a specific contributor; (2) certain information was not provided, specifically: a description of the occupation or business of contributors described as "other"; the formula by which an employer's contribution was determined; a description of those benefit plans other than Plans A, B, or C; and, for those entries where the contribution rate changed during the year, a breakdown of when each rate was in effect; (3) there were significant numbers of "blank" entries, i.e., entries where the only information reported was the contributor's code number and the amount of benefits paid; and (4) no information at all for 1980 was provided. The General Counsel and Hopkins assert that no justifiable explanation was presented regarding the failure to provide the information, that the information sought should not be considered confidential, and that the fact that the Fund rather than Respondent is the repository of the requested information does not justify Respondent's failure to provide it. Finally, the General Counsel and Hopkins contend that Respondent's failure to supply the information converted the subject of Hopkins' contribution to the Fund into a nonmandatory subject of bargaining; thus, by bargaining to impasse and striking over that issue, Respondent further violated Section 8(b)(3) of the Act.

Respondent contends, on the other hand, that it cannot be found to have committed an unfair labor practice by failing to supply information it did not possess, asserting that, in the instant case, unlike *Sinai Hospital*, supra, Respondent made an effort to procure the requested information and the fact that it was not all supplied cannot be attributed to Respondent. Respondent also contends that the trustees' unanimous decision, that in order to preserve confidentiality the financial data should not be correlated with the names and addresses of contributors, distinguishes the facts of this case from the Board's finding in *Sinai Hospital*, supra, that the refusal to supply the information was not made in good faith.

2. The relevance of the requested information

The duty of a participant in collective bargaining to provide information to its opposite number is well established, for:

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.[18]

It is also well established that a labor organization's duty to furnish information relevant for collective bargaining is parallel to that of an employer.[19] In the instant case, Johnson credibly testified that in light of his conclusion that the Hospital had contributed more to the Fund than the employees had received in benefits for the years 1976 through 1978, and as Hopkins had sued the Fund and the Union alleging mismanagement, he realized that Hopkins' contributions to the Fund would be an issue in the negotiations for a new contract. Clearly, in these circumstances, information enabling Hopkins to compare its number of employees, amount of contribution, gross annual payroll, contribution formula, actual contributions, number of employees eligible to receive benefits, type of plan, and total annual contributions, with similar data from other employers, would assist Hopkins in formulating its bargaining position and supporting that position at the bargaining table.

Respondent asserts that inasmuch as Hopkins had received its own experience reports and a copy of a letter from the Fund's actuaries indicating that a contribution rate of 9.6 percent was necessary to continue funding benefits at the same level, and had received the information described above pursuant to its May request, Hopkins had sufficient information available to negotiate the collective-bargaining agreement. However, Hopkins was not required to "demonstrate that the information sought is certainly relevant or clearly dispositive of the basic negotiating or arbitration issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation on the part of [the Union] to provide it. The appropriate standard in determining the potential relevance of information sought . . . is a liberal discovery-type standard."[20] Certainly, Hopkins was not required to rely on the conclusionary statement of the Fund's actuaries, but was entitled to obtain statistical data and reach its own conclusions.[21] In addition, the fact that Hopkins negotiated the collective-bargaining agreement without all of the information it requested does not establish that the information was not relevant.[22] Similarly, the fact that Respondent's failure to provide the information was not apparently a major item for discussion at the bargaining table does not warrant a finding that the information was not relevant for collective-bargaining purposes.[23]

Respondent also contends that the Fund's practice of pooling contributions by geographical area rather than on a nationwide basis suggests that information as to all contributors in the pool is not relevant. This contention, however, ignores Klein's uncontroverted testimony that areawide pooling began in the spring and summer of 1980; thus this pooling method was apparently not in effect for the period for which Hopkins requested the data.

Finally, with respect to the question of whether a correlation between specific contributors and the data regarding their contributions was relevant, I agree with the General Counsel and the Charging Party that it was, both because Hopkins had no way of verifying the accuracy of the statistical data without knowing how to match statistics and contributors, and also because, in light of the system of geographical pooling which was being implemented in 1980, as discussed above, Hopkins was entitled to information enabling it not only to compare its contributions and the benefits received by its employees with other contributors in the same pool, but also to compare contributions made by and benefits received by members of its pool with those in other geographic areas. In light of these considerations, and in view of the Board's findings in *Sinai Hospital*, I conclude that the information requested in the instant case was relevant.[24]

3. Respondent's asserted inability to obtain information correlating the names and addresses of contributors with statistical data

Respondent contends that no unfair labor practice can be found with regard to its failure to match the names and addresses of contributors with the statistical data relating to their contributions and the benefits received by them or their employees, because this information was in the possession of the Fund and the trustees of the Fund had declared this information to be confidential. It is undisputed that at the November 11 executive committee meeting the trustees declined unanimously to identify specific employers with their contributions. In this regard, Respondent emphasizes that in *Sinai Hospital*, supra, the Board relied on the fact that the president of

[18] *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967).
[19] *Graphic Communications Local 13 (Oakland Press Co.)*, 233 NLRB 994, 996 (1977).
[20] *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978).
[21] *General Electric Co. v. NLRB*, 466 F.2d 1177, 1183 (6th Cir. 1972).
[22] *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (2d Cir. 1951).
[23] *White Farm Equipment Co.*, 242 NLRB 1373, 1374 (1979).
[24] In *Sinai Hospital*, supra, the Board found, inter alia, that the names and addresses of contributing employers, the type of business in which the employer was engaged, the number of employees eligible to receive benefits, the employer's total annual contribution, and the type of benefit plan provided, all of which were also requested by Hopkins, were relevant, 248 NLRB at 632. In the instant case, Hopkins also requested other information which was not requested in *Sinai Hospital*, supra. Significantly, the Board found that the charging party in *Sinai Hospital* was apparently willing to accept the statistical data without correlation to specific employers, and, thus, the Board did not pass on the question of whether Sinai was entitled to information which would permit such a correlation.
Inasmuch as the relevance of the information sought is established by the record, I find it unnecessary to determine whether *all* of the information was *presumptively* relevant. Cf. *East Dayton Tool & Die Co.*, 239 NLRB 141, 143 (1978), in which the Board stated that insurance is encompassed within the concept of wages and that, therefore, information about insurance is presumptively relevant.

the National Union was chairman of the board of trustees and the executive vice president was the executive director of the Fund, and that the Board found that the latter had no legitimate reason for refusing to provide the information and that his refusal was not made in good faith. In the instant case, by contrast, the executive director of the Fund at the time of the negotiations between Hopkins and Respondent holds no position with either Respondent or the National Union, and it is undisputed that the executive committee of the trustees voted unanimously to refuse to supply a correlation between specific contributors and their contributions and other statistical data. Clearly, to some extent these facts differentiate the instant case from *Sinai Hospital*, supra. Nonetheless, I find that these factual differences are not such as to excuse Respondent from its obligation to provide the requested data.

a. *The confidentiality defense*

Although the record is replete with references to the asserted confidentiality of the identities of specific contributors matched to data regarding their contributions to the Fund, there is no evidence whatsoever as to why this information should be deemed confidential. Indeed, there is not even any evidence that employers were ever assured by the Fund that information about their contributions and about the benefits received by their employees would not be disclosed. Obviously, the decision by the trustees on the executive committee to categorize the information as confidential is not, by itself, dispositive as to whether the Board should direct that the information be provided.

b. *The defense that the Fund, not Respondent, possessed the information*

Respondent's contention, that its failure to match the names and addresses of contributors with the statistical data about their contributions was justified by the fact that this information was in the possession of the Fund, misconstrues Respondent's obligation as a party to collective bargaining. Clearly, if information is shown not to exist, there is no obligation to provide it.[25] However, where, as here, there is no dispute that the requested relevant information exists, there is an "obligation to make a reasonable effort to obtain this information, to investigate alternative means for obtaining this information, or to explain or document the reasons for its unavailability."[26] Respondent utterly failed to meet this obligation. True, Respondent did forward the Hospital's letter requesting the information to the Fund, but that is the only action Respondent took to supply the information. Thus, although two members of the executive committee of the Fund's trustees, Hollie and Henry Nicholas,[27] were on Respondent's negotiating team, there is no evidence whatsoever that either of them attempted to persuade the executive committee or even the union trustees that the information should be provided. Indeed, although Nicholas was at the November 11 meeting where the trustees voted to treat the information as confidential, he did not vote to supply the data, and there is no indication in the minutes of that meeting that he argued in favor of providing it. At least, if the union trustees had voted to provide the information and the employer trustees had voted against this action, the issue would have been submitted to the full board of trustees and, in the event of deadlock, to arbitration.

Similarly, there is not a scintilla of evidence that Respondent made any attempt to investigate alternative means for obtaining the information. In this regard, it is noteworthy that Respondent has collective-bargaining relationships with some of the employers who are contributors to the Fund, but, although presumably, by examination of its records regarding these employers Respondent could have matched some of the identities of the contributing employers with the statistics regarding their contributions, Respondent did not offer to do so or suggest any other alternative means for obtaining the information without recourse to the Fund.

Finally, it is undisputed that Respondent did not proffer any explanation as to why the information was not supplied other than that the Fund's trustees considered it confidential. Having found that the information was not confidential and that Respondent did not make sufficient efforts to obtain the information either from the Fund or elsewhere, I conclude that Respondent also failed to explain or document the reasons for the asserted unavailability of the information.

4. The failure to supply all the statistical data

As discussed above, there are significant gaps in the statistical information which was provided to Hopkins and no information was provided for 1980. Klein testified without contradiction that when the Fund received a written complaint from Sinai about gaps in the information which was furnished to it after the Board's decision (and which was apparently similar to the information furnished to Hopkins), the Fund requested the actuarial service which had prepared the information to supply the missing data to the extent it could and the actuarial service did so. Klein also testified that there was no similar complaint to the Fund from Hopkins. Respondent implies that Hopkins' failure to make such a complaint excuses the failure to attempt to supply more information. However, the parties stipulated that Lareau contacted Respondent's administrative organizer and specified what items were missing from the information supplied in November, but there is no evidence that Respondent subsequently attempted to obtain the missing information from the Fund.

To summarize, in light of the foregoing, I find that all of the information requested by Hopkins was relevant, that not all of the requested information was supplied, and that Respondent has asserted no sufficient justification for its failure to supply it. I therefore find that, by

[25] *Bendix Corp.*, 242 NLRB 62 (1979).

[26] *Borden, Inc.*, 235 NLRB 982, 983 (1978).

[27] Nicholas did not testify, but it appears from minutes of executive committee meetings in evidence and from stationery letterheads that he was a union member of the executive committee and secretary of the board of trustees.

failing to provide the information, Respondent violated Section 8(b)(3) of the Act. Having so found, I further conclude, in light of the Board's decision in *Sinai Hospital*, supra, that by bargaining to impasse and striking over the issue of Hopkins' contributions to the Fund while failing to supply relevant and necessary information about the Fund, Respondent further violated Section 8(b)(3) of the Act.

On the basis of the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Johns Hopkins Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. National Union of Hospital and Health Care Employees, District 1199E, Retail, Wholesale and Department Store Union, AFL–CIO, is a labor oraganization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time service and maintenance employees who work regularly twenty (20) or more hours in the workweek, including dietary employees and dietary cashiers, linen workers and housekeeping employees, aides, nursing assistants, nursing technicians, technical assistants or helpers, messengers, and maintenance department employees, pharmacy technicians, electronic technicians, apprentices, radiology maintenance technicians, fire safety mechanics, P.C.C. teacher assistants, uniform room attendants, central supply technicians, supply aides, physician's aides, nursing unit clerks, and dark room technicians, but excluding office clerical and all other clerks, physicians, dentists, registered nurses, licensed practical nurses, technical and professional employees, temporary employees, guards, confidential employees, supervisory, administrative, and executive employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material Respondent has been the exclusive bargaining representative of the employees in the aforementioned appropriate unit within the meaning of Section 9(a) of the Act.

5. By failing since about May 17, 1980, and at all times thereafter, to provide Johns Hopkins with relevant and necessary information pertaining to contributions by employers and others to the National Benefit Fund for Hospital and Health Care Employees, and by failing its affirmative obligation to make reasonable efforts to obtain the information, or to investigate reasonable alternative means for obtaining it, or to truthfully and in good faith explain or document the reasons for its unavailability, Respondent has failed to bargain collectively with Johns Hopkins Hospital and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(3) of the Act.

The relevant information requested consists of:

For the calendar years of 1978 and 1979 and the period January 1–March 31, 1980:

(1) The name and address of each employer or other persons who made contributions to the Fund;

(2) The business or occupation of each contributor;

(3) The formula by which the amount of the required contribution was determined;

(4) The date and actual amount of the contribution made on the most recent date prior to December 1, 1978, for 1978 listings, December 1, 1979, for 1979 listings, and April 1 for 1980 listings;

(5) The number of employees eligible to receive benefits from the Fund on the dates stated in response to item (4);

(6) The plan in which the covered employees were eligible to participate on the specified date;

(7) The benefits provided if the plan listed in response to item (6) was other than Plan A, Plan B, or Plan C;

(8) The total annual contribution.

6. By insisting to impasse and striking over a subject of bargaining about which it failed to supply relevant and necessary information, Respondent has engaged in further unfair labor practices within the meaning of Sections 8(b)(3) and 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Inasmuch as I have found that the information listed above and requested by the Hospital is relevant and necessary for purposes of collective bargaining, I shall recommend that Respondent be ordered to request the Fund, in writing, to supply the requested information to the extent that the Fund has not already done so. In the event the Fund refuses to make the information available, I recommend that Respondent be ordered to make reasonable efforts to obtain the information from its own records or other sources or document why it cannot obtain the information. Consistent with the remedy provided by the Board in *Sinai Hospital*, supra, if the information is not made available to the Hospital, I recommend that, if it so desires, the Hospital not be required to bargain with Respondent with respect to its Fund contribution until such time as it is provided with the requested information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, National Union of Hospital and Health Care Employees, District 1199E, Retail, Wholesale and Department Store Union, AFL–CIO, Baltimore, Maryland, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to make reasonable efforts to obtain and provide to Johns Hopkins Hospital information relevant

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

for purposes of collective bargaining regarding contributions to the National Benefit Fund for Hospital and Health Care Employees.

(b) Bargaining to impasse or striking over a subject of bargaining about which it failed to supply relevant and necessary information.

(c) In any like or related manner refusing to bargain collectively with Johns Hopkins Hospital concerning contributions to the Fund.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Request, in writing, from the Fund, the requested information regarding contributions to the Fund to the extent that the information requested by Johns Hopkins Hospital in its letter of May 16, 1980, has not already been supplied, as set forth in the section of this Decision entitled "The Remedy."

(b) In the event the Fund refuses to supply the information, make reasonable efforts to obtain the information from it own records or other sources, as described elsewhere in this Decision or document why it cannot obtain the information.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of the attached notice to the Regional Director for Region 5 for posting by Johns Hopkins Hospital, if said employer is willing, at all locations where notices to its employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[29] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. J. Heating & Air Conditioning, Inc. *and* Sheet Metal Workers' Union, Local No. 162, Sheet Metal Workers' International Association, AFL–CIO. Case 20–CA–16621(E)

14 December 1984

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 13 July 1984 Administrative Law Judge Russell L. Stevens issued the attached second supplemental decision. The Applicant filed exceptions and a supporting brief and the General Counsel filed an answering brief in support of the judge's second supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the second supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application of the Applicant, B. J. Heating & Air Conditioning, Inc., Woodland, California, for an award under the Equal Access to Justice Act be dismissed.

[1] The judge creates a misimpression by stating that "severance and subsequent dismissal of the case . . . were based upon refusal of witnesses to appear at trial in answer to subpoena." Actually, the General Counsel was unsuccessful in his attempts to serve subpoenas, and therefore needed witnesses could not be produced at the trial.

[2] Because Member Hunter agrees that the General Counsel's handling of this case was substantially justified and that the Applicant is not entitled to an award of fees and expenses under the Equal Access to Justice Act, he finds it unnecessary to pass on the question of whether the Applicant has adequately demonstrated its eligibility for an award.

SUPPLEMENTAL DECISION

(Equal Access to Justice Act)

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This matter arose from preliminary proceedings and trial in three cases consolidated December 30, 1981, by the Regional Director for Region 20 of the National Labor Relations Board (the Board). Cases 20–CA–16449 and 20–CA–16451 involved Perrin Heating and Air Conditioning, River City Mechanical and Sheet Metal Workers Union Local 162, Sheet Metal Workers International Association, AFL–CIO (the Union). Case 20–CA–16621 involved B. J. Heating & Air Conditioning, Inc. (B.J.) and the Union. At trial on August 31, 1982, prior to taking any testimony and prior to introduction of substantive evidence, the General Counsel moved to sever Case 20–CA–16621 from the other two cases, and that motion was granted by the administrative law judge (judge). The complaint in Case 20–CA–16621 later was withdrawn by the aforesaid Regional Director for Region 20.

On October 12, 1982, B. J. Heating & Air Conditioning, Inc. (Applicant) filed with the Board an application for award of fees and expenses under EAJA[1] and the Board's Rules and Regulations,[2] alleging entitlement to an award following withdrawal of the complaint against it. On October 18, 1982, the Board referred the application to me for appropriate action. On November 10, 1982, counsel for the General Counsel moved to dismiss the application, and set forth nine separate reasons in support of the motion. The first reason urged by the General Counsel was that the application was not timely filed. On November 29, 1982, Applicant filed a response to the General Counsel's motion to dismiss. On January 11, 1983, I issued a supplemental decision dismissing the application for lack of jurisdiction because it had not been timely filed. The remaining eight arguments advanced by the General Counsel were not reached by the dismissal, as they were procedural in nature. On January 26, 1984, the Board reversed the dismissal, held that the application timely was filed, and remanded the matter to me for further action, including the issuance of a decision on the merits of the application.

On March 6, 1984, Applicant filed a Motion for Summary Judgment, and on March 8, 1984, the General Counsel filed a response opposing Applicant's motion. Because of several apparent discrepancies and uncertainties disclosed by the record, I held an informal conference of the parties on April 16, 1984. In response to an Order dated April 16, 1984, issued following the conference, Applicant submitted explanatory material on April 27, 1984, and General Counsel submitted a supplemental memorandum in support of the Motion to Dismiss, dated June 15, 1984. The Order of April 16, 1984, provided, inter alia, that Applicant had 15 days in which to submit its affidavit response to the General Counsel's supplementary support of its motion to dismiss the application. That response, dated July 3, 1984, was filed July 5, 1984.

Findings and conclusions relative to Applicant's Motion for Summary Judgment, and to the General Counsel's eight arguments in support of the motion to dismiss, are discussed below.

I. MOTION FOR SUMMARY JUDGMENT

Applicant argues "By failing to file an answer to the application within 30 days of the Board's January 26, 1984 order denying the Motion to Dismiss, the General Counsel has consented to the award requested by the Applicant herein."

That argument is based on an erroneous presumption. The Board's Order to this judge did not deny the Gener-

[1] Equal Access to Justice Act, 5 U.S.C.A. § 504.

[2] Sec. 102.143 et seq.

al Counsel's motion to dismiss. The Order remanded "this proceeding," "for such further action as is required in light of our decision to accept as timely filed the application of" the Applicant, "including the issuance of a decision on the merits of the application."

Whether or not further proceedings ensue after the General Counsel's motion is disposed of is irrelevant to the proceedings herein. The only matter presently before this judge is the General Counsel's argument relative to items 2 through 9, set forth in the motion to dismiss.

Applicant's Motion for Summary Judgment is denied.

II. ELIGIBILITY REQUIREMENTS

The General Counsel argues that the application does not show the net worth of Applicant as of December 30, 1981, the date of the complaint, as required by Section 102.143(d) of the Board's rules; that the application does not show the number of Applicant's employees on December 30, 1981, as required by Section 102.143(d) of the Board's rules; and that the application does not include accompanying notes and the accountant's review report referred to in Applicant's financial statement, as required by Section 102.147 of the Board's rules.

Section 102.143(d) provides that, for the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of the complaint in an unfair labor practice proceeding. The date of the complaint in this proceeding is December 30, 1981.

Applicant's balance sheet, submitted with the application, is dated March 31, 1982, 3 months after the date of the complaint. Total assets are shown as $442,744. Total stockholders' equity is shown as $296,221. Total cost of property and equipment is shown as $295,256, with a net value of $90,412. Nothing in the record casts doubt on those figures, and no reason is shown for assuming that Applicant's net worth changed so greatly (more than $4.5 million) within a 3-month period as to place Applicant outside the purview of EAJA.

So far as the number of employees is concerned, it is apparent from the complaint and Applicant's balance sheet that far fewer than the 500 criteria of EAJA were employed as of December 30, 1981. As of March 31, 1982, Applicant's cash totaled $60,063, and its total receivables were $114,196. A weekly payroll for 500 employees, even at the minimum wage of less than $4 per hour, would be far more than Applicant's total cash on hand. Further, the application states, as required by Section 102.147(a) of EAJA, that Applicant employed 12 full- and part-time employees as of October 7, 1982. There is nothing in the record to indicate or show a precipitous drop in the employee complement within the 3-month period just prior to March 31, 1982, and the inference is drawn that, as of December 30, 1981, Applicant had employees totaling substantially fewer than 500. If there was any doubt concerning Applicant's eligibility on the basis of net worth or number of employees, that doubt could be resolved pursuant to Board rules.[3] There is no such doubt.

[3] Sec. 102.147(f) and Sec. 102.152(a).

So far as failure of the application to include the accountant's notes and review report is concerned, there is no basis in the record to indicate that the balance sheet is not within the requirements of EAJA and Board rules. Section 102.147(f) provides, inter alia, that the financial statement "may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part."

The General Counsel's arguments relative to this issue are found to be without merit.

III. FEES FOR WORK ON OTHER CASES

The General Counsel argues that the application "clearly contravenes the stated purposes of EAJA," in that it claims fees related to other litigation and matters between the parties.

In the application, Applicant claims fees for time devoted to an RM petition, and to cases consolidated with Case 20-CA-16621.

In its explanatory memorandum of April 27, 1984,[4] Applicant's counsel states, inter alia:

> In view of the Region's consolidation of these cases, there were certain portions of pre-trial preparation that were common to all three respondents. Accordingly, all time spent on trial preparation activities that were in the common benefit of all three respondents were billed out at 1/3 the total costs for each respondent. For example, on August 9, 1983, 4.8 hours were spent reviewing case files and conducting research on legal defenses available to all three respondents. For billing purposes, each respondent was billed 1/3 the total, or 1.6 hours. This method of proration is reflected in the Documentation of Fees and Expenses attached as Exhibit D to the Application for Award of Fees and Expenses Under the Equal Access to Justice Act in B.J. Heating & Air Conditioning, Inc. (Sheet Metal Workers Union, Local No. 162) in Case No. 20-CA-16621. It is also reflected in the Amended Documentation of Fees and Expenses—B.J. Heating & Air Conditioning, attached hereto and incorporated herein by reference. All other expenses listed were attributable solely to work on Case No. 20-CA-16621 and were billed 100% to B.J. Heating & Air Conditioning.

It appears that Applicant is not claiming fees for time spent on other cases that were not related to Case 20-CA-16621. It is clear from affidavits submitted by the General Counsel (discussed infra), and from Applicant's explanation, that the claim by Applicant covers prorated time spent on matters that were common to all three Respondents involved in the consolidated cases. This claim does not appear unreasonable or improper. The General

[4] The General Counsel states in the supplemental memorandum of June 15 that Applicant's explanatory memorandum was not received by the General Counsel. Applicant's letter of June 20, 1984, remedies that matter.

Counsel's argument on this point is found to be without merit.

IV. EXCESSIVE FEES

As discussed during the informal conference of April 16, 1984, Exhibit D attached to the application for fees award was not clear and readily understandable. The revised claim submitted by Applicant on April 27, 1984, which accords with Applicant's oral explanation of April 16, 1984, indicates that the amounts claimed are on the basis of $75 per hour as permitted by EAJA, or on lesser computations if actual billings to clients were at less than $75 per hour.

The General Counsel's argument that fees in excess of $75 per hour are claimed by Applicant is not supported by the record.

V. FEES AND EXPENSES INCURRED PRIOR TO OCTOBER 1, 1981

Applicant claims $60 for time expended on RM matters on August 14 and 26, 1981. The General Counsel submitted lengthy argument against such fees, contending, "it is clear that Congress did not intend to apply the statute retroactively so as to include fees and expenses incurred before the effective date of the statute," while acknowledging that EAJA is silent so far as that proposition is concerned.

The General Counsel makes the same argument that was made in *Tyler Business Services v. NLRB*.[5] There, the U.S. Court of Appeals for the Fourth Circuit stated, inter alia:

> The Act's test for recovery of attorney's fees is whether the case was pending on or after October 1, 1981, and not when the fees were incurred. The Supreme Court previously has approved fee awards for work performed before the effective date of the applicable authorizing statute. See *Hutto v. Finney*, 437 U.S. 678, 694 n. 23 (1978) (Civil Rights Attorney's Fees Awards Act); *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 711–21 (1974) (Educational Acts Amendments of 1972). Because the statutes involved in those cases and the Equal Access to Justice Act address similar concerns, the rationale of *Bradley* and *Hutto* applies here. See *Underwood v. Pierce*, No. 79–1318–HP, slip op. at 7–8 (C.D. Cal. Mar. 25, 1982); *Photo Data, Inc. v. Sawyer*, 533 F.Supp. 348, 351–52 (D.D.C. 1982).

The test, therefore, is whether or not the case for which Applicant claims fees and expenses, i.e., Case 20–CA–16621, was pending as of October 1, 1981. It was not so pending—it was issued December 30, 1981, when it was consolidated with Cases 20–CA–16449 and 20–CA–16451, neither of which involved Applicant.

This argument by the General Counsel is meritorious, and the amount of $60, discussed above, is not eligible for an award under EAJA.[6]

VI. FEES AND EXPENSES INCURRED PRIOR TO DECEMBER 30, 1981

Applicant claims fees and expenses totaling $668 incurred prior to December 30, 1981, for preparing one letter concerning an RM petition and for conferences with B. J. Heating personnel and NLRB representatives.

The General Counsel argues that "only fees and expenses that are incurred in 'adversary adjudication' are recoverable, and that, under Section 102.143(a) of the Board's Rules and Regulations, "adversary adjudication" begins with the issuance of a complaint.

The General Counsel's summary of pertinent portions of Board rules is correct. The language of the rules is plain. No fees or expenses incurred prior to issuance of a complaint are eligible for award. The General Counsel is required by law to investigate all charges, and there is no basis on which to conclude that fees and expenses incurred during the investigatory stage of the controversy were intended by Congress to be compensable.

This argument by the General Counsel has merit, and the above-mentioned $668 portion of Applicant's claim is found not to be eligible for award.[7]

VII. FEES AND EXPENSES INCURRED IN DRAFTING THE EAJA APPLICATION

Applicant seeks an award of no less than $1576 for fees and expenses "according to proof incurred in the within application."

General Counsel argues that no fees and expenses incurred "after the adversary adjudication has been completed" are eligible for award.

The General Counsel's position is considered incorrect, since denial of such fees and expenses would have the effect of discouraging litigants who have established eligibility for an award from filing claims.[8] Claiming such an award, however, properly is for consideration only after an award has been made. The claim is not subject to a motion to dismiss. As found below, General Counsel was justified in proceeding herein, and the application is found to be without merit. Therefore, this portion of the claim for no more than $1576 is found to be an includable item in the total claim, but not eligible for an award because Applicant is not entitled to any of the fees and expenses set forth in the application.

VIII. FAILURE TO SHOW HOW APPLICANT "PREVAILED"

The General Counsel argues that "Respondent has failed to identify the Particulars in which it has prevailed and has failed to identify the positions of the General Counsel which were not substantially justified."

This argument is without merit. The application devotes approximately five of its pages, to a detailed review of the history of the case and, in another four pages states with considerable particularity the basis for

[5] 111 LRRM 3001, 3003 (4th Cir. 1982).
[6] *Moholland v. Schweiker*, 546 F.Supp. 383 (1982).
[7] See, for a summary of this issue, Administrative Law Judge Shapiro's decision in *Evergreen Lumber Co.*, JD–(SF)–108–83, adopted by the Board December 7, 1983, in the absence of exceptions.
[8] *Tyler Business Services*, supra.

concluding that the case was initiated and pursued without "substantial justification."

The issue of "substantial justification" is a separate matter, which is discussed below.

IX. SUBSTANTIAL JUSTIFICATION

It is noted at the outset, that this motion to dismiss raises a two-faceted issue. One facet relates to the investigative stage of the controversy; the other relates to the litigation stage. The Government's position must be found to have been substantially justified at both stages, in order for the General Counsel to prevail in this motion.[9]

So far as the investigative stage is concerned, it is quite clear that the General Counsel proceeded in a reasonable manner. The investigation was exhaustive and detailed.[10] Possible violations of the Act reasonably disclosed by the investigation were not novel or unusual—they included several possible 8(a)(1) violations (interrogations, circulation of unlawful petitions, and unlawful solicitation of employees) and 8(a)(5) violations (discontinuance of contractual contributions to trust funds). B.J.'s attorneys were present during much of the investigative stage (taking of affidavits), and during several negotiations involved in the three consolidated cases. There is no indication of any surprise on the part of, or of any advantage taken of, or of any false or misleading statements by investigators addressed to, B.J. or its attorneys. There is no indication, however slight, that the General Counsel's attorneys or investigators were motivated by antagonism, dislike, or vindictiveness so far as B.J. or its representatives were concerned. Issuance of a complaint based on the investigation was reasonable and proper.

So far as the litigation stage is concerned, there is no indication that the General Counsel's initial severance, and later dismissal, of the case against B.J. improperly was motivated or was based on last-minute recognition that a prima facie case was out of grasp. Counsel for the General Counsel represented at trial, and later in memoranda, that severance and subsequent dismissal of the case against B.J. were based upon refusal of witnesses to appear at trial in answer to subpoena. A copy of the subpoena for David Gladwill was submitted to the judge by counsel for the General Counsel, pursuant to the judge's request for subpoena copies. Gladwill was a key witness for the General Counsel's case. Without witnesses, a case could not be made. Pretrial affidavits, of which there were many, cannot be used as substantive proof of violations of the Act. If there had been no pretrial investigation, subsequent failure to litigate the issues possibly may have provided the predicate for an award. However, that is not this case. Possibly the General Counsel could have gone further, and asked a U.S. district court to enforce the subpoenas. However, that would have involved lengthy and costly procedures, and it must be assumed, in light of the General Counsel's generally reasonable approach to the case, that good reason existed for abandoning further efforts to get witnesses, whose affidavit evidence already had been obtained, to trial. There is no evidence that the General Counsel acted arbitrarily or improperly during the litigation stage of these proceedings.

Applicant's principal argument is that, had the case gone to trial, it would have prevailed on the merits. That may be true, but it is beside the point. The question is whether or not the General Counsel substantially was justified in initiating action against B.J. and in pursuing that action to the point of trial. As noted above, such justification is apparent. The General Counsel's evidentiary support disintegrated through no fault of his own, and that fact cannot now be used to negate the justification that existed prior to that time.

Based on the foregoing, it is concluded that there was reasonable basis and substantial justification, both in law and in fact, for the General Counsel's pretrial and trial conduct. It will, therefore, be recommended that the application be denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

It is ordered that the application of B. J. Heating & Air Conditioning, Inc. for an award of fees and expenses under the Equal Access to Justice Act is denied.

---

[9] *Moholland v. Schweiker*, supra.

[10] The record includes pretrial affidavits of B.J.'s president and several of B.J.'s employees, as well as extensive documentary evidence such as letters and statements.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Crouse-Hinds Company, a Division of Cooper Industries, Inc. *and* **Randolph C. Burroughs.** Case 16–CA–11026

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 28 February 1984 Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel filed with the Board a motion to strike the Respondent's brief opposing the exceptions. Thereafter, the Respondent filed a motion to strike the General Counsel's exceptions. Both motions are denied.

[2] The General Counsel alleged that the Respondent violated Sec. 8(a)(1) of the Act by discharging Supervisor Burroughs because his business partner, employee Newbrough, engaged in union activities. The General Counsel argued that the discharge coerced Newbrough in the exercise of his employee rights because the part-time business in which Newbrough had a one-half interest could be harmed by the loss to Burroughs through the discharge of his main source of income. In adopting the judge's conclusion that Burrough's discharge did not violate the rights guaranteed Newbrough by Sec. 7 of the Act, we emphasize that the judge found that Burroughs was fired for his own conduct in maintaining a business relationship with a union organizer and not because of Newbrough's organizing activities or for helping Newbrough to vindicate his employee rights. We find it unnecessary to pass on *Golub Bros. Concessions*, 140 NLRB 120 (1962), and similar cases that hold that it is unlawful to discharge a supervisor because his or her spouse engaged in protected activity, as those cases are inapposite to the facts here.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case was tried before me in Amarillo, Texas, on October 6, 1983, pursuant to the August 10, 1983 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed April 18, 1983, by Randolph C. Burroughs, an individual (Burroughs or the Charging Party), against Crouse-Hinds, a Division of Cooper Industries, Inc. (Respondent).[1]

In the complaint the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act on March 25, 1983, by discharging Burroughs, Respondent's maintenance general foreman, because a statutory employee (Joseph R. Newbrough) of Respondent, who was engaged in a sideline business as a partner with Burroughs, became involved in union activities, and that the discharge violated Section 8(a)(1) of the Act because it was done "in order to discourage employees" from engaging in union or other protected activities.

By its answer Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Ohio corporation. It has a facility located in Amarillo, Texas, where it is engaged in the manufacture and sale of electrical fittings for electrical construction.[2] During the past 12 months, Respondent purchased supplies and materials valued in excess of $50,000 from firms located outside the State of Texas, and such supplies and materials were shipped from such firms directly to Respondent's Amarillo, Texas facility. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The General Counsel alleges that the International Brotherhood of Electrical Workers, Local 602, AFL–CIO–CLC (the Union or Local 602) is a labor organization within the meaning of Section 2(5) of the Act. Neither in its answer nor at the hearing did Respondent ever admit such allegation to be true. However, Crouse-Hinds has contracts with other locals of the IBEW at other locations (Tr. 194). It appears from the record that on March 4, 1983, Local 602 filed the representation petition in Case 16–RC–8545, and that the Board-conducted election was held in that case on April 29, 1983 (Tr. 173–174, 219). The fact that Region 16 conducted the election supports the finding, which I make, that Local 602 is a labor organization. *Story Oldsmobile*, 244 NLRB 835, 836 (1979).

[1] All dates are for 1983 unless otherwise indicated.

[2] The corporate headquarters of Cooper Industries is located in Houston, Texas (Tr. 189). The division headquarters of Crouse-Hinds is situated in Syracuse, New York (Tr. 191; R. Br. 6).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Facts*

Charging Party Burroughs, as the parties stipulated, was a statutory supervisor at all times relevant (Tr. 24).[3] Around January 10, 1983, Burroughs and Joseph R. Newbrough, a millwright in Respondent's maintenance department, orally agreed to a business partnership, ostensibly on a 50/50 basis, in which they began operating a septic tank and backhoe business part time.[4] As shown on their business card, they named their side business the "B & N Septic Systems & Backhoe Service." (G.C. Exh. 3; Tr. 32–34.) In accordance with Respondent's rules, Burroughs obtained clearance from Respondent to enter the side business (Tr. 118–119). He thereafter distributed B & N's business cards (which named both him and Newbrough) to various supervisory personnel. In the latter part of January, Personnel Manager Don Barclay and Plant Manager Robert J. Murphy each conversed with Burroughs concerning the progress of B & N (Tr. 36).[5]

About Monday, February 28, 1983, Newbrough, his wife Marlene (herself an employee of Respondent), and employee Peggy Griffin went to the union hall of IBEW Local 602 and obtained authorization cards which they began distributing (Tr. 156–165). The organizing went rather quickly, for on March 4, 1983, the Union, in Case 16–RC–8545, filed a petition for representation election (Tr. 173, 219). Newbrough passed out union literature every working day in March (Tr. 65). The election was conducted in a unit of 118 employees on April 29 (Tr. 219), and, in Newbrough's words, the Union lost by a "pretty good" margin (Tr. 165).

By no later than early March Burroughs was aware that Newbrough was involved in the union organizing, and around Friday, March 11, Plant Manager Murphy informed Burroughs that the organizing had started in his maintenance department (Tr. 77, 114, 139–142).[6]

Leading up to the conversation in Murphy's office about March 11, Burroughs had a conversation with Personnel Manager Barclay, perhaps a day or two before March 11, in Burroughs' office. On that occasion Barclay told Burroughs that Burroughs needed to get his business partner "straightened out on his activities." Burroughs said that he did not feel he had the right to interfere with Newbrough's beliefs and that, if Newbrough wanted to be involved in the Union, it was his right and Burroughs would not interfere. At that Barclay changed the subject (Tr. 78–80, 115). Although Barclay did not expressly mention "union," it is clear, and I find, that he was making reference to the union activities of Newbrough.

At one point during the March 11 conversation when Murphy informed Burroughs that the union organizing had started in the maintenance department, Murphy and Burroughs were standing by a window. It was at the end of the shift and Newbrough could be seen waiting for Burroughs in the latter's automobile. Gazing out at Newbrough, Murphy told Burroughs that "it does not look good to the company or to the employees" for Burroughs to be seen in the company of Newbrough, and that such a relationship could lead to a serious problem. Burroughs replied that he and Newbrough did not discuss the Union, that the subject was not a problem between them, and that Burroughs would not discontinue their friendship or relationship (Tr. 80–81, 114).

Following this conversation, Burroughs told Newbrough that because of Burroughs' management obligations he no longer could socialize with Newbrough although they would continue their B & N business relationship (Tr. 116). Either in that conversation, or one as late as March 21, Burroughs, as Newbrough credibly testified, told Newbrough that Burroughs was receiving heat because of their association and because Newbrough was a union organizer (Tr. 162, 168).

The parties stipulated that James Ferguson is a statutory supervisor (Tr. 41). Based on the stipulation and the combined testimony of Burroughs (Tr. 38, 84) and that of Vice President Dunphy (Tr. 196), it appears that Ferguson holds some position in the employee relations department in Cooper Industries' corporate office in Houston. During the Company's counterorganizing campaign,[7] Ferguson conversed with Burroughs on three occasions. The first two conversations are not described. The third took place about March 22 in the office of Ron Riley, the plant superintendent. Only Ferguson and Burroughs were present. On this occasion Ferguson stated that Burroughs' outside business relationship with the union organizer was a real problem, and that it was not acceptable and would have to be dealt with soon (Tr. 85–86, 89, 115–116). Ferguson asked if Newbrough was aware that he was placing Burroughs' job in jeopardy. Burroughs replied that he saw no problem on the matter, that he and Newbrough knew how the other stood on the union subject.

Ferguson then complained that Burroughs had interfered with Ferguson's countercampaign when Burroughs intervened on behalf of Peggy Griffin who had received a warning for absenteeism. Burroughs told Ferguson that the reason he asked Plant Manager Murphy to review the case was because Murphy had always had an open

[3] Respondent hired Burroughs on July 10, 1980, raised him to maintenance foreman around October 1980, and promoted him to general foreman about October 1981 (Tr. 22, 132; G.C. Exh. 8).

[4] Newbrough, who later voluntarily quit his employment with Respondent, was a rank-and-file employee directly under a maintenance foreman. The foreman in turn reported to Burroughs. There were about 26 employees in the maintenance department.

[5] Only three witnesses testified in this proceeding: Burroughs and Newbrough for the General Counsel (with Burroughs again taking the stand in the rebuttal stage), and Edward Dunphy Jr. for Respondent. An attorney, Dunphy is vice president of employee relations for Crouse-Hinds at its Syracuse, New York headquarters.

[6] The record is unclear concerning exactly when Burroughs first became aware of the organizing. Although Newbrough places one conversation on the subject with Burroughs as occurring even before the cards were obtained, he seems to merge a separate and later matter with that conversation (Tr. 160). The precise time of Burroughs' knowledge is immaterial here.

[7] Burroughs testified that the supervisors were trained in the "Do's and Don'ts" and instructed not to commit any unfair labor practices (Tr. 143). Burroughs carried out his assigned tasks in the countercampaign, including distributing Respondent's handbills (Tr. 93). Respondent opposed unionization of the plant (Tr. 142). Dunphy testified, however, that Crouse-Hinds has contracts with the IBEW at other locations (Tr. 194).

door policy and several union supporters had come to him and said that the Peggy Griffin case was an example of why they wanted a union. Burroughs told Ferguson that afterwards Murphy told Griffin the matter had been mishandled by the personnel department and that the warning would be removed from her file. Burroughs further told Ferguson that he was not in favor of the Union at the plant, but he would not disavow his friendship with Newbrough. Finally, Burroughs expressed the opinion that the personnel department constituted 90 percent of the problems in the plant by, for example, mishandling certain terminations. Ferguson said "that" (personnel ineptness, apparently) would all be at an end (Tr. 86–90).

At a regular meeting of the maintenance department in the late afternoon on Friday, March 25, 2 of the 18 employees present asked Burroughs about his personal views on the Union. Burroughs responded that it did not matter to him personally, that his job was to run the job effectively and efficiently, and that he would see that the job was done—with the Union or without one (Tr. 92, 144–145).

Moments later Burroughs was summoned to Plant Manager Murphy's office. Just the two of them were present. Murphy asked for Burroughs' resignation. Burroughs inquired if Murphy meant from his supervisory position. The plant manager advised that it was a complete separation, and that Burroughs would be terminated if he did not resign. Burroughs asked for the reason and who had made the decision.[8] Murphy stated that the reason which would be given was a "conflict of interest," that the people handling Respondent's counter campaign felt that Burroughs was a problem because of his outspokenness and his association with the union organizer, and that such persons did not want that association.

Burroughs said that he would not resign, that he wanted the reasons stated on the termination slip, and that he would return the following day to obtain any evaluation or contracts he had signed (Tr. 94–96). The following day he picked up the termination slip which states (G.C. Exh. 7): "Termination due to conflict of interest."

At the close of the General Counsel's case-in-chief, Respondent moved for dismissal on the ground that no violation had been established even if all the General Counsel's evidence were credited (Tr. 174). I denied the motion and Respondent proceeded with its defense by calling its only witness, Vice President Edward Dunphy.

Vice President Dunphy testified that he was present at a general meeting of Respondent's officials at the corporate office in Houston, Texas, on March 24, 1983. In attendance were H. John Riley Jr., executive vice president of Cooper Industries; Felix F. House, senior vice president and general manager of the electrical construction materials product group of Cooper Industries; James Ferguson; and Dunphy (Tr. 190, 204). A number of matters were discussed including a report, apparently by Ferguson, on the Union's organizing attempt at the Amarillo plant (Tr. 189–190). Included in the report, according to Dunphy, was a comment that Burroughs was engaged in a commercial venture with a person he supervised, and that the business venture had consumed some of the normal work hours at Respondent's plant (Tr. 190, 195, 199–200).[9] Ferguson's report also included the fact that Newbrough was the husband of a woman active on behalf of the Union (Tr. 191). Dunphy testified that the report made no mention that Newbrough was active for the Union (Tr. 202). According to Dunphy, that report was his first knowledge that Burroughs was involved in a business venture with one of his department's employees (Tr. 195, 201).

Riley, House, and Dunphy conferred at a separate meeting later that March 24. Dunphy remarked that, although Burroughs was held in high regard as a technician, he was a problem in his relationship with other supervisors, and that the business venture with a subordinate was unacceptable. When Riley asked what should be done, Dunphy stated that Burroughs should be terminated. Riley asked if it made any difference that Newbrough's wife was active in the Union's campaign. Dunphy responded in the negative and added that Respondent could not have a supervisor compromising his responsibility to the Company by becoming involved in such a situation (Tr. 190–191). At Syracuse, New York, the following day, Murphy's superior, Patrick J. Vassallo, vice president of manufacturing for Crouse-Hinds, was informed of the policy decision to terminate Burroughs, and Vassallo apparently instructed Murphy that very day, March 25, to implement the decision (Tr. 191).[10]

On the matter of Burroughs' supervisory performance, it should be noted that the record contains his last appraisal, dated September 10, 1982, by Plant Manager Murphy, and approved by Vassallo on September 17, 1982 (G.C. Exh. 2). Item 6 under job performance pertains to his ability to work well with others. Murphy's entry for this item reads:

> Works well with his subordinates; has difficulty working with his peers in the production area.

Under the general heading of overall performance, item 4 asks for a description of areas needing improvement. Murphy wrote:

> Needs to improve his tact in dealing with people outside of his direct realm of responsibility. He also needs to develop a better understanding of the rules that a corporation of our size is governed by.

On the topic of potential for advancement, under item 4, Murphy wrote that Burroughs could eventually be

[8] On cross-examination Burroughs testified that he and Murphy respected each other and he therefore knew Murphy would not have taken this action on his own without talking with him in advance (Tr. 147–148).

[9] Although the report apparently named Newbrough, Dunphy testified that he did not recognize the name (Tr. 190, 192). Dunphy either knew Burroughs or recognized his name, and, indeed, referred to him by his nickname of "Bo" in his testimony.

[10] As Vassallo's name appears in the record with questionable or uncertain spelling (Tr. 31, G.C. Exh. 2 at 4), I have used the spelling shown at page 8 of Respondent's brief.

promoted to plant manager. As a final comment, Murphy added:

> Mr. Burroughs is a very highly qualified Maintenance Supervisor. He knows how to operate a maintenance crew. He needs to grow in the area of personnel relationships with people outside this group.

According to Dunphy, he considered and rejected the option of having Burroughs, rather than being fired, be directed to cease his business relationship with Newbrough. He rejected the idea because: (1) the B & N relationship was well known among a large number of the employees; (2) his supervisory skills were a source of concern to Dunphy; (3) he showed a lack of judgment in establishing B & N with a subordinate; and (4) attendance to B & N had, in some instances, occurred during work hours at Respondent's plant (Tr. 205).[11]

B. *Credibility Resolutions*

1. Introduction

It can be argued that I should first determine whether the General Counsel's evidence adduced during his case-in-chief, viewed in isolation from Respondent's defense, establishes a prima facie case before I proceed to review all the evidence.[12] On the other hand, as Respondent proceeded with its defense after I overruled its motion, one might contend that the appropriate procedure is to consider all the evidence, make credibility resolutions, and resolve the case on the merits of the entire record.[13] In view of the disposition I make of the case, the procedural choice seems immaterial, and I therefore have considered the entire record.

2. Resolutions

There is no direct contradiction of the testimony of Burroughs and Newbrough. Their demeanor was persuasive, and I credit them.

Neither was there any direct contradiction of Dunphy's testimony. However, Dunphy testified with an unpersuasive demeanor and I do not credit him. Moreover, certain elements of Dunphy's testimony are inconsistent with the undisputed facts. For example, Dunphy testified that Ferguson did not report that Newbrough, as well as Newbrough's wife, was active for the Union. In view of the evidence concerning Ferguson's March 22, 1983 conversation with Burroughs, it is simply illogical that Ferguson would omit reporting that Newbrough himself was active. I find that Ferguson did report that Newbrough was active in the union campaign. In view of my ultimate disposition herein, it is unnecessary for me to resolve whether Dunphy testified otherwise in an effort to place some perceived distance between Burroughs and the person active for the Union for the purpose of insulating Burroughs' discharge from a direct connection with a person active in the union campaign.

Second, other grounds specified for opting against simply requiring Burroughs to sever the business relationship seem to be afterthoughts added as makeweights. Thus, Dunphy overextends himself by listing Burroughs' supervisory skills as a basis for the termination. Murphy did write that Burroughs needed to "improve" in the areas of dealing with other supervisors, but his opinion that Burroughs had the potential to be a plant manager is a far cry from Dunphy's assessment that the deficiency of Burroughs was so bad as to warrant a termination.

Other than Dunphy's testimony about Ferguson's alleged report, there is no record evidence of a conflict between the work of B & N and the plant's work. Dunphy testified with an unpersuasive demeanor, and Burroughs (Tr. 128–130, 150–151) and Newbrough (Tr. 166–167) credibly denied that there was any interference. I find that Ferguson did not report about any conflict.

As for Burroughs' lack of judgment in establishing a commercial venture with a subordinate, Dunphy failed to address the fact that both Murphy and Personnel Manager Barclay were aware of the situation in January. It did not become an issue until Newbrough became a known union activist. It is noteworthy that Dunphy gave no testimony that either Plant Manager Murphy or Personnel Manager Barclay, or both, were discharged or reprimanded for allowing Burroughs to go into the B & N business with a subordinate.

In short, I find that but for Newbrough's union activities, the most that would have happened would have been an order to Burroughs to sever his business relationship with his subordinate. Although such a course had been strongly suggested to Burroughs, he was never ordered to sever his business relationship with Newbrough.

It is clear, and I find, that the real reason Respondent terminated Burroughs was that given to Burroughs on Friday, March 25, by Plant Manager Murphy, that is, his outspokenness[14] and his business association with a known union organizer. I find the "conflict of interest" ground to be a complete fabrication insofar as a termination is concerned. It could form the basis for an order to sever the business relationship, but that option was not chosen by Respondent. Thus, Burroughs was not terminated for insubordination in refusing to comply, for he was never ordered to comply.

C. *Analysis and Conclusions*

The thrust of the General Counsel's case, although initially appearing to be two-pronged, apparently has been merged into a single argument: A violation is established because Respondent interfered with the protected rights of employees by discharging statutory Supervisor Burroughs based on his business relationship with union activist Joseph R. Newbrough. The legal theory, advanced

[11] As to the last item, no specific instance was described, and Dunphy testified that such factor had been reported to him by Ferguson (Tr. 199–200). Ferguson did not testify.

[12] See *Hillside Bus Corp.*, 262 NLRB 1254 (1928).

[13] See *Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478 (1983). However, under Sec. 102.41 of the Board's Rules and Regulations, a party does not waive an objection by further participation.

[14] A euphemism, I find, for expressing a neutral position to his employees on the union issue, such as occurred on March 25, and to management when questioned about his association with Newbrough.

by the General Counsel in support of this contention, is the line of cases finding it unlawful for an employer to discharge a supervisor *because of* the union activities of an employee who is the spouse of the supervisor. The parties dispute whether the Board impliedly overruled such cases by its June 23, 1982 decision in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982).

At the hearing it appeared that the General Counsel was contending that Burroughs' discharge additionally was unlawful because he failed to "straighten out" Newbrough. That is, that Burroughs failed to dissuade Newbrough from his union activities and even refused to make such an attempt. It was clear at the hearing that such a theory, to be successful, required inferring that Personnel Manager Barclay meant that Burroughs should, if necessary, engage in illegal conduct to dissuade Newbrough. This is so because the Board has long held that an employer is entitled to discharge a supervisor who fails to use *lawful* efforts in seeking to persuade employees to cease their union activities. *World Evangelism*, 261 NLRB 609 (1982); *Western Sample Book Co.*, 209 NLRB 384, 389–390 (1974); and *Southwest Shoe Exchange Co.*, 136 NLRB 247 (1962). At page 8 of his brief, counsel for the General Counsel acknowledges this settled statement of the law. As for Barclay's remark, the General Counsel does not argue that the evidence supports a finding that Respondent expected Burroughs to use unlawful means to dissuade Newbrough.

The relevant complaint allegation, contained in paragraph 8, is in the conjunctive rather than the disjunctive. Paragraph 8 reads:

> Respondent engaged in the conduct described above in paragraph 7 because Burroughs's business partner, i.e., Respondent's statutory employee, joined, supported, or assisted the Union, and/or engaged in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and* in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. [Emphasis added.]

It seems clear that the final clause of the allegation is an implied acknowledgment that it takes more than a discharge of an employee's supervisor-spouse to constitute a violation. Thus, there must be a further finding that the discharge would interfere with the statutory rights of employees.

We may now return to the debate of the application over *Parker-Robb*. When the General Counsel rested his case-in-chief, Respondent moved for dismissal (Tr. 174). As part of its argument in support of the dismissal motion, Respondent contended that *Parker-Robb* overruled the family relationship line of cases (Tr. 179). Respondent relies on the Board's language in *Parker-Robb* overruling the "secondary or incidental effect" cases. (262 NLRB at 404.) As earlier noted, I overruled the dismissal motion. I did so on the basis that the statement by Personnel Manager Barclay conceivably could support a finding that Respondent discharged Burroughs because he failed to use, if necessary, unlawful means to dissuade Newbrough.

In *Parker-Robb* the Board further stated that the justification for finding a supervisor's discharge to be unlawful, and ordering his reinstatement, is grounded on the view that the discharge itself *severely impinged* on the employees' Section 7 rights. Examples of this would be when a supervisor is discharged for testifying at a Board hearing or at a contractual grievance proceeding, or for refusing to commit unfair labor practices in order to dissuade employees from their union activities.

In support of its argument that the supervisor-spouse employee cases are still viable, the General Counsel cites *Operating Engineers Local 400*, 265 NLRB 1316 (1982). The Board there, at footnote 1, cited with approval cases which reaffirmed the Board's position that "a supervisor discharged because he or she is the spouse of an employee who has engaged in union or other protected activities is entitled to reinstatement and backpay." That decision issued some 6 months after *Parker-Robb*.

Burroughs was not fired because Newbrough was a union activist. Such an action would be more in the nature of a discharge for failing to dissuade Newbrough from supporting the Union. Burroughs was fired because he continued his business association with a union activist. An incidental effect of such a termination might be one of discouraging employees from supporting a union.

Respondent, as I have found, would not have taken any action against Supervisor Burroughs had he severed his business association with Newbrough. Newbrough could have continued in his capacity as a union activist and Burroughs in his position as a general foreman had Burroughs withdrawn from the B & N business partnership. When Burroughs failed to do this, he was fired. While it is true that Plant Manager Murphy did not give Burroughs that option, it is clear from my earlier findings, including the March 22 remarks of James Ferguson, that such an option had been available and strongly suggested to Burroughs. However, Burroughs repeatedly declared that he would not sever his association with Newbrough.

Does the option Supervisor Burroughs had call for dismissal of the complaint? If we had a spouse situation here, with a husband the supervisor and his wife an employee and also a union activist, could an employer tell the supervisor that his wife can remain active for the union, but that the supervisor would have to terminate the relationship, i.e., divorce his wife? Such a choice indirectly places the employee-spouse in the untenable position of learning that the price for his or her continued union activities would be either (a) a fired supervisor spouse or (b) a divorce.

The General Counsel contends that the "rationale in these earlier spousal decisions seems to be that the effect of the discharge of the supervisor-spouse is a form of economic reprisal against the employee-spouse, since the income of one is part of the income of both." (Tr. 8) From this the General Counsel argues that the discharge of Supervisor Burroughs because of the union activities

of his business partner, Newbrough, would reasonably tend to discourage employee Newbrough from engaging in union activities.

"Thus," the General Counsel argues, "we see that the supervisor-partner's discharge operates as an economic reprisal against a statutory employee because of the statutory employee's union activities. The nature of the economic reprisal and the resulting coercive tendency is clear in the circumstances such as here, where Burroughs and Newbrough both engaged in a part-time business and the present and future viability of the business necessarily depended on the continued income of both partners." (Br. 8–9.) As the discharge of Burroughs, continues the General Counsel, had the effect of economically harming Newbrough, it then follows that the discharge of Supervisor Burroughs interfered with the Section 7 rights of Newbrough (and presumably, by extension, with the Sec. 7 rights of all other employees) in violation of Section 8(a)(1) of the Act. Reinstatement of Burroughs, with backpay, is the appropriate remedy, concludes the General Counsel, in order to end the coercive effect of the discharge of Newbrough[15] as well as to convey to employees the extent to which the Act protects Section 7 rights.

In *Consolidated Foods Corp.*, 165 NLRB 953, 959 (1967), the Board adopted an analysis acknowledging the general rule to be that although a supervisor is not protected from discharge because of his own union activities, there are three exceptions.

> First, that an employer may not discharge a supervisor if his defense is that he refused to commit an unfair labor practice for the employer. *Jackson Tile Manufacturing Company*, 122 NLRB 764, enfd. 272 F.2d 181 (C.A. 5). A second exception was established in the instance of a supervisor who gave evidence before the National Labor Relations Board. The third exception as spelled out in *Golub Bros. Concessions*, 140 NLRB 120, is where a supervisor is discharged because he or she is the spouse of an employee who has engaged in union or other protected activities.

Although the Sixth Circuit denied enforcement of the Board's order calling for reinstatement of the supervisor discharged in *Consolidated Foods*, it did so on the facts and expressly without reaching the legal issue of whether the discharge of a supervisor is ever unlawful. *Consolidated Foods Co. v. NLRB*, 403 F.2d 662 (6th Cir. 1968).

In *Golub Bros. Concessions*, 140 NLRB 120 (1962), the Board adopted the following language (140 NLRB at 127):

> There is no merit to the first defense aforementioned involving blanket immunity under the Act for the discharge of supervisory employees. It is now well established that while an employer may demand the complete loyalty of his supervisors and may discharge those who participate in union activity, the Act does not permit him to use this loyalty as a device for infringing upon the rights of rank-and-file employees. *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 208 (C.A. 5); *Jackson Tile Manufacturing Company*, 122 NLRB 764, 767, enfd. 272 F.2d 181 (C.A. 5). A restraint on the exercise of employee rights is readily apparent where, as it is here claimed, the supervisor is discharged because she is the wife of an employee who has engaged in union or other protected activities. *Brookside Industries, Inc.*, 135 NLRB 16. Under these circumstances, the rank-and-file employees of Respondents can "reasonably . . . fear that the employer would take similar action against them if they continued to support the Union." *Jackson Tile Manufacturing Co.*, supra.

In *Jackson Tile Mfg. Co.*, 122 NLRB 764 (1958), enfd. per curiam 272 F.2d 181, (5th Cir. 1959), the Board wrote at 767:

> We also find, as did the Trial Examiner, that the Respondent violated Section 8(a)(1) by discharging John Scoggins, a supervisor, because he became reluctant to commit further unfair labor practices on the Respondent's behalf. The Board has held that a discharge of a supervisor for refusing to commit unfair labor practices on behalf of his employer constitutes an invasion of the self-organizational rights of rank-and-file employees.[5] This is so because it demonstrates graphically to rank-and-file employees the extreme measures to which the offending employer will resort in order to thwart them in their desire to join or assist a labor organization.

The Board did not expressly address the supervisor-spouse line of cases in *Parker-Robb*. And in the subsequent case of *Operating Engineers Local 400*, supra, the Board, in footnote 1, cited with approval *Consolidated Foods* and *Golub Bros.* and did not mention *Parker-Robb*. It therefore appears that the Board considers the supervisor-spouse cases a separate class distinguishable from the types of cases it overruled in *Parker-Robb*.

Assuming, therefore, that the supervisor-spouse cases remain viable, does the rule of those cases apply here? First, what is the rationale of those cases? Is it the economic relationship of the supervisor and his or her spouse as posited by the General Counsel? Is it the fear of an economic loss, that is, loss of the supervisor-spouse's job and income, which reasonably tends to interefere with, restrain, and coerce employees in the exercise of their Section 7 rights? Or is it also the special and ancient relationship of husband and wife and the public consideration that the statutory goals will be defeated, in part, if an employer is given the right to hold a threat of economic terrorism over a husband and wife when one is a supervisor and the other a rank-and-file employee?

If the touchstone is that there is an economic relationship, then Burroughs and Newbrough qualify with their

[15] In accordance with *Operating Engineers Local 400*, 265 NLRB 1316 (1982).

[5] *Talladega Cotton Factory, Inc.*, 106 NLRB 295, enfd. 213 F.2d 208 (C.A. 5).

B & N operation. But if the special relationship of husband and wife is also part of the rationale, then the General Counsel's argument fails as to Burroughs and Newbrough.

It appears to me that something more than an economic relationship is part of the underlying rationale in the supervisor-spouse cases. That extra something can be described for our purposes here as the husband-wife relationship.[16] Consequently, the General Counsel's argument fails.

The only impact on Newbrough here would have been an economic inconvenience in his having to buy out Burroughs or sell his interest to Burroughs. That is a far cry from an employee being faced with the prospect of having to cease his or her union activities or face either (1) a discharged supervisor spouse with attendant economic loss to the family, or (2) a divorce. In short, the impact of Respondent's action here did not severely impinge on the Section 7 rights of Newbrough or other employees. I therefore shall dismiss the complaint.

[16] Whether that basis would include other family members, and even extend to friends and "friends" are matters which need not be decided here.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. IBEW Local 602 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times, Randolph C. Burroughs was a supervisor within the meaning of Section 2(11) of the Act.

4. By discharging Supervisor Burroughs on March 25, 1983, because Burroughs continued his part-time business association with employee and union activist Joseph R. Newbrough, Respondent did not violate Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The complaint is dismissed.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Joseph F. Whelan Company, Inc. *and* **Charles T. Wiltse.** Case 29–CA–10004

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 30 June 1983 Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging employee Wiltse for refusing to participate in a disciplinary interview without a union representative. Contrary to the judge and for the reasons set forth below, we find that the Respondent acted lawfully when it discharged Wiltse for refusing to obey an order to go to the manager's office without a union representative.

During Wiltse's 6 years of employment as a truckdriver for the Respondent, he had received eight written warnings. He received four of these warnings in the 10 months before his discharge on 10 June 1982, two of which stated that the Respondent would take other action against him if his poor work performance continued and the third stated that the Respondent was asking for a hearing at which it would request permission to discharge him for poor work performance. After the fourth warning, there were two hearing sessions in April and May 1982 about the Respondent's request to discharge Wiltse, and a third session was scheduled for late June.

On 9 June 1982 a customer where Wiltse was supposed to be making a delivery called Respondent Manager Cotter to complain that Wiltse was not with his truck so it could not be unloaded. Cotter asked the customer to have Wiltse call when he returned. When Wiltse called about 15 minutes later, he told Cotter that he had taken his lunch break from 1 to 1:30 p.m., even though the customer's employees took their lunch breaks from 12:30 to 1 p.m., because he believed he was not allowed to stop for lunch until that time under the contract. Cotter said that Wiltse was wrong about the lunch hour provisions of the contract and that he should have called the office when he took a different lunch period from the customer's employees. Wiltse said he did not know that rule. Cotter said it had always been the rule that you should call because "you just don't walk away from the truck when the warehouse is operating." Cotter ended the conversation by telling Wiltse to get back to his truck, unload it, and "I'll show you tomorrow, you're wrong about this lunch hour."

On 10 June 1982, at the morning "shape" where drivers' work assignments were made, Cotter handed Wiltse his work assignment book and told him to come into the office next to the drivers' room. Wiltse asked if shop steward Sorensen was there. Cotter said he was not. Wiltse said he would not go into Cotter's private office for a talk without Sorensen being present. Cotter said that if Wiltse did not come into the office he could not work. Wiltse again refused to enter the office. Cotter then took Wiltse's work book, and Wiltse left the Respondent's terminal. That day, Cotter sent Wiltse a letter stating he was discharged because of his actions on 9 June at Krasdale Foods and on 10 June at the Respondent's facility, "when you refused an order to come into the office to cooperate with the company in straightening out the previously mentioned incident at Krasdale."

The judge found that, on most of the other occasions when Wiltse received written warnings, Cotter had asked Wiltse during the morning "shape" to come into the office for a talk. Each time Wiltse went into Cotter's office, where the shop steward was waiting, and discussed the incident with Cotter and the steward. Then Cotter handed Wiltse a written warning a few days later. Based on this past practice and on the scheduled hearing about the Respondent's request to discharge Wiltse, the judge found that Wiltse reasonably believed the 10 June interview might result in disciplinary action against him. Relying on the Supreme Court's *Weingarten* decision,[1] the judge concluded Wiltse was entitled to have a union representative present at this interview, and, therefore, the Respondent violated Section 8(a)(1) of the Act when it discharged Wiltse for refusing to participate in the interview without a union representative.

Significantly, the judge found that the Respondent fired Wiltse "only for his refusal to enter the office."[2] We agree. Based on this finding, we conclude that the Respondent acted lawfully under *Roadway Express*.[3] In *Roadway Express*, we stated

[1] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).
[2] JD, sec. II,B, par. 12.
[3] *Roadway Express*, 246 NLRB 1127 (1979).

that an employer does not first have to assure an employee that his representative will be present at a meeting in order to induce the employee to leave the plant floor. Thus, if the employer, as here, asks the employee to leave the work area to go to another location where further discussion can occur in private, the employee acts at his peril if he declines to do so.[4] In this case, Wiltse's refusal to report to the office as directed by Cotter clearly undermined the Respondent's right to maintain discipline and order, especially as it occurred in the drivers' room while Cotter was making work assignments. Although Wiltse was entitled to refuse to participate in an interview in the absence of the requested representation, he was not privileged to ignore the Respondent's order to report to the office in an attempt to compel the Respondent to conduct its business in the work area. Accordingly, we find that the Respondent did not violate the Act when it discharged Wiltse for refusing to obey an order to go to the office, and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[4] *United States Steel Corp.*, 253 NLRB 593 (1980).

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed on October 6, 1982,[1] by Charles T. Wiltse, a complaint was issued by Region 29 of the National Labor Relations Board on November 30 against Joseph F. Whelan Company, Inc. (Respondent). The complaint alleges that Respondent violated Section 8(a)(1) of the Act by discharging Wiltse on June 10 because he requested that a union representative be present for a disciplinary interview, and because he refused to participate in such interview without a union representative.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, having its principal office and place of business at 439 West 54th Street, New York, New York, and a truck depot at 400 Western Avenue, Staten Island, New York, is engaged in providing transportation and related services. During the year ending December 1981, it derived gross revenues in excess of $50,000 from services performed for Proctor & Gamble Company, Inc., located in New York, which company annually produces goods valued in excess of $50,000 which it ships directly out of the State in which it is located. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Truckdrivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

Wiltse, hired by Respondent on April 19, 1976, as a truckdriver, has been a member of the Union during his employment there.

Wiltse has had a very poor work record. During his 6 years of employment he has received 8 written warning notices which set forth the details of such alleged infractions as having several traffic accidents which caused damage to the truck and failing to orally report an accident; taking excessive time while unloading the vehicle at certain stops and also between such delivery stops; writing false, later times of deliveries on his worksheet in order to make it appear that it took longer to make certain deliveries than it actually took; taking excessive overtime; stopping for coffee during work hours; failure to note on a receipt why all the items scheduled for delivery to a customer were not delivered; failure to travel by the most direct route between deliveries; failure to call the office if delayed at a delivery stop; driving with the brakes on, causing damage to two tires; inability to properly park the truck; ignoring the instructions of a mechanic, thereby causing the truck to stall which resulted in a mechanic being sent to fix the truck.[2]

Robert Cotter, Respondent's manager of the Staten Island facility, handed Wiltse the warning notices at the terminal.[3] About 1 to 3 days prior to the delivery of each warning notice, Cotter, during the morning shape, on handing Wiltse his assignment book for the day's work, asked him to come into the office because he wanted to talk to him.[4] On each occasion, Wiltse entered Cotter's office where he spoke with Cotter and the shop steward concerning the incident. About 1 to 3 days after the meeting, a warning notice concerning the incident discussed was delivered to Wiltse.

It should be noted that the warning letters of September 1 and October 2, 1981, contained the following admonition:

[1] All dates are in 1982 unless otherwise stated.

[2] The notices are dated September 15, 1976, February 17, 1978, March 26 and September 25, 1980, September 1 and October 2, 1981, and January 15 and March 23, 1982.

[3] The parties' collective-bargaining agreement provides that the warning letter must be issued within 7 days of the incident involved.

[4] However, on one or two occasions, the shop steward told Wiltse that Cotter wanted to speak with him and, on another occasion, Cotter began talking to Wiltse alone but then stopped the conversation and he (Cotter) called the steward in so that he could be a party to the conversation.

> If this poor work performance continues or if there are any other violations of the labor agreement by you we will take other action against you.

2. The events of 1982

The warning letter of January 15 specified incidents involving excessive time in unloading the truck at Respondent's terminal: failure to call the office when delayed at a customer; ignoring a mechanic's instructions, and causing the truck to stall, which resulted in Respondent incurring the time and expense of having a mechanic service the broken truck in the field. The letter ended with the following:

> Your work performance has not improved as you have been warned in the past. Your attitude seems to be that the company will just have to go along with whatever you do or say you have done, that whatever amount of time you take will have to be accepted, that whatever the costs are none of your concern. We are therefore asking for a hearing for permission to discharge you for poor work performance.

The parties' collective-bargaining agreement contains a provision whereby the Company may ask for an arbitration hearing at which permission is requested to discharge an employee. Generally, the employee continues working until the arbitrator issues a decision as to whether the employer may properly discharge the grievant.[5]

On March 23, a warning letter was given to Wiltse. The letter related an incident in which his trailer hit a bridge, causing a hole in the trailer's roof. The letter criticized his carelessness in striking the bridge; his failure to examine the damage to determine whether the roof was torn, thereby exposing the cargo to possible precipitation; and failing to immediately orally report the damage.

A hearing on Respondent's request for permission to discharge Wiltse was held on three separate dates, the last session being held on June 24. The General Counsel claims that, at the April 8 hearing, the arbitrator directed Respondent to retain Wiltse during the pendency of the hearing. Respondent disputes this. The transcript of the hearing is unclear on this issue.[6] I need not resolve this dispute inasmuch as I do not believe that it affects my ultimate resolution of this case. It is fact, in any event, that Wiltse was discharged on June 10, prior to the last arbitration hearing date which took place on June 24.

On June 9, Wiltse was assigned to make a delivery to Krasdale Foods. About 1:20 p.m. that day the receiving manager at Krasdale called Cotter, complaining that the driver was not with his truck. She said she would not be responsible for any detention charges. Cotter asked the manager to have Wiltse call him. About 1:35 p.m. Wilte called and told Cotter that the Krasdale employees took their lunch period from 12:30 to 1 p.m. but he could not stop for lunch then because, inasmuch as he started work at 9 a.m. that day, he believed that he could take a lunchbreak only between the fourth and sixth hour, so that the earliest he could take lunch would be 1 p.m. Wiltse accordingly took his lunch period from 1 to 1:30 p.m. Cotter replied that Wiltse was wrong about his lunch period being between the fourth and sixth hour, and was also wrong in not calling the office when he took a lunch period different from that which the customer's employees take. Wiltse responded that he did not know that that was the rule and asked which rule number he was referring to. Cotter said that it had always been a rule. "Everybody calls in. You just don't walk away from the truck when the warehouse is operating." The conversation continued for a few minutes and Cotter finally told Wiltse: "Look, they're irate up there. Get back to the truck, and we'll straighten [this] out tomorrow. Just get that load off now, and I'll show you tomorrow, you're wrong about this lunch hour."

The following day, June 10, at the morning shape, Cotter gave Wiltse his work assignment and book and told him to come into the office. Wiltse asked if Eddie Sorensen, the shop steward, was there. Cotter said he was not.[7] Wiltse refused to go into Cotter's office.[8] Cotter told Wiltse that if he did not come into the office he could not work. Wiltse again refused to enter, Cotter took the work book from Wiltse and Wiltse left.

That day Cotter sent a letter of discharge to Wiltse which stated:

> This is to inform you that you are hereby discharged because of your actions of June 9, 1982 at Krasdale Foods and June 10, 1982 at Staten Island when you refused an order to come into the office to cooperate with the company in straightening out the previously mentioned incident at Krasdale.

On June 24 the final arbitration hearing was held, and on July 20 the arbitrator issued his decision in which he found that Respondent had just cause to discharge Wiltse on June 10. The arbitrator's conclusion is as follows:

> After hearing all of the testimony offered at this hearing, the undersigned is persuaded that the grievant wants to do everything his way regardless of what his way is going to do to the Company, the labor agreement, promulgated rules of operation or the Union. By several of his self-willed acts he was posited just cause for his own discharge by the Company.

[5] By retaining the employee until the decision, the employer avoids liability for backpay which it would have incurred if it had first fired the employee and then later received a decision that the discharge was not justified.

[6] The arbitrator said the following at different parts of the hearing:

MR. CHAIRMAN: Leave [sic] him work until I hear the case. I mean that is my ruling. You request to discharge the man. Now, somebody has been postponing this, but I don't know what side.

MR. CHAIRMAN: Either you discharge him, or I am going to let him work. Because he has go to work until you request for discharge.

[7] Sorensen was not at work that day.

[8] Wiltse claims he told Cotter that he would not go into Cotter's private office for a talk without Sorenson being present. I credit his statement.

Therefore, I rule that the discharge of the grievant by the Company was for just cause and is hereby sustained.

B. *Analysis and Discussion*

The General Counsel alleges that Wiltse was discharged on June 10 because he requested that a union representative be present for a disciplinary interview and because he refused to participate in the interview without a union representative being present, in violation of his rights as set forth in *NLRB v. J. Weingarten*.[9] Respondent contends that the requested June 10 meeting was only for the purpose of explaining the contractual provision concerning lunch hours to Wiltse, and was a routine and informal meeting not requiring the presence of a union representative. Respondent argues that Wiltse was not discharged for refusing to attend the meeting without a steward, but rather was discharged for refusing to participate in the meeting in which he was to be shown that he was mistaken as to his understanding of the contract relating to lunch periods.

In *Weingarten*, the Supreme Court held, in agreement with the Board, that employee insistence on union representation at an investigatory interview, which the employee reasonably believes might result in disciplinary action against him, constitutes protected concerted activity.[10]

I believe that the evidence is clear that Wiltste reasonably believed that the interview that Cotter requested on June 10 might result in disciplinary action.[11]

On June 9, when the dispute arose over Wiltse's failure to take the proper lunch period, and his failure to call Respondent when he took a lunchbreak different from that which the customer's employees took, it was clear, as Cotter conceded, that Wiltse was taking excessive time because he stopped work between 12:30 and 1 p.m., and also took his 30-minute lunchbreak between 1 and 1:30 p.m.[12] In the past, Wiltse had been accused of taking excessive time, for which he was called into Cotter's office, discussed the matter with him in the presence of the shop steward, and had also, shortly after the meeting, received a warning letter regarding his taking excessive time. Moreover, the collective-bargaining agreement states that theft of time "is recognized as an offense for which severe disciplinary measures may be invoked." Two of the prior warning letters[13] which involved excessive time cautioned that "if this poor work performance continues or if there are any other violations of the labor agreement by you we will take other action against you." Wiltse apparently believed that it was necessary to answer three of the warning letters concerning excessive time, and he did so by writing responses with attached documentary evidence on April 3 and October 7, 1980, and September 9, 1981. Wiltse therefore took these warning notices seriously enough to attempt to rebut their allegations which is an indication that on June 9, when Cotter told him he would speak with him the following day, Wiltse reasonably believed that discipline might result from the interview.

It should be noted that Wiltse had also received a warning letter in the past regarding his failure to call the office when there was a delay at a customer. On June 9, Cotter accused Wiltse of a similar offense failing to call in when he took a different lunch hour from the customer's employees, thereby causing a delay. Cotter conceded that he would have spoken to Wiltse about that issue on June 10 also.

Furthermore, when Cotter requested his presence at a meeting on June 10, Wiltse was "at risk." Respondent had already requested permission to discharge him and two arbitration hearing sessions had already been held on his discharge, the last one only 3 weeks earlier, and the final hearing to be held only 2 weeks later, on June 24.[14]

In addition, the June 10 request for a meeting with Wiltse followed the past pattern of such interviews. The request occurred at the morning shape; the steward was present at the interview which took place in Cotter's office; the interview related to some wrongdoing by Wiltse immediately prior to the meeting; and the session was followed by the issuance of a warning letter 1 to 3 days later incorporating the matters discussed at the interview. Respondent argues that there have been occasions in the past where Cotter spoke alone with Wiltse. However, such occasions, as testified by Cotter, all involved incidents of alleged malfeasance by Wiltse, and as to which he could have requested the presence of a steward but apparently did not do so as was his right.

Thus, objectively viewing the circumstances which Wiltse confronted when requested to meet with Cotter on June 10, we see that: (a) he was accused on June 9 of theft of time, an offense recognized in the contract punishable by "severe disciplinary measures," and for failing to report a delay at a customer, as to both of which he had received warning letters in the past, (b) he was told on June 9 that he was to talk to Cotter the following day about these matters, (c) the past practice had been that

[9] 420 U.S. 251 (1975).

[10] The complaint alleges that the unlawful discharge occurred because of Wiltse's request for a union representative at a "disciplinary" interview. The distinction between disciplinary and investigatory interviews is of no moment since the Board has held that "the full purview of protections accorded employees under *Weingarten* apply to both 'investigatory' and 'disciplinary' interviews, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action." *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

[11] The test for determining whether an employee reasonably believes the interview might result in disciplinary action is measured by objective standards under all the circumstances of the case rather than by an employee's subjective motivations, *Weingarten*, supra at 257 fn. 5. I accordingly sustain Respondent's objection to a question asked of Wiltse as to why he asked for the presence of steward Sorensen on June 10. I have therefore not considered nor relied on Wiltse's subjective answer to the question in making my findings and conclusions herein.

[12] Wiltse was only entitled to take 30 minutes for lunch.

[13] The warning letters are dated September 1 and October 2, 1981.

[14] Respondent argues that the fact that Wiltse was given the right by the arbitrator to remain at work until a decision was issued leads to the conclusion that he could not have reasonably believed that he would be *discharged* until such time. However, *Weingarten* requires only that the employee reasonably believe that the interview might result in *discipline*. As set forth above, Wiltse reasonably believed that the interview might result in discipline and it did—his discharge that day. Moreover, he was discharged in part as set forth in the letter of June 10, for the June 9 incident for which the interview was sought—prior to the issuance of the arbitrator's decision.

when a request for interview was made in the circumstances in which it was made on June 10, the interview had been with the steward present, was concerned with his alleged incompetence, and was followed by the issuance of a warning letter, and (d) he was "at risk" in that a request had already been made for his discharge and two arbitration sessions had already been held.

Under these circumstances, the evidence is overwhelming that on June 10, Wiltse reasonably believed that the interview might result in disciplinary action, and he therefore had a right to have a steward present at the interview.[15]

On June 10, when Cotter asked Wiltse to come into the office, Wiltse asked if Sorensen, the shop steward, was there. Cotter said he was not.[16] Wiltse refused to go into Cotter's office without Sorensen present.[17] Cotter told Wiltse that if he did not come into the office he could not work. When Wiltse again refused, Cotter took the assignment book from him.

In this circumstance, the Employer had the choice of giving the employee time or a postponement to obtain the representation or, as the Supreme Court pointed out in *J. Weingarten*, 420 U.S. at 258–259 (adopting the Board's statement in *Mobil Oil*, supra, 196 NLRB at 1052), of "advis[ing] the employee that it will not proceed with the interview unless the employee is willling to enter the interview accompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources." Respondent did none of these things.[18]

In its letter of June 10 to Wiltse, Respondent stated that he was discharged: "because of your actions of June 9, 1982 at Krasdale Foods and June 10, 1982 . . . when you refused an order to come into the office to cooperate with the Company in straightening out the previously mentioned incident at Krasdale." At the hearing, when asked by the General Counsel why he discharged Wiltse, Cotter replied: "Because he refused to come in and let me show him that he was wrong in his interpretation of this lunch hour." Indeed, the circumstances of the discharge lead me to agree that Wiltse was fired only for his refusal to enter the office.[19] Inasmuch as Wiltse had a right to have a union representative present at the interview, his refusal to engage in the meeting without a representative present, and his discharge for doing so is a violation of Section 8(a)(1) of the Act.[20]

CONCLUSIONS OF LAW

1. Respondent Joseph F. Whelan Company, Inc. is, and at all times material herein, has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by discharging Charles T. Wiltse on June 10, 1982, because Wiltse requested that a union representative be present at an interview which he reasonably believed might result in disciplinary action against him and because Wiltse refused to participate in said interview without a union representative.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In cases where an employee has been discharged for refusing to participate in an interview conducted in derogation of his Section 7 right to a representative, a make-whole remedy is appropriate.[21] However, in this case, the General Counsel states that he does not claim that Wiltse's later discharge, as found by the arbitrator in his decision issued on July 20, 1982, was violative of the Act. Accordingly, the General Counsel does not seek reinstatement for Wiltse, and seeks backpay only for the period from June 10 to July 20, 1982.[22]

I therefore recommend that Respondent be ordered to make Wiltse whole for any loss of earnings he may have suffered as a result of the discrimination against him from June 10 to July 20, 1982.[23] The amount of backpay

[15] I reject Respondent's argument that the June 10 interview was only for the purpose of explaining the contractual provisions, relating to lunch period to Wiltse, to correct his misunderstanding of the contract, and to prevent further similar incidents. Wiltse was not advised of this when Cotter requested that he go into the office on June 10. Moreover, the extreme form of discipline—discharge—was imposed on Wiltse in part according to the June 10 letter for the June 9 incident. *Northwest Engineering Co.*, 265 NLRB 190 (1982), relied on by Respondent, is inapposite. That case involved a "general shop meeting, informational in nature," to review work rules, at which all the employees were present. The purpose of the meeting was stated at the outset, "it did not relate to any one specific employee or to any single instance of purported misconduct or deficiency in performance," and no discipline was imposed. In contrast, the instant case involved a situation where only Wiltse was asked to go into the office for a private meeting with Cotter. He was not told that the purpose of the meeting was to explain the contractual provisions relating to the lunch period. The purpose of the meeting clearly was to discuss his wrongdoing of the previous day, and discipline was imposed.

[16] Sorensen was not at work that day. There was no evidence as to whether alternate shop steward Freddie O'Neal was available.

[17] Cotter agrees that Wiltse refused to come into the office. I credit Wiltse's statement that he refused to speak to Cotter without union representation. In view of Wiltse's reasonable belief that the interview would result in discipline, it is manifest that he would have expressly refused to enter unless Sorensen was present.

[18] *Super Valu Xenia*, 235 NLRB 1581, 1591 (1978).

[19] Respondent could not have immediately discharged Wiltse for theft of time since the contract states that such an offense is not a ground for immediate discharge. Moreover, Wiltse had been similarly accused of such wrongdoing in the past but had not been fired on the spot for that reason before.

[20] *Ladies Garment Workers Union v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

[21] *Salt River Valley Water Users' Assn.*, 262 NLRB 970 (1982).

[22] The complaint allegations are consistent with these contentions of the General Counsel. I need not therefore reach the question of whether the arbitrator's award meets the criteria set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[23] I reject Respondent's contention that the backpay period should be reduced because of Wiltse's failure to provide the arbitrator with a transcript of the hearing in a timely manner. Wiltse requested that his attorney engage a court reporter to record and transcribe the June 24 arbitration hearing. The arbitrator required that a copy of the transcript be sent to him. On July 14, 1982, Wiltse's attorney advised the arbitrator that the transcript "would not be forthcoming and the Impartial Chairman should not wait any longer before rendering his award." The arbitrator issued

Continued

shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[24]

[Recommended Order omitted from publication.]

his decision on July 20. In the absence of proof that any delay in the arbitrator's issuance of his decision was caused by Wiltse's failure to provide a copy of the transcript as promised, I cannot find that the backpay period should be limited. There was no evidence that there was any delay in the issuance of the award. Thus, the arbitrator was advised on July 14 that he would not receive the transcript and it was not until July 20 that the award was issued.

[24] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Herbert F. Darling, Inc. *and* **Robert T. Ewing.** Case 3-CA-10565

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 26 August 1983 the National Labor Relations Board issued a Decision and Order[1] in this proceeding. By panel majority, the Board reversed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by initially refusing to recall the Charging Party from his 3 December 1980 layoff and then only employing him intermittently in 1981. The Board majority reversed the judge's credibility resolutions, considering them to be based not specifically on demeanor but on inferences drawn from an incorrect factual analysis made by the judge. The Board majority, therefore, found that the General Counsel had not proven by a preponderance of the evidence that the Respondent had discriminated against the Charging Party because it believed that he had filed a complaint against the Company with the Occupational Safety and Health Administration (OSHA). Thus, the complaint in this case was dismissed in its entirety.[2]

Thereafter, the Charging Party filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the Second Circuit. On 17 April 1984 the court issued an opinion[3] in which it refused to affirm the Board's decision and order, which it found to be unsupported by substantial evidence. The court consequently remanded the case to the Board for a determination of the applicability of the Board's newly adopted principles concerning protected concerted activity recently enunciated in *Meyers Industries*,[4] which issued while court appeal of this case was pending. According to the court's remand, if *Meyers* applies, then the Board is to reevaluate the case on the basis of the judge's factual findings; if *Meyers* does not apply, then the Board is to "reinstate" the decision and order of the judge.

On 2 July 1984 the Board advised the parties that it had decided to accept the remand from the court and that they could, if they so wished, submit statements of positions with respect to the remanded issues. Thereafter, the Charging Party and the Respondent filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having accepted the remand, the Board must observe the court opinion as the law of the case.

The Board has considered this case in light of the court's opinion and the parties' statements of position and has decided to apply *Meyers Industries* to this case and find no violation of Section 8(a)(1) of the Act because, based on the judge's factual findings, the Charging Party's suspected actions in connection with an OSHA complaint do not fall within the *Meyers* definition of concerted activity.

In *Meyers Industries*, the Board held that "[i]n general, to find an employees' activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[5] In doing so, the Board overruled *Alleluia Cushion Co.*,[6] the precedent on which the judge principally relied to find the Charging Party's suspected contact with OSHA to be concerted activity. Under *Alleluia*, "[t]he existence of relevant legislation and its invocation by a solitary employee became sufficient to find concerted activity."[7] Thus, in *Alleluia*, the Board found concerted activity based on a single employee's contact with OSHA, in the absence of any outward manifestation of group employee action. With *Meyers*, the Board has rejected the per se standard of concerted activity established by *Alleluia* and, instead, has returned to the pre-*Alleluia* "objective" standard of concerted activity.

Since the decision in *Meyers* issued, the Board has consistently applied the "objective" standard of concerted activity to all pending cases.[8] This retroactive application of *Meyers* follows the Board's traditional approach to apply the pronouncement of a new rule of law to the case in which it arose and to all pending cases, absent special circumstances.[9] To date, the Board has already retroactively applied *Meyers* to pending cases in which the events occurred before *Meyers* was decided, in particular, events occurring during 1980 and 1981, the

[1] 267 NLRB 476.

[2] In such circumstances, the majority found it unnecessary to reach the further legal issue presented in the case, i.e., "whether Respondent would have violated the Act had it curtailed [the Charging Party's] work opportunities because it thought that he had filed a complaint with OSHA." 267 NLRB 476 fn. 16.

[3] 732 F.2d 1117.

[4] 268 NLRB 493 (1984).

[5] Id.

[6] 221 NLRB 999 (1975).

[7] *Meyers Industries*, supra at 496.

[8] See, e.g., *Schreiber Materials Co.*, 268 NLRB 457 (1984); *Alcan Cable*, 269 NLRB 184 (1984); *Briley Marine*, 269 NLRB 697 (1984). *Central Georgia Electric Corp.*, 269 NLRB 635 (1984); and *Goodyear Tire & Rubber Co.*, 269 NLRB 881 (1984).

[9] See, e.g., *Laidlaw Corp.*, 171 NLRB 1366 (1968); *H. F. Binch Co.*, 188 NLRB 720 (1971); *Wright Line*, 251 NLRB 1083 (1980); *Bruckner Nursing Home*, 262 NLRB 955 (1982); *Great Southern Construction*, 266 NLRB 364 (1983); *Hickman Harbor Service*, 266 NLRB 476 (1983).

years involved in the instant case.[10] Accordingly, we shall apply the principles of *Meyers* to this case.

Applying the *Meyers* definition of concerted activity, we observe that the judge's findings show that the Respondent's suspicions ran only to a *single* employee making a complaint against the Respondent to OSHA. The judge found that Union Business Manager Burke advised Charging Party Ewing that "Respondent didn't want Ewing to work for them anymore because he [Ewing] had written a letter to OSHA complaining about Respondent."[11] The judge further found that the Respondent's vice president Shafer "confirmed that Respondent did not want Ewing back because they believed he had reported the company to OSHA." In a later conversation with Shafer in the presence of Burke, Ewing denied that he made a complaint to OSHA. According to the judge's findings, Shafer told Burke and Ewing that "Respondent had narrowed it down to three men who they believed reported the company to OSHA, one of them was Ewing, and they didn't want Ewing working for them." The judge then concluded that "[i]t is clear from this record that Ewing was not recalled from layoff because Respondent believed (albeit inaccurately) that he had complained about it to OSHA." Finally, the judge concluded that Ewing's curtailment of employment occurred "because of Respondent's mistaken belief that Ewing had filed a complaint concerning Respondent with OSHA." Thus, a fair reading of the judge's findings does not support a finding that the Respondent thought Ewing acted "with or on authority of other employees, and not solely by or on behalf of" himself. We likewise note that the record itself does not support a finding that the activity in which the Respondent thought Ewing engaged and for which Ewing lost job opportunities—individually filing an OSHA complaint—was concerted.

Accordingly, we find that Ewing was not engaged in concerted activity under *Meyers Industries*. We therefore conclude that the Respondent did not violate the Act by failing to recall Ewing or by employing him intermittently in 1981. Thus, we affirm our prior dismissal of the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

For the reasons stated in my dissenting opinion in *Meyers Industries*, 268 NLRB 493 (1984), I find, contrary to my colleagues and in agreement with the judge, that the Respondent violated Section 8(a)(1) of the Act by refusing to recall employee Robert Ewing from layoff because it believed, albeit erroneously, that Ewing had filed a complaint against it with the Occupational Safety and Health Administration (OSHA). Whether he had been fired because he filed such a complaint or, as here, because of a belief that he had done so, his discharge was motivated by his conduct, actual or perceived, that impliedly was concerted and therefore protected.

[10] See, e.g., *Schreiber Materials Co.*, supra; *Alcan Cable*, supra; *Briley Marine*, supra; *Central Georgia Electric Corp.*, supra; and *Goodyear Tire & Rubber Co.*, supra.

[11] In giving a fuller description of this conversation, the court noted that "Burke told Ewing there were rumors that 'you blew the Darling Company into OSHA, and that you won't go back to work for them any more.'" *Ewing v. NLRB*, 732 F.2d 1117, 1119 (2d Cir. 1984).

Airco, Inc. *and* Chauffeurs & Sales Drivers, Local Union No. 402, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 10–RC–12839

14 December 1984

DECISION ON REVIEW AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 28 September 1983 the Regional Director for Region 10 issued a Decision and Direction of Election in the Petitioner's requested unit of production and maintenance employees at the Employer's Cherokee, Alabama facility, including plant operators, truckdrivers, and mechanics. The Employer had contended that the operators were not properly included in the unit because they did not share a community of interest with the other requested employees. The Employer filed a timely request for review and the Board granted it by telegraphic order of 28 October 1983. No briefs were filed on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review, and reaches the following conclusions:

The Employer manufactures industrial gases by a largely automated process; the operators' duties consist principally of monitoring the equipment. The operators also fill trucks belonging to other employers, and complete various paperwork associated with those pickups. The Employer's drivers fill their own trucks and deliver the gas to the Employer's customers, spending most of their working time on the road. The mechanics work at the Cherokee facility, maintaining and repairing the trucks. There are approximately 26 drivers, 2 mechanics, and 4 operators.

The Regional Director found that the Employer's production department, employing the operators, and the distribution department, including the drivers and mechanics, were largely separate. The departments are separately housed and the employees have little contact across departmental lines, although drivers enter the production department briefly in connection with filling their trucks. The departments are separately supervised at both the immediate and facility levels. There has been no interchange, and seniority is separate. Pay is determined independently by department and paychecks are distributed separately. Each department buys uniforms on its own and furnishes them to its employees.

Drivers and operators receive the same training in operation of the filling equipment, but otherwise the skills and training of the three groups of employees are different. Operators must have experience with production equipment like the Employer's, drivers must have a class A chauffeur's license and meet Transportation Department requirements, and mechanics must have class A diesel mechanic certification. The three groups of employees also work different schedules and are paid by different methods. The drivers are paid by mileage and hourly but receive no overtime. The mechanics and operators are paid hourly with overtime; they work a 40-hour week except that 1 week a month operators work 48 hours. The two mechanics work different shifts and different days of the week. The operators work rotating shifts around the clock, and record their own time whereas the other employees use a timeclock.

The Regional Director concluded that "while . . . a separate unit of truckdrivers and mechanics may be appropriate, where, as here, no other union is claiming to represent the truckdrivers . . . they may be included in a production unit where the petitioning union so desires . . . . Further, in view of the close relationship between the truckdrivers and the mechanics and the fact that to exclude the mechanics would result in a residual unit of two unrepresented employees, I find that the mechanics should be included in the overall unit."

We agree with the Regional Director that the Petitioner's requested unit is an appropriate one, but not for the reasons he stated. His decision implies that a petitioner's desires alone will determine the placement of truckdrivers in or separate from a production and maintenance unit. We agree with the Employer that that is not the correct standard; there are no per se rules to include or exclude any classification of employees in any unit. Rather, we examine the community of interest of the particular employees involved, considering their skills, duties, and working conditions, the Employer's organization and supervision, and bargaining history, if any, but no one factor has controlling weight. See *E. H. Koester Bakery Co.*, 136 NLRB 1006, 1009–11 (1962); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136–138 (1962) (severance petition).[1]

[1] We disavow the statement in *Keystone Pretzel Bakery*, 242 NLRB 492, 505–506 (1979), enfd. 696 F.2d 257 (3d Cir. 1982), that the placement of truckdrivers in a production and maintenance unit "depend[s] largely upon the wishes of the petitioning union." We find that the correct standard was applied in *Marks Oxygen Co.*, 147 NLRB 228 (1964).

We will continue to consider a petitioner's desires relevant, for the reasons we stated in *Marks Oxygen* and elsewhere. *Mc-Mor-Han Trucking*, *Continued*

Nonetheless, Congress expressly contemplated the plantwide unit in Section 9(b), and we have held that "[a] plant-wide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such employees." *Kalamazoo Paper Box Corp.*, 136 NLRB at 136. The standard is the same but the burden is on the Employer to demonstrate that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit. *E. H. Koester Bakery*, 136 NLRB at 1011. Here the Petitioner's request includes all the Employer's employees whom Board policy allows to be included in a production and maintenance unit.

The presumption that this unit is appropriate has not been rebutted. We recognize that there are three separate groups of employees—drivers, mechanics, and operators—each of which has very little in common with either of the other two. While the drivers and mechanics are included in the same department by the Employer, they have little contact, and their skills, training, and working conditions are different. Similarly, both drivers and operators fill trucks and are trained by the Employer to do that, and the two groups have occasional brief contact in the process. While the employees in different classifications thus have little contact, it is just as true that no two employees in the *same* classification have much contact. That factor therefore cannot negate a community of interest sufficient to allow collective representation.

We also note that the employee complement of 32 is small, and that the three classifications are functionally integrated. The related functions of drivers and mechanics are one basis for their frequent inclusion in the same unit, and the Employer does not contest that inclusion.[2] As noted, though, the drivers here have as much in common with the operators as they do with the mechanics.

Indeed, the alternatives to a plantwide unit here are not favorable. The Board does not favor organization by department or classification, and it is doubtful that either the mechanics or operators are a craft. A combined unit of the two would be even less appropriate on community-of-interest grounds than either alone. Any of these units could thus be called residual, as the Regional Director noted, and the Board has normally preferred to avoid creating such units where possible.

For all these reasons we find the plantwide unit of drivers, mechanics, and operators appropriate. Because the Regional Director directed an election in this unit we will remand this proceeding to him with directions to open and count the ballots and to issue a certification.

DIRECTION

It is directed that the Regional Director for Region 10 shall, within 10 days from the date of this Decision on Review and Direction, open and count the ballots of the employees who voted in the election conducted 28 October 1983. The Regional Director shall prepare and serve on the parties a tally of ballots and, unless there are determinative challenges or timely objections filed, he shall issue the appropriate certification.

IT IS FURTHER DIRECTED that this proceeding is remanded to the Regional Director for further action pursuant to this Decision on Review and Direction.

166 NLRB 700, 701 (1967); *Metropolitan Life Insurance Co.*, 156 NLRB 1408, 1411–1413 (1966), on remand from court of appeals in light of *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441–442 (1965). That does not, however, obviate the need to show some community of interest on the facts of the specific case.

Chairman Dotson notes that where competing petitioners request different units, the relevancy of their desires will require a different analysis. Otherwise the Chairman finds it adds nothing to the analysis to say that no petitioner desires a different unit, as the Regional Director noted here.

[2] See, e.g., *Carpenter Trucking*, 266 NLRB 907 (1983); *Transportation Enterprises*, 229 NLRB 1248, 1249 (1977); *Brunswick Meat Packers*, 164 NLRB 887, 899 (1967).

The Daily Mining Gazette, A Division of Thomson Newspapers (Michigan), Inc. *and* Graphic Communications International Union, AFL–CIO, Petitioner. Case 30–RC–4346

14 December 1984

DECISION ON REVIEW AND DIRECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held on 28 March 1984 in the above-captioned proceeding. In a Decision and Direction of Election issued on 10 April 1984 the Acting Regional Director for Region 30 directed an election in a unit of all full-time and regular part-time mailroom employees, including drivers, employed at the Employer's Houghton, Michigan facility.[1] Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's decision on the ground that the Acting Regional Director erred in concluding that the drivers are employees and not independent contractors within the meaning of Section 2(3) of the Act and therefore should be included in the unit. The Employer also filed a motion for stay of election pursuant to Section 102.65 of the Board's Rules.

By telegraphic order dated 10 May 1984 the Board granted the Employer's request for review but denied its motion to stay the election.[2] Thereafter, the Petitioner filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case and makes the following findings.

The Employer is a Michigan corporation which publishes a daily newspaper called The Daily Mining Gazette (The Gazette) at its Houghton, Michigan facility. The petitioned-for unit consists of 10 motor route drivers whose status is at issue in this proceeding and 5 mailroom employees.[3]

The motor route drivers deliver the Employer's newspapers to predetermined locations in three ways: they drop off bundled newspapers for dealers and carriers, they place newspapers in coin-operated newsracks, and they insert newspapers in plastic tubes on stakes placed in front of the homes of individual subscribers. Some drivers have as many as three kinds of deliveries on their routes while others have only one.

Drivers also collect money from the newsracks, pick up damaged newsracks to return to the Employer's facility for repair, and place newsracks at locations designated by the Employer. The Employer assumes the responsibility for repairing the newsracks, but drivers will sometimes make minor repairs in the field themselves.

The Employer determines the initial composition of a route. When a route becomes available, the Employer attracts applicants for the position of driver by advertising in the newspaper. There is no written agreement governing the relationship between drivers and the Employer. The Employer informs applicants for the position of driver that drivers are independent contractors and not employees of The Gazette.

Drivers must provide their own delivery vehicles. License fees, taxes, and insurance premiums for the vehicles are paid by the drivers. Drivers also pay for the gasoline used in delivering the newspapers.

Drivers are paid a flat rate set by the Employer for each run of deliveries actually completed. In computing the "base rate" for a run, the Employer considers factors such as the mileage of the run, the length of time it consumes, and the number of tube deliveries and bundle drops it entails. Occasionally, a new driver may negotiate a rate higher than that offered by the Employer if no applicant is available and willing to accept the Employer's rate.[4]

Most drivers are required to pick up the newspapers each day at the Employer's loading dock. These drivers are assigned pickup times falling between 1 and 2:45 p.m. according to the length of their routes. Drivers who pick up newspapers in the field are not assigned pickup times but are expected to get the papers out as quickly as they can. The Employer has established a target completion time for the routes of between 5 and 5:30 p.m.

The Employer reserves the right to unilaterally change the composition of the routes. When the Employer alters a route, it recalculates the base

[1] Excluded from the unit found appropriate were substitutes, helpers, inserters, professional employees, guards, and supervisors as defined in the Act, and all other employees.

[2] The election was conducted on 10 May 1984, the drivers cast challenged ballots, and all ballots were impounded pending the Board's Decision on Review.

[3] The parties stipulated at the hearing that the five individuals sought in addition to the drivers, Howard Heckel, Steven Koski, Keith Abramson, Cvetko Shopp, and Sharmein Joyal, are mailroom employees and should be included in the unit found appropriate.

[4] The drivers are paid by check in the middle of the month and at the end of the month. Employees on the Employer's payroll are paid every 2 weeks, whenever that date occurs.

rate for the route by the same method used to set the rate initially. If an alteration to a route results in a change in its base rate, the Employer adjusts the driver's compensation accordingly.[5]

Before the Employer starts paying a newly hired driver, the driver delivers the newspapers for a day or two accompanied by one of the Employer's district managers to ensure that the driver has learned the route. Thereafter, the driver runs the route without supervision by the Employer. The Employer does not monitor the drivers on their daily runs nor require them to keep records of their performance.[6] Drivers may vary the order in which they make their deliveries as long as they complete their runs on time.

The drivers are free to hire substitutes and helpers without the Employer's approval. A driver who cannot make a run for any reason is required to locate a substitute. The drivers may and do make whatever employment arrangements they wish with substitutes and helpers without interference from the Employer. The Employer requests that drivers inform it of the identity of substitutes, but in practice they often do not do so. A driver who hires a full-time substitute is still paid and held responsible for the route by the Employer.

The Employer does not require that the drivers operate a particular kind of vehicle, submit the vehicle to inspection, or maintain a certain level of insurance. Drivers are not subject to work rules or a dress code and are not expected to attend company meetings.[7] Apart from noting on an "in and out" sheet how many unsold papers are returned by the dealers, drivers do not keep records for the Employer. Occasionally, drivers are asked to deliver free newspapers to nonsubscribers and prizes won in catalogue contests to carriers on their routes. The drivers receive no extra compensation for these deliveries.

Customer complaints about drivers are received by the Employer. The Employer writes a notice to the driver describing the complaint and asking the driver to rectify it. It is the driver's responsibility to remedy complaints. The Employer will follow up on a complaint to make sure that it has been resolved.

The Employer's circulation manager will warn a driver who is late picking up or delivering papers, but the Employer can take no disciplinary action against an unsatisfactory driver short of replacing the driver. The Employer cannot dock a driver's pay and has never suspended a driver. The Employer has fired one driver whose heavy drinking prevented him from making his run and another who made repeated mistakes and finally threw promotional material he was asked to deliver to prospective customers in the trash.

The Employer has placed no restrictions on the drivers' ability to hold other jobs or make deliveries in addition to the Employer's newspapers. One driver delivered laundry on his route without objection from the Employer.

About one-half of the drivers are eligible to participate in a bonus plan which provides compensation in addition to the base rate per run. A driver under the bonus plan receives 34 cents per week for every tube customer on his or her route in excess of a base number set by the Employer. Eligible drivers increase their compensation on their own initiative by soliciting new individual subscribers. Should a change in a route subject to the bonus plan result in a reduction in the number of tube customers, the Employer will decrease the base number accordingly to preserve the driver's bonus.[8]

The Employer does not withhold money for taxes or social security from the drivers' bimonthly checks nor does it make unemployment or workmen's compensation payments for them. The drivers do not receive vacation or sick time, paid holidays, or the Christmas bonus given by the Employer. They do not participate in the Employer's pension or life insurance plans.

The Employer contends that a unit including drivers is inappropriate because the drivers are independent contractors. Section 2(3) of the National Labor Relations Act specifically excludes independent contractors from coverage by the Act. Whether a person is a protected employee or an independent contractor within the meaning of Section 2(3) is properly resolved by applying general principles of the common law of agency. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). The Board relies primarily on the common law "right to control" test in determining the status of individuals alleged to be independent contractors. See, e.g., *Fort Wayne Newspapers*, 263 NLRB 854 (1982). This test provides that where the one for whom a service is performed retains the right to control the manner and means by which the de-

[5] The Employer's circulation manager testified that when he has subtracted from a route he has not penalized the driver.

[6] The Employer does try to make a practice of sending a district manager with each driver once a year to confirm where the drivers are going and determine if their rates should be adjusted.

[7] Two drivers on their own initiative placed insignia of The Gazette on their vehicles, but drivers are not required to display the Employer's logo.

[8] It is unclear from the record whether the drivers must pay for lost, stolen, or damaged papers. A driver testified that when he was hired he was told he had to pay for the newspapers if they got "damaged, burnt or otherwise." The Employer's circulation manager testified, on the other hand, that he would not require drivers to pay for damaged papers.

sired result is accomplished, the person performing the service is an employee, but if control is reserved only over the end result, the person performing the service is an independent contractor. The Board's determination of the nature of the control retained turns on the particular facts of each case. *A.S. Abell Publishing Co.*, 270 NLRB 1200 (1984).

We have carefully examined all the evidence bearing on the relationship between the drivers and the Employer and conclude that the drivers are independent contractors and not employees within the meaning of Section 2(3) of the Act.

We find most significant that the Employer exercises no control over the manner and means by which the desired result, daily delivery of the newspapers, is accomplished. See *Air Transit, Inc.*, 271 NLRB 1108 (1984). Drivers are free to run their routes in whatever order they wish as long as the newspapers are delivered by late afternoon each day. The Employer does not supervise or monitor the drivers in the performance of their deliveries. Drivers are not subject to work rules or a dress code and are not required to drive a particular kind of vehicle or display the Employer's insignia. Moroever, there is no requirement that the deliveries be made by the same driver to whom the Employer originally agrees to assign a vacant route. Drivers can and do hire full-time substitutes. The Employer does not retain the right to approve the substitutes, does not dictate the terms of their employment, and frequently does not know who they are. The Employer receives customer complaints but does not discipline drivers for poor job performance. The Employer has replaced two drivers who proved unable to accomplish their deliveries, but this has little bearing on whether the Employer controls the manner and means by which deliveries are to be performed.

In addition, there are other aspects of the drivers' relationship with the Employer that are recognized at common law as indicia of independent contractor status. See Restatement 2d, *Agency* § 220 (1957). Drivers are hired with the understanding that they will be independent contractors and not employees. They are not offered the fringe benefits enjoyed by the Employer's employees, no provision is made for deductions from their bimonthly checks, and no payments are made on their behalf for unemployment or workmen's compensation insurance. On the other hand, drivers are permitted to hold other jobs and make deliveries for clients other than the Employer while on their newspaper routes.

Drivers supply the vehicles and gasoline needed to perform the deliveries. Moreover, drivers are responsible for their routes even if unable to deliver the newspapers themselves and must find their own substitutes. Accordingly, they do not receive leave time of any kind. The Employer continues to pay a driver even if the driver has hired a substitute who is actually running the route.

Drivers are not paid a salary or an hourly wage. Rather, they are paid a lump sum for each run completed. Some drivers can receive additional compensation in the form of the bonus offered for new subscribers they can solicit on their own initiative. The drivers' bimonthly checks represent the total of payments due for completed runs plus any applicable bonus.

We are mindful that there are factors absent in this case that, if present, would more strongly compel a finding that the drivers are independent contractors. The drivers do not have a proprietary interest in their routes: drivers do not buy and sell the routes and the Employer reserves the right to add to or subtract from them. Drivers do not purchase the newspapers from the Employer and assume the entrepreneurial risk associated with trying to make a profit by reselling them. We also recognize that the Employer's virtually unilateral control over the drivers' compensation and its ability to terminate drivers at will are more commonly found in employer/employee relationships. We find, however, that this evidence suggesting employees status is outweighed by the factors supporting the conclusion that the drivers are independent contractors discussed above.

As we have concluded that the drivers are independent contractors, we shall exclude them from the unit. Accordingly, we find that the following constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(c) of the Act:

> All full-time and regular part-time mailroom employees employed at the Employer's Houghton, Michigan facility, excluding drivers, substitutes, helpers, inserters, professional employees, guards, and supervisors as defined in the Act, and all other employees.

We shall therefore remand this case to the Acting Regional Director for Region 30 for the purpose of opening and counting the impounded ballots in the unit found appropriate.

DIRECTION

It is hereby directed that the Acting Regional Director for Region 30 shall, within 10 days of this Decision on Review and Direction, open and count the impounded ballots in the above-described unit, prepare and serve on the parties a tally of ballots,

and proceed thereafter as is appropriate in accordance with this decision.

MEMBER HUNTER, dissenting in part.

I agree with my collegues' conclusion, contrary to the Acting Regional Director, that the Employer's newspaper delivery drivers are independent contractors and as such must be excluded from the bargaining unit sought to be represented by the Petitioner. However, I disagree with my colleagues' direction to the Acting Regional Director to open and count those impounded ballots from the 28 March 1984 election which form the unit found appropriate herein. In my view, the proper course of action is to direct the Acting Regional Director to conduct a second election.

The Acting Regional Director's Decision and Direction of Election informed employees that the election would be held in a unit of "[a]ll full-time and part-time mailroom employees, including drivers, employed at the Employer's Houghton, Michigan facility."[1] Under the Acting Regional Director's decision, the unit consisted of the 10 drivers at issue herein plus the 5 mailroom employees who were stipulated to be in the unit. Excluding the 10 drivers, as the Board's decision does today, therefore has the result of diminishing the unit to only one-third its original size.

As the Second Circuit suggested in a recent case involving similar facts, *Hamilton Test Systems v. NLRB*,[2] employees may vote differently depending on what they know about the size or scope of the unit. Of the several reasons posited by the court as to why the employees in that case might have voted differently had they known the "true nature" of the unit (which the court found to be considerably smaller than that found by the Board), two reasons stand out as being also possible here: the five mailroom employees might have believed that a smaller bargaining unit would provide insufficient bargaining power, or they might have believed that a small unit could produce divisiveness and tension in the workplace.[3] Thus, by changing the boundaries of the appropriate bargaining unit after the election, my colleagues in the majority have effectively denied the employees in the appropriate unit the right to make an informed choice in the selection or rejection of a bargaining representative. In my view, at this stage in the proceedings only the holding of a second election can rectify the now misleading choice of the first election.

[1] Exclusions from the unit are listed at fn. 1 of the majority's decision.

[2] 743 F.2d 136 (2d Cir. 1984), denying enf. to 268 NLRB No. 175 (Feb. 27, 1984) (unpublished). In agreeing with the Board's granting of the General Counsel's Motion for Summary Judgment in the technical 8(a)(5) proceeding in that case, I noted that I had not participated in the underlying representation case and accepted the findings therefrom only for institutional reasons.

[3] 743 F.2d at 141.

Micronesian Telecommunications Corporation *and* International Brotherhood of Electrical Workers, Local 1357, Petitioner. Case 37–RC–2717

14 December 1984

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Thomas W. Cestare on 5, 6, and 7 January 1983. On 8 March 1983 the Regional Director for Region 20, pursuant to Section 102.67(h) of the Board's Rules and Regulations and Statements of Procedure, transferred this proceeding to the Board for decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

The Board has considered the entire record[1] in this case, including the posthearing briefs[2] of the Employer and the Petitioner.

The primary issues in this case involve the Board's statutory jurisdiction and its exercise of discretionary jurisdiction over an employer doing business in the Northern Mariana Islands. For the reasons set forth below, we find that the Board has such statutory jurisdiction and that it effectuates the policies of the Act to assert jurisdiction over this Employer.

The Employer, a Northern Mariana Islands corporation with its principal office at Gualo Rai, Saipan, is engaged in providing interisland telephone services and worldwide telecommunications and telex services. The parties stipulated at the hearing that in the preceding 12 months the Employer had gross revenues in excess of $1 million and received revenues in excess of $50,000 directly from the United States, the territory of Guam, and foreign countries.

The grouping of about 15–19 islands in the South Pacific known as the Northern Mariana Islands was, together with several other island groupings,[3] entrusted by the United Nations to the United States to administer after World War II. The overall trust, informally known as Micronesia, has been known as the Trust Territory of the Pacific Islands (TTPI). Pursuant to a trusteeship agreement approved by the United Nations Security Council and the United States Government,[4] the United States exercises powers of administration, legislation, and jurisdiction over the TTPI.[5] The United States is also obligated thereunder to "[f]oster the development of such political institutions as are suited to the trust territory" and "promote the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its people and the freely expressed wishes of the peoples concerned" giving "due recognition to the customs of the inhabitants in providing a system of law for the territory."[6] The trusteeship remains in effect. The trusteeship agreement may only be terminated upon motion of the United States and approval of the United Nations Security Council. The United States has apparently taken the position that it will not seek termination of the trusteeship until the status of all island groupings is resolved.[7] To date, the status of at least one island grouping remains unresolved.[8]

Nonetheless, in 1972 the United States began separate negotiations on future political status with representatives of the Northern Mariana Islands. Those negotiations culminated in 1975 in the signing of a covenant to grant commonwealth status to the Northern Mariana Islands. The Covenant was subsequently endorsed by the legislature of the Northern Mariana Island, approved by a vote of

[1] The Employer has requested oral argument. That request is denied as the record and the briefs adequately present the issues and the positions of the parties.

[2] The Employer's motion to strike appendices A through D of the Petitioner's brief is denied. Appendices A through C were apparently attached as a convenience to the reader of the record since they are the texts of a Federal Statute, Presidential proclamation, and portions of a congressional hearing, all of which constitute appropriate cites in the brief. Appendix D is a summary of most of the Petitioner exhibits received at the hearing and the transcript pages on which they were assertedly received; there is nothing in the appendix not ascertainable from a reading of the transcript.

[3] Those groupings include the Federated States of Micronesia (Kosrae, Yap, Ponape, and Truk districts), the Marshall Islands, and Palau.

[4] Trusteeship Agreement for the Former Japanese Mandated Islands, 2 April—18 July 1947, United States—United Nations, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

[5] Art. 3 of the agreement states that the United States may apply to the trust territories, subject to any modifications it may consider desirable, "such laws of the United States as it may deem apropriate to local conditions and requirements."

Art. 9 of the Agreement states that the United States "shall be entitled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement."

[6] Trusteeship Agreement, supra at art. 6.

[7] Willens and Siemar, *The Constitution of the Northern Mariana Island: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373, 1383 at fn. 40 (1977).

[8] See *Matter of Bowoon Samgsa Co.*, 720 F.2d 595, 600 (9th Cir. 1983), regarding the status of Palau.

the inhabitants of the Northern Mariana Islands, and enacted into law by the U.S. Congress.[9]

Although the trusteeship continues, most of the Covenant's provisions are currently in effect,[10] including those pertinent here. Thus, while the Northern Mariana Islands will become a self-governing commonwealth known as the "Commonwealth of the Northern Mariana Islands" in political union with and under the sovereignty of the United States only on termination of the Trusteeship Agreement,[11] the United States may currently "enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands."[12]

In article V of the Covenant, there is a formula for determining the applicability of Federal laws in the Northern Mariana Islands. At section 502, it is stated:

> (a) The following laws of the United States in existence on the effective date of this Section[13] and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant.

Thereafter, in paragraph (1), there are specific laws made applicable, including one particular section of the Social Security Act. Then, paragraph (2) makes applicable those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States. Finally, paragraph (3) generally makes applicable those laws not described in paragraphs (1) or (2) which are currently applicable to the TTPI.

At section 503, the Covenant specifies certain laws not presently applicable to the TTPI which will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable by Congress after termination of the Trusteeship Agreement. Among exclusions are the minimum wage provision of the Fair Labor Standards Act as it pertains to private employers and employees.[14] The National Labor Relations Act is not made inapplicable under this provision.

At section 504, the Covenant provides for Presidential appointment of a commission on Federal laws. The commission will survey United States laws and make recommendations to the United States Congress about which laws now applicable to the Northern Mariana Islands should be made inapplicable, which laws now inapplicable should be made applicable, and the extent and manner of applicability or inapplicability. The commission's final report and recommendations are due within 1 year after the termination of the Trusteeship Agreement.

United States judicial authority within the Northern Mariana Islands is set forth in article IV of the Covenant which became effective 9 January 1978. That article provides for the establishment of a "District Court for the Northern Mariana Islands," which has the same jurisdiction as a district court in the United States.[15] The article also provides that the Northern Mariana Islands will constitute a part of the same judicial district as does Guam, currently the Ninth Circuit.

We note particularly, with regard to the applicability of Federal laws within the Northern Mariana Islands, that the legislative history of the Covenant's enactment indicates that while the formula of Federal law applicability "does not make the Northern Mariana Islands into a territory or possession of the United States prior to termination of the Trusteeship Agreement[, i]n many instances, however, the Northern Mariana Islands will be treated as if it were a territory or possession of the United States prior to termination, for many laws applicable to Guam because it is a territory or pos-

[9] Joint Resolution Approving the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" (herein called the Covenant), 24 March 1976, Pub. L. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. § 1681 note.

[10] Certain Covenant provisions became effective on approval of the Covenant by the United States, by the legislature of the Northern Mariana Islands and the inhabitants of the Northern Mariana Islands. Certain other provisions became effective on 9 January 1978 upon proclamation by the President of the United States. Covenant, art. X, sec. 1003; Proclamation No. 4584, Constitution of the Northern Mariana Islands, 42 F.R. 56593 (1977), reprinted in 48 U.S.C. § 1681.

[11] Those Covenant provisions related to citizenship and nationality, which entitle TTPI citizens domiciled in the Northern Mariana Islands to become United States citizens, will become effective on termination of the Trusteeship Agreement and the establishment of the Commonwealth of the Northern Mariana Islands.

[12] Covenant, art. I, sec. 105.

[13] The effective date of this section was 9 January 1978.

[14] The legislative history of the Covenant's enactment clearly indicates that while the minimum wage provisions of the Fair Labor Standards Act were made inapplicable, that Act's other provisions, including those dealing with such matters as overtime pay and maximum hours, are applicable under the formula for applicability of Federal laws. To Approve the Convenant to Establish a Commonwealth of the Northern Mariana Islands and for Other Purposes, hearing on H.J. Res. 549, H.J. Res. 550, and H.J. Res. 547 before the Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. 643 (1975) (section-by-section analysis); hearing on H.J. Res. 549 before the Subcommittee on General Legislation of the Senate Committee on Armed Services, 94th Cong., 1st Sess. 149 (1975) (questions and answers).

[15] One exception is that in cases arising under the United States Constitution, treaties, or laws, the Northern Marianas district court will have jurisdiction regardless of the sum or value of the matter in controversy. Covenant, art. IV, sec. 401, 402. Further, the Covenant provides that the Northern Marianas district court may have jurisdiction over some local cases.

session will become applicable to the Northern Mariana Islands."[16]

The Employer argues that the Board is precluded from exercising statutory jurisdiction because of the current political status of the Northern Mariana Islands—a unique status as part of a trust territory under United States administration but not a "territory" under the sovereignty of the United States.

We recognize the "unique political relationship between the Northern Mariana Islands and the United States."[17] Nonetheless, we must be guided by whether Congress[18] clearly expressed its affirmative intention of applying the National Labor Relations Act to the Northern Mariana Islands.[19] In our view, the formula for applicability of Federal laws contained in the Covenant and enacted by Congress is a clear expression of Congress' affirmative intention to apply the National Labor Relations Act, among other Federal statutes, to the Northern Mariana Islands.[20] This view is supported by the fact that the Covenant specifically excluded from applicability certain Federal laws, or portions thereof including certain provisions of the Fair Labor Standards Act, but did not specifically exclude from applicability the National Labor Relations Act or any portion thereof. Further support is found in the legislative history's indications of a literal reading of the Covenant's applicability formula. Accordingly, we find that the Board has statutory jurisdiction over employers located in the Northern Mariana Islands who satisfy our jurisdictional standards, as do the operations of the Employer involved here.

Further, considering congressional enactment of the Covenant, as well as a variety of other factors, we are unable to discern a basis for using our discretionary power and declining to exercise our statutory jurisdiction to the fullest extent.

We note the following factual characteristics about the Northern Mariana Islands. Their total population is approximately 17,000 with 87 percent residing on the largest island, Saipan, and almost all of the remaining inhabitants residing on the next largest islands, Tinian and Rota. Saipan is the governmental and commercial center of the islands. There is not a substantial United States military presence in the Northern Mariana Islands at this time. According to data submitted by the Petitioner, the government sector of the economy accounts for more than 40 percent of all employment. The largest portions of the private sector appear to be service industries (including tourism, property rental, and auto repair), retail merchandising, and construction and construction supply. Agriculture remains the primary land use on Rota. Geographically, culturally, and ethnically, the Northern Mariana Islands are closely related to Guam,[21] over which the Board has specifically asserted jurisdiction.[22] Guam, which is 3792 miles from Honolulu, is the southernmost and largest island of the archipelago known as the Mariana Islands; it is approximately 45 miles from Rota, 135 miles from Tinian, and 150 miles from Saipan, which is about 3927 miles from Honolulu. There is regular air service from Honolulu to Saipan and from Guam to Saipan and Tinian and some air service at least to Rota from Saipan. There is scheduled shipping between the West Coast and Saipan and scheduled barge service from Guam to Saipan with calls at Tinian and Rota as required. The dominant ethnic group in the Northern Mariana Islands—the Chamorros—is of the same origin as the people of Guam. While about two-thirds of the Northern Mariana Islanders speak Chamorro, English is the primary language and is used in the courts and taught in the schools.

Considerations which have persuaded the Board to decline to assert jurisdiction over businesses in the Panama Canal Zone, Wake Island, and Diego Garcia do not exist here. Thus, in *Contract Services*, 202 NLRB 862 (1973), the Board declined to assert its statutory jurisdiction in the Panama Canal Zone because there were at the time ongoing negotiations about the scope and effect of United States presence there. Here, in contrast, negotiations about the status of the Northern Mariana Islands have concluded and resulted in an approved convenant setting forth the terms of the relationship between the Northern Mariana Islands and the United States. In *Facilities Management Corp.*, 202 NLRB 1144 (1973), the Board declined to assert ju-

[16] Hearing on H.J. Res. 549, H.J. Res. 550, and H.J. Res. 547 before the Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs, supra at 640 (section-by-section analysis); see also Rep. No. 94–433 to accompany H.J. Res. 549, 94th Cong., 1st Sess. 77 (1975).

[17] *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984).

[18] For a discussion of Congress' ultimate authority over Trust Territory governance, the authority of Congress vis-a-vis the Covenant and some effects of congressional enactment of the Covenant, see *Sablan Construction Co. v. Government of the Trust Territory of the Pacific Islands*, 526 F.Supp. 135, 139–141 (1981).

[19] *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1962); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1956).

[20] In reaching this conclusion, we have not discounted the possibility that Congress may, at some future time, determine that the Act, or any portion of the Act, is inapplicable to the Northern Mariana Islands either at the recommendation of the Covenant-established commission on Federal Laws or based on its own judgment. We do not, however, believe that the creation of the commission negates the affirmative intention of the applicability formula; nor do we believe that it is productive to speculate about possible congressional action in light of Congress' existing intention.

[21] See Willens and Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373, 1375 (1977).

[22] *RCA Communications, Inc.*, 154 NLRB 34 (1965).

risdiction over an employer engaged in maintenance and repair services for the Air Force on Wake Island, a 2-1/2-square-mile island in the Central Pacific on which there is only an Air Force base, there are no permanent residents, and to which there is no access without Air Force permission and no scheduled air or water carrier service. In finding that it would not effectuate the purposes of the Act to assert jurisdiction, the Board emphasized the absence of local permanent residents, the remoteness of the island, the difficulty of access, and the absence of anything other than a military installation. Here, while the Northern Mariana Islands are at least as distant as Wake Island, they are proximate to Guam and are not difficult of access either because of transportation or entry limitations. Nor is a local permanent population or private industry lacking here. Finally, in *Offshore Express, Inc.*, 267 NLRB 378 (1983), the Board declined to assert jurisdiction over a naval contractor who was providing crew boat service and operating two Navy-owned vehicles in the lagoon at Diego Garcia. Among the factors stressed by the Board were once again the difficult access, restricted to military transportation and generally military personnel, the Employer's limited operation, and the fact that the island is under foreign sovereignty. Here, the Employer's operation is not similarly circumscribed and, while the Northern Mariana Islands are still under the trusteeship, the relationship to the United States has been formalized and the islands are not under foreign sovereignty. Accordingly, we shall assert jurisdiction over the Employer here.

Having asserted jurisdiction over the Employer, we now proceed to the issues of unit inclusion and exclusion. The parties have agreed that all full-time and regular part-time employees on the island of Saipan, excluding supervisors,[23] managerial employees, professional employees, confidential employees and guards and watch-persons as defined in the Act, are to be appropriately included in the unit found. The Petitioner also seeks to include full-time and regular part-time employees on the islands of Rota and Tinian while the Employer maintains that they should be excluded as managerial employees or because they do not share a community of interest with other employees. The Employer also maintains that the service order administrator should be excluded as a managerial employee, that the personnel administrator should be excluded as a managerial or confidential employee, and that the transmission supervisor, chief operator/communication center, account supervisor, billing administrator, and traffic settlement administrator should be excluded as supervisors. Finally, the Employer alternatively contends that the billing administrator should be excluded as a managerial employee.

The Employer employs one person each on the islands of Rota and Tinian, referred to as MTC representatives. Their duties involve service and clerical work—accepting applications for service and issuing and collecting bills—as well as installation of telephones and cables and routine maintenance on telephones, central office equipment, and cables. The MTC representative on Rota has on occasion attended meetings on Rota of the Port Authority in place of the Employer's general manager; his attendance at those meetings serves a public relations function. In terms of administrative duties, they may recommend to the billing administrator on Saipan, in accordance with established practice, that customers' service be discontinued and they may negotiate billing schedules which must be cleared through the Saipan main office. The MTC representative on Rota has recommended cable extension locations based on feedback from customers and knowledge of the area, but he does not engage in long-range planning. They do not directly supervise any employees; when crews come from Saipan to do major cable installation, the crews are accompanied by a stipulated supervisor or are sufficiently trained to do the work independently. The MTC representatives have nothing to do with the formulation or determination of management policies that directly affect employment relations, such as pay rates, fringe benefits, and other conditions of employment.

Based on the above and the record as a whole, we find that the MTC representatives are not managerial employees as they are not involved in the formulation, determination, and effectuation of management policies by expressing and making operative decisions of the Employer nor do they have discretion independent of the Employer's established policies.[24] We also find that they share sufficient community of interest with other unit employees[25] to warrant their inclusion in the unit. Their work duties involve a combination of the duties of different classifications of unit employees.

[23] The parties stipulated that the following individuals are excluded from the unit as supervisors: Edward Takahashi, general manager; Duke Silva, service manager; Diane Guerrero Villagomes, department head secretary; Vicenta Teregeyo, chief overseas operator; P. Pangelinan, inside plant supervisor; and Mariano Falig, outside plant supervisor. The parties also stipulated that Andy Tudela, plant accounting administrator, was to be permitted to vote subject to challenge.

[24] See *Simplex Industries*, 243 NLRB 111 (1979); *Textron, Inc.*, 219 NLRB 384 (1975).

[25] Among those included in the unit are employees who install, maintain, and repair cables, telephones, and other equipment; operators; and office clerical employees.

They are paid at the same level as combination technicians, a classification of employees included in the unit, and receive the same general fringe benefits as unit employees on Saipan. It appears that additional benefits they receive are a function of their being the only Employer employees on the respective islands; thus, they live rent free in facilities leased by the Employer which also serve as offices and equipment storage areas and they have full-time use of pickup trucks because they are on call at all times whereas combination technicians on Saipan have use of trucks only when they are working or on call. Their regular work hours are similar to those of other unit employees except for their full-time on-call status, they are required to fill out timesheets. They may work overtime without prior permission in an emergency situation but they are otherwise expected to obtain authorization. They are directly supervised by the service manager who is in charge of all inside plant, outside plant, transmission, and service operations. The MTC representatives submit weekly reports on their activities and meet monthly on Saipan with the service manager, the inside and outside plant supervisors, and the transmission supervisor. Inasmuch as the MTC representatives have similar job functions and other terms and conditions of employment with unit employees and inasmuch as they are part of the Employer's overall provision of communication service on the three islands, we shall include them within the unit found here.

The service order administrator has the primary responsibility of maintaining all customer records. She also receives applications for service, prepares service orders, coordinates the installation of service, disseminates information for billing, and updates the telephone directory. She decides whether to refer requests for expedited service to the general manager, who will himself then make a determination. She has made suggestions concerning processing of service orders and information to be provided to customers, which suggestions were adopted after discussion with the general manager. She does not establish or have input into Employer policies concerning employees' wages, hours, or terms and conditions of employment. She does not exercise any discretion regarding the formulation, termination, or effectuation of employment policies. She is supervised directly by the general manager. She works the same hours as other employees at the headquarters' office. She is paid according to the administration wage schedule which also applies to some stipulated supervisors. While that wage schedule does provide for higher wages at the higher step levels than the wage schedule applied to most of the unit employees at the low and midrange step levels, the wage rates are commensurate with those paid to some unit employees. We find that her duties and administrative responsibilities do not meet the standards for managerial status; it does not appear that the service order administrator formulates policies or uses her discretion independent of established company policies. See *L & S Enterprises*, 245 NLRB 1123, 1126 (1979). We therefore find that she is appropriately included in the unit.

The personnel administrator has the following duties: receiving employment applications, insuring they are complete, recording her impression of applicants' appearance, and checking references; explaining new policies to employees; conducting exit interviews with employees; recording and monitoring vacation and sick pay entitlement; advising supervisors of the time for employee appraisals; completing paperwork on personnel changes; keeping documents on immigrant laborers; preparing notices of job vacancies; and generally maintaining employee personnel files. The personnel administrator neither formulates nor determines employment policies; she was described by the general manager as the "administrator" insofar as she may describe existing policies to employees or supervisors. On one occasion, she suggested to the general manager that the preexisting policy concerning bereavement leave be followed; her suggestion was adopted. She supervises no employees; she cannot hire, fire, discipline, or evaluate nor can she recommend those actions or work assignments, transfers, or promotions. Her involvement in the actual hiring of employees appears limited to screening applications for those that match the qualifications of a vacancy and, on occasion, calling the general manager's attention to an application that reflects outstanding credentials or skills. She is not involved in handling employee complaints through any formalized grievance procedure.

The general manager's letters and documents are typed by the department head secretary, a stipulated supervisor. The personnel administrator does her own typing.

The personnel administrator has her own office, is paid according to the same wage schedule as the service order administrator, and receives the same fringe benefits as all the unit employees.

We find based on the above and the record as a whole that the personnel administrator is neither a managerial nor a confidential employee. See, e.g., *Washington Post Co.*, 254 NLRB 168, 191-192 (1981). With regard to managerial status, her duties admittedly do not involve the formulation or determination of management policies; and we do not view the one adopted suggestion she made con-

cerning bereavement policy to be a compelling manifestation of managerial status. Further, the evidence does not demonstrate that she has substantial discretion to act independently of established policies; rather, it appears that she serves primarily routine clerical, informational, and secretarial functions.

With regard to confidential status, we note that the Employer's focus in asserting this position is upon the personnel administrator's access to employee files and payroll rate information. However, the fact that the personnel administrator has access to personnel files and is aware of pay rates and personnel changes has not been held to be sufficient to confer confidential employee status.[26] We shall therefore include the personnel administrator in the unit found appropriate here.[27]

The transmission supervisor is responsible for the installation and maintenance of all record services on Saipan, i.e., teletype services, telex services, and special circuits. He reports directly to the service manager and appears from the Respondent's table of organization to be at the same administrative level as the inside and outside plant supervisors, both of whom are stipulated supervisors. He meets on a daily basis together with the service manager and the inside and outside plant supervisors to discuss work to be done. In 1981, he was responsible for the work of three equipment technicians. Since about March 1982, he has worked with only one equipment technician who is his coequal in skill level, although at the time of the hearing the Employer anticipated filling an equipment technician vacancy. The transmission supervisor has interviewed applicants and has effectively recommended the hire of two employees. He has authority to issue verbal and written warnings to employees with whom he works although he has not done so. He has also never promoted, suspended, or discharged an employee. He has performed annual written appraisals of the employees with whom he has worked. He also is responsible for granting overtime to employees with whom he has worked and for reviewing their timecards. His wage rate is at least 20 cents per hour higher than that of his subordinate. While the evidence about the transmission supervisor is sparse, we are persuaded that his effective recommendations of hire together with his appraising functions and authority to issue warnings are such indicia of supervisory status as to warrant his exclusion from the unit on that basis.

The chief operator communications center oversees the operations of the communications center and the work of the five telex operators who receive messages from throughout the trust territories to retransmit to points throughout the world, log long-distance calls, and receive at a counter customer payments for telephone services. She does not regularly work as an operator herself; she generally fills in during absences or emergencies. She has a separate office and spends a substantial amount of her time reviewing documents concerning long-distance calls and financial payments and monitoring the operators at work; she prepares a weekly report of all transactions occurring at the communications center including the amount of money received and the number of messages transmitted.

The chief operator communications center reports directly to the general manager. She has not been called upon to interview employees and has recommended neither hire nor discharge of employees, although the general manager asserts that she has the authority to do so. She sets the five operators' schedules, reviews and initials their timesheets, determines when the operators work overtime, and has authority to permit employees to leave work early. She prepares written appraisals of the operators which are used to determine whether they receive raises and the amounts of wage increases. She has authority to recommend promotions but has not done so; she has chosen that two employees be transferred after the general manager made a decision to effect a transfer. She has authority to issue verbal and written warnings to employees and she has given at least one employee an oral reprimand. In light of the above, and particularly what we find to be her responsible direction of the work of the operators, her authority to discipline employees, and her authority to effectively recommend their wage increases and transfers, we find that she is a supervisor within the meaning of the Act.

The account supervisor's primary function is to account for and report the Employer's financial data. She spends approximately 75 percent of her time engaged in that function. Her remaining time is spent directing the work of the accounting clerks and collection clerks and generally overseeing the work of the billings administrator, traffic settlement administrator, and plant accounting administrator.[28] She has interviewed and effectively recom-

[26] *Washington Post Co.*, supra at 192; *Los Angeles New Hospital*, 244 NLRB 960, 961 (1979); *Mid Allegheny Corp.*, 233 NLRB 1463, 1464–1465 (1977).

[27] At the hearing, the Employer suggested that the personnel administrator may be a supervisor within the meaning of the Act. It did not argue this position in its brief. Nonetheless, it is clear that the personnel administrator possesses none of the indicia of supervisory status.

[28] Both the billings administrator and the traffic settlement administrator are contested positions and are discussed below. As stated above, the

Continued

mended the hire of several employees. She has authority to recommend the discharge of employees but has not exercised that authority. She has the authority to discipline employees; she has issued both oral and written warnings. She performs appraisals for those employees whose work she directs as well as for those whose work she oversees, and she has effectively recommended at least one merit increase. She has authority to approve vacation requests and to approve absences. She has authority to grant overtime. She reviews employee timecards.

She is paid 25 cents per hour more than the next highest paid individual in the department. In view of the account supervisor's effective recommendation of hire, actual discipline of employees, and responsible direction of employees in the accounting department, we find her to be a supervisor within the meaning of the Act.

The duties of the billing administrator include putting all new accounts into a customer master file, posting all payments made to those accounts, accepting credit card applications and issuing credit cards, and handling customers' billing questions. The billing administrator reports to the account supervisor. The billing administrator works with one other employee, an accounting clerk. She initially assigns work to the accounting clerk and directs the accounting clerk if there is a change in work priorities. She participated in the interview of the current accounting clerk and discussed her approval with the account supervisor who made the direct hiring recommendation to the general manager. She filled out an appraisal for the former employee in the accounting clerk position, which appraisals affect determination of employee raises; she is responsible for appraising the current employee in that position after a year of employment. She has authority to permit the accounting clerk to work overtime. She has authority to issue verbal and written warnings and recommend discharge although she has not exercised that authority.

She works in the accounting departments' open area with the accounting clerks. She is a senior employee and is paid at the maximum level of the administration wage schedule such that her wage is approximately $3 more per hour than that of the accounting clerk.

While the evidence presented with regard to the billing administrator is somewhat sketchy, and while she is asserted to supervise one employee in a rather small accounting department, we are persuaded that the evidence shows that she responsibly directs the work of the accounting clerk and has affected and may affect that employee's terms and conditions of employment. Accordingly, we shall exclude her from the unit as a supervisor.[29]

The traffic settlement administrator is responsible for the accounting of all toll calls and settlements between the various carriers, including long-distance telephone calls and telex and telegraph services. He oversees the work of two clerks, one of whom reviews all toll tickets for accuracy and time changes and enters the information into a computer and the other of whom performs the same duties with telex and telegraph information. He makes sure their work is correct and completed in a timely fashion. He has the authority to recommend hiring and discharges and to discipline employees but he has not exercised that authority. He did effectively recommend that one of the current clerks be transferred into the department based on his knowledge of her capabilities. He also effectively recommended that one of the clerks be replaced during a leave of absence. He authorizes overtime for the clerks, reviews their timecards, and schedules their vacations. He also performs appraisals on the two clerks. He has his own office next to that of the general manager.

Based on the above and the record as a whole, and like our decision with respect to the billing administrator, we are convinced that the traffic settlement administrator responsibly directs the work of the clerks who are responsible to him and has the authority to affect and has affected their terms and conditions of employment. Accordingly, we find him to be a supervisor within the meaning of the Act and excluded from the unit.

We therefore find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

> All full-time and regular part-time employees of the Employer on the islands of Saipan, Rota and Tinian, but excluding managerial employees, professional employees, confidential employees, supervisors, guards and/or watch-persons as defined in the Act.

[Direction of Election omitted from publication.]

parties agreed that the plant accounting administrator would be permitted to vote subject to challenge; there is no record evidence concerning the status of the individual in that position.

[29] The Employer alternatively maintained that the billing administrator was a managerial employee because she recommended a policy for contacting customers before their service was disconnected for nonpayment and because she can routinely set up a customer payment plan if the amount owing is nominal. These facts do not support a finding of managerial employee status.

Heuer International Trucks, Inc. *and* General Teamsters Local Union No. 528, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 10–CA–19174

14 December 1984

ORDER DENYING THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT, GRANTING THE RESPONDENT'S MOTION FOR RECONSIDERATION, AND STAYING THE CERTIFICATION OF THE COLLECTIVE-BARGAINING REPRESENTATIVE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 21 April 1983[1] the Regional Director for Region 10 issued a complaint and notice of hearing in the above-entitled proceeding, alleging that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act. Specifically the complaint alleges that the Respondent is engaged in the sales and servicing of trucks. On 8 March the Union was certified as the collective-bargaining representative of a service department unit that includes mechanics, mechanic trainees, service department utility man, and shop foreman/service writer at the Respondent's Kennesaw, Georgia facility.[2] Thereafter on 21 March the Union requested to bargain with the Respondent. However, on 8 April and at all times thereafter the Respondent has refused to bargain with the Union on the basis that the unit determination was inappropriate. Subsequently, the Respondent filed an answer to the complaint, admitting that it refused to bargain and again maintaining that the appropriate unit should include all parts department employees and service clerical employees.

Chairman Dotson notes that he did not participate in the underlying representation case. Member Hunter dissented in that proceeding because he would have granted the Employer's request for review of the Regional Director's unit determination.

Thereafter on 19 May the General Counsel filed with the Board a Motion for Summary Judgment on grounds that the Respondent violated Section 8(a)(5) by its refusal to bargain. The General Counsel asserted that the Respondent's contentions offered no newly discovered or previously unavailable evidence, and raised no issue not previously litigated.

On 26 May the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter on 28 May the Respondent filed an answer to the Notice to Show Cause and filed a further pleading entitled "Motion for Reconsideration."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We agree that the present case warrants our reconsideration and therefore deny the General Counsel's Motion for Summary Judgment. Although our dissenting colleague would grant the motion on the basis that the Board previously rejected the Respondent's arguments and that our decision encourages relitigation in unit determinations, it is well settled that a motion for summary judgment should only be granted when issues of fact and law are not in dispute. Here it cannot be disputed that there exists a conflict in Board law regarding the appropriate service department unit. In *International Harvester Co.*, 119 NLRB 1709 (1958), the Board held that "partsmen" though working with "craftmen" were excluded from the bargaining unit since they did not exercise craft skills. The Board also applied *International Harvester Co.* recently in *Taylor Bros.*, 230 NLRB 861, 870 (1977). There the Board excluded partsmen from the mechanic unit. However, in *Austin Ford*, 136 NLRB 1398 (1962), cited by the Respondent, the Board found that the mechanics there were not a separate appropriate unit and stated that all service and parts department employees should be included in the same bargaining unit. Similarly, as noted by the Respondent, in *Graneto-Datsun*, 203 NLRB 550 (1973), the Board refused to separate mechanics from the rest of the service department employees and dismissed the 8(a)(5) allegation because there had been no demand for recognition in the appropriate unit. In *Gregory Chevrolet*, 258 NLRB 233

[1] All dates are in 1983 unless otherwise indicated.

[2] On 8 February the Respondent filed a request for review of the Regional Director's Decision and Direction of Election and contended that the unit should include all employees in the parts department and three clerks. It further contended that the unit was inappropriate because there was no community of interest between the mechanics and service utility man. On 25 February the Board denied this request for review, and stated that the election raised a substantial issue solely as to the unit placement of the service department's utility man. However, the Board concluded that this issue should be resolved through the challenge procedure, and amended the Decision and Direction of Election to permit them to vote under challenge. Thereafter on 4 March the Respondent filed a motion for reconsideration and reasserted its position that the clerks and parts employees should be included in the unit. On 25 March the Board denied this motion because it did not raise an issue not previously considered.

(1981), the Board included parts department employees with mechanics. Therefore, as clearly indicated by the inconsistency in the cited cases, it would be highly improper to grant the Motion for Summary Judgment when we have concluded that a clarification of existing Board law on this issue is required.[3]

The Respondent in its answer and motion for reconsideration renews its contention that the only appropriate unit consists of all parts and service department employees at its facility. After considering that argument in light of the Regional Director's decision in the underlying representation case, we conclude that a conflict in Board law exists as to what constitutes the appropriate unit for a motor vehicle service department. Accordingly, we have decided to reconsider the Board's previous determination of this unit at the Respondent's facility.

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is denied, based on the existing conflict in Board law.

IT IS FURTHER ORDERED that the Respondent's motion for reconsideration is granted.

IT IS FURTHER ORDERED that the certification of the collective-bargaining representative be stayed pending resolution of this issue. The parties herein may file briefs with the Board in Washington, D.C., on or before 28 December 1984.

MEMBER ZIMMERMAN, dissenting.

The Respondent's defense to the summary judgment motion and 8(a)(5) complaint here is, quite simply, a reiteration of the same argument about Board precedent and the appropriate bargaining unit that was twice made and twice rejected by the Board in the underlying representation proceeding, Case 10–RC–12709. The third time around, however, my colleagues in the majority now see an unspecified conflict in Board law where none was seen before, even though the Respondent has consistently alleged it. Consequently, the majority will permit reconsideration and relitigation of a representation proceeding bargaining unit issue in the absence of newly discovered evidence, an intervening change in Board law, or any other genuine special circumstance which would require the Board to reconsider its earlier decisions. This decision derogates the Board's well-established policy against relitigation of representation issues in an 8(a)(5) case,[1] creates uncertainty about the finality of Board election procedures, encourages incessant litigation, and thereby contravenes the statutory scheme for the promotion of stability in labor relations.[2] The majority fails to acknowledge that the Respondent has exhausted its appeals in this administrative forum. It should now be required to recognize and bargain with the certified union in the unit found appropriate or to challenge the Board's unit determination before a Federal court of appeals.

The question whether relitigation is proper here subsumes the question whether a conflict in Board law exists; the majority erroneously suggests the reverse. To repeat, the Board has twice considered and rejected the argument that a conflict exists. It settled the issue of law for this case. Had my colleagues participated in those actions, the outcome would undoubtedly have been different. Before stating now that they see a conflict where their predecessors did not, however, they must identify some independent reason for even looking at the issue. They have not done so.[3]

[3] Thus, contrary to our dissenting colleague, we do not believe that we are required to cite "precedent which holds as a matter of law that a separate mechanics' unit cannot be found appropriate" in order to deny a motion for summary judgment.

[1] See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1942); Board's Rules and Regulations, Secs. 102.67(f) and 102.69(c).

[2] See my dissenting opinion in *Sub-Zero Freezer Co.*, 271 NLRB 47 (1984).

[3] I note parenthetically that the majority has failed to cite any precedent which holds as a matter of law that a separate mechanics' unit cannot be found appropriate.

Local Union No. 7, International Longshoremen's and Warehousemen's Union *and* Bellingham Division, Georgia-Pacific Corporation and Bellingham Stevedoring Co. and Local Union No. 194, Association of Western Pulp and Paper Workers. Case 19–CD–415

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a charge filed 16 December 1982 by Bellingham Division, Georgia-Pacific Corporation (the Employer), and duly served on Local Union No. 7, International Longshoremen's and Warehousemen's Union (the Respondent or ILWU), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued a complaint and notice of hearing dated 24 August 1983, an amended complaint and notice of hearing dated 28 December 1983, and a second amended complaint and notice of hearing dated 10 January 1984 against the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(D) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge, the complaint and notice of hearing, and the amended complaints and notices of hearing were duly served on the parties.

The complaint, as amended, alleges that since about 8 August 1983 the Respondent has failed and refused to comply with the Board's Decision and Determination of Dispute[1] in the underlying 10(k) proceeding, which awarded the work to the Employer's employees who were represented by Local Union No. 194, Association of Western Pulp and Paper Workers. The complaint also alleges that since about 8 August 1983 the Respondent has failed and refused to notify the Regional Director that it will comply with the above-mentioned Decision and Determination of Dispute although it has been afforded a fair opportunity to do so. The complaint further alleges that commencing in September 1981, and for subsequent unloading operations since, the Respondent has filed grievances under its collective-bargaining agreement with Bellingham Stevedoring Co. (Bellingham Stevedoring), claiming "in-lieu-of" pay from Bellingham Stevedoring for the work in dispute, and that subsequent to the issuance of the above-mentioned 10(k) decision the Respondent has filed new grievances claiming in-lieu-of pay for such work. The complaint alleges that an object of the above acts and conduct by the Respondent is, and has been, to force or require the Employer to assign the work described in the 10(k) award to employees of Bellingham Stevedoring who are represented by the Respondent rather than to the Employer's employees who are represented by AWPPW.

The Respondent filed an answer admitting in part and denying in part the allegations of the amended complaint and raising certain affirmative defenses. The Respondent admits the allegations that it failed to notify the Regional Director that it would comply with the Board's 10(k) decision, but contends that the Board lacked jurisdiction in the underlying 10(k) proceeding because the facts did not present a jurisdictional dispute within the meaning of Section 10(k) and Section 8(b)(4)(D). The Respondent also admits the allegation that it filed grievances claiming in-lieu-of pay for the work in dispute, but contends that its claims for in-lieu-of pay do not have an object proscribed by Section 8(b)(4)(D) and are not coercive within the meaning of Section 8(b)(4)(D). The Respondent further contends that the Board is without authority to order the Respondent to cease and desist from filing the in-lieu-of claims.

On 18 January 1984 the parties filed a stipulation and motion to transfer the proceeding to the Board. The parties agreed that the stipulation of facts, the formal papers, the transcript and exhibits from the hearing previously held in the underlying 10(k) proceeding, and the arbitrator's award involving the work referred to in the stipulation of facts constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties also waived a hearing before an administrative law judge and the issuance of an administrative law judge's decision, and stated their desire to submit the case directly to the Board for findings of fact and conclusions of law.

On 9 March 1984 the Board approved the stipulation, made it a part of the record, and transferred the proceeding to and continued the proceeding before the Board for the purpose of making findings of fact and conclusions of law for the issuance of a Decision and Order. Thereafter, the General Counsel, the Respondent, and the Employer filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the briefs, and the entire record, and makes the following

[1] 267 NLRB 26 (1983).

FINDINGS OF FACT

I. JURISDICTION

The Employer, a Georgia corporation, manufactures pulp, paper, and chemical products at its facility in Bellingham, Washington, where it annually sells and ships goods and materials directly to points outside the State of Washington valued in excess of $50,000, and purchases goods and materials directly from points outside the State of Washington valued in excess of $50,000.

We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that ILWU and AWPPW are labor organizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Facts*

The Employer receives bulk shipments of salt about 14 times a year at its dock facilities in Bellingham, Washington. In a typical unloading operation prior to September 1981, cranes located in the hold of the ship were used to scoop the salt out and into a hopper on the dock, from where the salt was transported on a series of conveyor belts to a salt pad. At the salt pad, a shuttle conveyor was used to distribute the salt evenly over the pad. ILWU members employed by Bellingham Stevedoring operated the cranes on the ship, while the Employer's AWPPW-represented employees operated the conveyor belts, including the shuttle conveyor.

Around September 1981 the Employer decided to cease using the shuttle conveyor and instead to use bulldozers on top of the salt pad during unloadings. Following a meeting between the Employer and AWPPW officials, the Employer agreed to use its AWPPW-represented employees to operate the bulldozers. During the first unloading in September 1981, ILWU protested to Bellingham Stevedoring that under the Pacific Coast Longshore Contract Document (PCLCD), to which Bellingham Stevedoring was a party by virtue of being a member of the Pacific Maritime Association (PMA), ILWU members should have been ordered from the dispatch hall to operate the bulldozers used on top of the salt pad. ILWU filed a grievance under the PCLCD seeking monetary payments (in-lieu-of pay) as compensation for not getting the assignment of work. During all subsequent unloadings at the dock, AWPPW-represented employees continued to operate the bulldozers used on top of the salt pad, and ILWU continued to file grievances or claims for in-lieu-of pay. At some point, Bellingham Stevedoring approached the Employer about acting as a contractor for the work on top of the salt pad, but the Employer rejected the request. Meanwhile, ILWU's grievances proceeded through the various steps of the PCLCD grievance procedure until they were submitted for arbitration in late 1982. When AWPPW learned that the ILWU grievances had been referred to an arbitrator, it advised the Employer by letter dated 6 December 1982 that it would "take whatever action it determines is necessary—up to and including work stoppage—to assure that [the bulldozer operator] jobs remain covered by the AWPPW and its Local Union as they have in the past."

On 16 December the Employer filed the instant charge alleging that both ILWU and AWPPW violated Section 8(b)(4)(D) of the Act. A 10(k) hearing was held on 8 February 1983, and on 8 August 1983 the Board issued its Decision and Determination of Dispute in which it found reasonable cause to believe that both AWPPW and ILWU violated Section 8(b)(4)(D). Regarding ILWU, the Board based its finding of reasonable cause on ILWU's filing of grievances against Bellingham Stevedoring. Relying on evidence that Bellingham Stevedoring had no control over the work in dispute and that ILWU members never had performed the work in dispute, the Board rejected ILWU's "work preservation" defense and found reasonable cause to believe that ILWU's grievances had an object of applying indirect pressure on the Employer to assign the disputed work to ILWU-represented employees. On the merits, the Board concluded that the Employer's AWPPW-represented employees were entitled to perform the work in dispute based on, inter alia: the Employer's practice, assignment, and preference; relative skills and training; and economy and efficiency of operations. The Board also determined that ILWU was not entitled by means proscribed by Section 8(b)(4)(D) to force or require the Employer to assign the disputed work to employees represented by that labor organization. The Board's decision further ordered ILWU to notify within 10 days the Regional Director, in writing, whether it would refrain from engaging in the proscribed conduct.

The parties' stipulation of facts indicates that subsequent to the 10(k) hearing, but prior to the issuance of the Board's Decision and Determination of Dispute, an arbitrator's opinion and decision issued favorable to ILWU's position under the PCLCD. That decision, attached as an exhibit to the stipulation, indicates that on 10 February 1983, after a hearing in which ILWU and PMA participated, Washington Area Arbitrator Forrester decided that the dispute regarding ILWU's in-lieu-of claims turned "on the determination of control of

cargo." Although noting PMA's position that Bellingham Stevedoring's control of the cargo ends when the cargo is dumped into the hopper on the dock, the arbitrator nevertheless found that the salt discharge operation is a continuous movement of cargo from the ship to the place of rest on the salt pad, and held:

> Regardless of the Agreement between Bellingham Stevedoring Company and Georgia Pacific, the [PMA] Employers are required to maintain control of the cargo in the continuous movement to sustain the integrity of the Agreement between the ILWU and the PMA as to the work to be performed by ILWU members.

He therefore concluded that the "work opportunity in contention is longshore work," but further held that "time-in-lieu"[2] was not payable for ILWU's claims made prior to the issuance of his decision.

The stipulation of facts further indicates that pursuant to the arbitrator's decision Bellingham Stevedoring and the PMA honored and paid ILWU's claims for in-lieu-of pay dated subsequent to that decision. Bellingham Stevedoring and the PMA refused, however, to honor ILWU's claims for in-lieu-of pay on or after the issuance date of the Board's 10(k) decision.

B. *Contentions of the Parties*

The Respondent contends, as a procedural matter, that the Board's finding of reasonable cause in the 10(k) proceeding is not binding in a subsequent unfair labor practice proceeding and therefore it is entitled to a de novo review of the complaint allegation that its filing of in-lieu-of claims was violative of Section 8(b)(4)(ii)(D).[3] The Respondent reiterates its contention from the 10(k) proceeding that its resort to the contractual grievance procedure on an issue involving work jurisdiction is the agreed-on method of resolving disputes under the PCLCD and thus is not threatening or coercive within the meaning of the Act. In this regard, the Respondent also reiterates that its claims for in-lieu-of pay were directed solely to Bellingham Stevedoring and the PMA, not to the Employer, and that its purpose in making the claims was to preserve for its members a remedy for lost work opportunities caused by Bellingham Stevedoring's violation of the PCLCD. Finally, the Respondent contends that the Supreme Court's opinion in *Bill Johnson's Restaurants v. NLRB*, 103 S.Ct. 2161 (1983), precludes the Board from holding that ILWU's filing of in-lieu-of claims under its contractual grievance procedure constitutes an unfair labor practice which may be enjoined.

The General Counsel contends that the Respondent's argument that its claims for in-lieu-of pay do not constitute unlawful pressure to obtain a jurisdictional assignment was previously litigated and, in the absence of newly discovered evidence or a change in the law, should not be reconsidered in this proceeding. The General Counsel also contends that the instant case is controlled by *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), which was pending before the Board at the time the instant case was transferred to the Board. The General Counsel further contends that the Respondent's demands for in-lieu-of pay from Bellingham Stevedoring effectively constitute a demand for the disputed work in violation of the 10(k) award. Finally, the General Counsel contends that the Respondent's admitted refusal to commit itself in writing to comply with the Board's 10(k) order is inconsistent with the Respondent's contention that it has not demanded the disputed work and constitutes a separate Section 8(b)(4)(D) violation. The Employer takes a position consistent with that of the General Counsel.

C. *Discussion*

As indicated above, in the Decision and Determination of Dispute we found reasonable cause to believe that ILWU's filing of in-lieu-of grievances against Bellingham Stevedoring had an object of forcing or requiring the Employer to assign the disputed work to employees represented by ILWU and that ILWU thereby was engaging in conduct violative of Section 8(b)(4)(D). We determined that ILWU was not entitled to use proscribed means to force or require the Employer to assign the disputed work to members of ILWU, and we further directed ILWU to advise the Regional Director in writing whether or not it would abide by the 10(k) determination.

In this proceeding it is undisputed that ILWU has continued to file grievances against Bellingham Stevedoring seeking in-lieu-of pay for the work at issue herein. It also is undisputed that ILWU has failed to notify the Regional Director in writing that it would comply with the 10(k) determination although, as indicated above,[4] ILWU has denied

[2] "Time-in-lieu" appears to be used interchangeably with "in-lieu-of" for monetary claims made under the PCLCD.

[3] The Respondent admits that it did not notify the Regional Director that it would comply with the Board's 10(k) decision. It contends, however, that because it has not engaged in any conduct proscribed by Sec. 8(b)(4)(ii)(D) there is no basis for requiring a written assurance of compliance with the 10(k) decision; that there is nothing coercive or threatening about failing to send a letter; and that, even assuming that its failure to notify the Regional Director constitutes a technical violation, such conduct does not warrant a remedial order.

[4] See fn. 3 above.

that it did not comply with the 10(k) determination. The Board has held that engaging in the same or similar conduct which constituted the basis for a 10(k) determination constitutes proof of noncompliance with the 10(k) determination.[5] Moreover, the Board has required actual performance of the written notice requirement of the 10(k) determination.[6] We therefore find, contrary to ILWU's denials, that ILWU has not complied with the 10(k) determination.

Having determined that the Respondent has not complied with the 10(k) determination, we turn now to the merits of the complaint allegation that ILWU, by not complying with the 10(k) determination and filing in-lieu-of grievances against Bellingham Stevedoring, engaged in conduct violative of Section 8(b)(4)(ii)(D).

In its first affirmative defense and in its brief, the ILWU seeks to place in issue the existence of a jurisdictional dispute. A review of the record in the 10(k) proceeding indicates that this issue was raised and litigated in the 10(k) proceeding. As the Board stated in *Plaza Glass*, above,[7] "It is settled that issues raised and litigated in a 10(k) proceeding may not be relitigated in a subsequent unfair labor practice proceeding, alleging violations of Section 8(b)(4)(D) which are based in part on factual determinations made in the 10(k) proceeding." Therefore, we find no merit in the Respondent's first affirmative defense.

In its second affirmative defense and in its brief, ILWU seeks to place in issue the Board's finding in the 10(k) proceeding that an object of its filing of in-lieu-of grievances against Bellingham Stevedoring was to force or require the Employer to assign the disputed work to members of ILWU. In support of its position, ILWU reiterates its argument from the 10(k) proceeding that its sole purpose in making the in-lieu-of claims was to preserve for its members a remedy for Bellingham Stevedoring's continued violations of the PCLCD. ILWU also relies on Arbitrator Forrester's decision in its favor as further evidence that its filing of grievances was based on a legitimate contractual claim.

As we found in the 10(k) proceeding, however, ILWU's in-lieu-of claims were for the amount that ILWU members would have earned if they, and not the Employer's AWPPW-represented employees, had been assigned the work in dispute. We also found, based on evidence that Bellingham Stevedoring had no control over the disputed work and that ILWU members never had been assigned such work, that ILWU's grievances did not have a "work preservation" object but rather were designed to induce Bellingham Stevedoring to put pressure on the Employer to reassign the disputed work to ILWU members. The post-10(k) hearing issuance of Arbitrator Forrester's decision does not warrant a different finding regarding ILWU's object. Neither the Employer nor AWPPW participated in or was bound by that arbitration proceeding.[8] Furthermore, it is well settled that a 10(k) determination by the Board takes precedence over an arbitrator's contrary award.[9] Thus, although Arbitrator Forrester's award upheld ILWU's contractual claims, it does not alter the facts that Bellingham Stevedoring had no control over the work in dispute and that such work remained at all material times under the sole control of the Employer.

The consequences of ILWU's conduct are also relevant to our determination of its object. It is obvious that Bellingham Stevedoring will suffer economically if it is compelled to pay wages for work not performed by its employees every time a shipment of salt is unloaded for the Employer at the Bellingham dock. Inevitably, to avoid the continuing imposition of such a wage liability, Bellingham Stevedoring would cease doing business with the Employer or otherwise exert pressure on the Employer to force or require the Employer to change its assignment of work.[10]

In these circumstances, we find that ILWU has used the filing of in-lieu-of grievances under the PCLCD as an economic device against Bellingham Stevedoring with an object of forcing or requiring the Employer to assign the disputed work to ILWU members.[11] We further find that ILWU's conduct in filing the in-lieu-of grievances amounted to prohibited economic coercion.[12] Therefore, we reject ILWU's second affirmative defense.

[5] *Iron Workers Local 595 (Bechtel Corp.)*, 112 NLRB 812, 815 (1955).

[6] *Bechtel*, above at 817. See also *Plumbers Local 741 (Ashton Co.)*, 259 NLRB 944, 946 (1982); *Plumbers Local 195 (Texas Oil)*, 231 NLRB 525, 527 (1977); *Iron Workers Local 433 (Plaza Glass)*, 218 NLRB 848, 849 (1975), enfd. 549 F.2d 634 (9th Cir. 1977).

[7] See also *Teamsters Local 445 (Blount Bros.)*, 197 NLRB 46, 51 (1972).

[8] Thus, even if the arbitrator's award had issued prior to the 10(k) hearing, or if it had been brought to the Board's attention while the 10(k) decision was pending, the Board would have afforded it little or no weight in determining the dispute.

[9] *Carey v. Westinghouse Corp.*, 375 U.S. (1964). See also *Auto Workers v. Rockwell International Corp.*, 619 F.2d 580 (6th Cir. 1980), in which the court stated:

> Once the NLRB decides a work assignment dispute, its determination takes precedence over a contrary arbitrator's award. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964); *NLRB v. Radio & Television Broadcast Engineers*, supra; *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755 (5th Cir. 1966). This is true regardless of which action was initiated first. *Dock Loaders and Unloaders, ILA Local No. 854 v. Richeson & Sons, Inc.*, 280 F.Supp 402 (E.D.La.1968). In *Carey*, the Court specifically noted that where a NLRB determination and an arbitrator's award conflict, the former's ruling would take precedence. Further, "[t]he superior authority of the Board may be invoked at any time." 375 U.S. at 272, 84 S.Ct. at 409. Accord, *New Orleans Typographical*, supra.

[10] See *Weyerhaeuser*, above.

[11] Ibid.

[12] See *Teamsters Local 85 (Pacific Maritime)*, 224 NLRB 801, 805-806 (1976). See also *Weyerhaeuser*, above.

Based on all of the foregoing, we conclude that, by filing the in-lieu-of grievances, ILWU has engaged in conduct violative of Section 8(b)(4)(ii)(D). We also conclude that, by filing new in-lieu-of grievances after the issuance of the Board's 10(k) determination and failing to notify the Regional Director in writing that it would comply with the 10(k) determination, ILWU has failed to comply with the Decision and Determination of Dispute and thereby has continued to engage in conduct violative of Section 8(b)(4)(ii)(D).[13]

Finally, regarding ILWU's third affirmative defense that, based on the Supreme Court's decision in *Bill Johnson's*, above, the Board is without authority to enjoin it from filing its in-lieu-of claims, we find that the Board's recent decision in *Weyerhaeuser* is controlling. In *Weyerhaeuser*, the Board rejected the respondent's argument that *Bill Johnson's* compelled a stay of the 8(b)(4)(D) proceedings until such time as the courts resolved the respondent's Section 301 suit seeking time-in-lieu payments pursuant to an arbitration award.[14] Relying on *Carey v. Westinghouse*, above, the Board found that the Section 301 suit, "which seeks to enforce an arbitration award contrary to the Board's 10(k) award and also seeks to achieve a prohibited objective," lacked a reasonable basis in fact and law and therefore did not require a stay of the unfair labor practice proceedings. Based on the same reasoning, we reject the Respondent's third affirmative defense and shall order the appropriate injunctive relief.

CONCLUSIONS OF LAW

1. Bellingham Division, Georgia-Pacific Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 7, International Longshoremen's and Warehousemen's Union and Local Union No. 194, Association of Western Pulp and Paper Workers are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act by: filing in-lieu-of claims for work performed by members of AWPPW with an object of forcing or requiring the Employer to assign the work, described below, to employees represented by ILWU rather than to employees represented by AWPPW; and by failing and refusing to comply with the Board's Decision and Determination of Dispute reported at 267 NLRB 26 (1983). The work consists of:

> The operation of bulldozers for the purpose of piling salt on a salt pad owned by the Employer and located on a pier leased to the Employer, during times when ships and barges containing salt to be deposited on that pad are being unloaded at the pier by employees of Bellingham Stevedoring Company who are represented by ILWU.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the purposes of the Act. We also shall order the Respondent to reimburse Bellingham Stevedoring Company and the Pacific Maritime Association for any in-lieu-of claims paid to the Respondent pursuant to Washington Area Arbitrator Forrester's award of 10 February 1983, with interest computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[15]

ORDER

The National Labor Relations Board orders that the Respondent, Local Union No. 7, International Longshoremen's and Warehousemen's Union, Bellingham, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Filing in-lieu-of claims for work performed by members of Local Union No. 194, Association of Western Pulp and Paper Workers with an object of forcing or requiring Bellingham Division, Georgia-Pacific Corporation to assign the work described below to employees represented by Local Union No. 7, International Longshoremen's and Warehousemen's Union rather than to employees represented by Local Union No. 194, Association of Western Pulp and Paper Workers. The work consists of:

> The operation of bulldozers for the purpose of piling salt on a salt pad owned by the Employ-

[13] *Ashton Co.*, above; *Texas Oil*, above.

[14] In *Weyerhaeuser*, the Board's "reasonable cause" finding in the underlying 10(k) proceeding was based on a work stoppage by the union, a sister local of the Respondent in the instant case. After the Board's 10(k) decision, reported at 256 NLRB 167 (1981), an arbitrator ruled in favor of the union's claim that the work in dispute should have been assigned to its members and that its claim for time-in-lieu payments under the PCLCD should be sustained. The union thereafter submitted time-in-lieu claims against the employer, Jones, but none of these were paid. The union subsequently filed a Section 301 suit to enforce the arbitration award and to require PMA to pay damages in an amount equal to the time-in-lieu payments referred to in the arbitration award.

[15] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

er and located on a pier leased to the Employer, during times when ships and barges containing salt to be deposited on that pad are being unloaded at the pier by employees of Bellingham Stevedoring Company who are represented by ILWU.

(b) Refusing to comply with the Board's Decision and Determination of Dispute reported at 267 NLRB 26 (1983).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and cease filing in-lieu-of claims for the above-described work performed by members of Local Union No. 194, Association of Western Pulp and Paper Workers.

(b) Reimburse Bellingham Stevedoring Company and the Pacific Maritime Association for any in-lieu-of claims paid to the Respondent pursuant to Washington Area Arbitrator Forrester's award of 10 February 1983.

(c) Post at its office and meeting halls copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of the notice to the Regional Director for posting by Bellingham Division, Georgia-Pacific Corporation, if it is willing, at all locations on the jobsite where notices to its employees customarily are posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT file "in-lieu-of" claims for work performed by members of Local Union No. 194, Association of Western Pulp and Paper Workers with an object of forcing or requiring Bellingham Division, Georgia-Pacific Corporation to assign the work described below to employees represented by our labor organization rather than to employees represented by Local Union No. 194, Association of Western Pulp and Paper Workers. The work consists of:

> The operation of bulldozers for the purpose of piling salt on a salt pad owned by the Employer and located on a pier leased to the Employer, during times when ships and barges containing salt to be deposited on that pad are being unloaded at the pier by employees of Bellingham Stevedoring Company who are represented by ILWU.

WE WILL NOT refuse to comply with the Board's Decision and Determination of Dispute reported at 267 NLRB 26 (1983).

WE WILL withdraw and cease filing in-lieu-of claims for the above-described work performed by Local Union No. 194, Association of Western Pulp and Paper Workers.

WE WILL reimburse Bellingham Stevedoring Company and the Pacific Maritime Association for any in-lieu-of claims paid to our labor organization pursuant to Washington Area Arbitrator Forrester's award of 10 February 1983, with interest.

LOCAL UNION NO. 7, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Jake McWhorter, d/b/a McWhorter Trucking *and* Teamsters Construction Workers Local Union No. 13. Case 27–CA–8039

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 3 August 1983 Administrative Law Judge Roger B. Holmes issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a reply brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jake McWhorter, d/b/a McWhorter Trucking, Lakewood, Colorado, his agents, successors, or assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(d).

"(d) Make whole the unit employees who have incurred losses of wages and benefits because of the Respondent's failure to abide by the terms and conditions of the collective-bargaining agreement between the Respondent and the Union. Such monetary amounts are to be computed in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977); and *Olympic Medical Corp.*, 250 NLRB 146 (1980). In addition, the Respondent shall pay the contractually agreed-upon trust funds in the amounts of the contributions which the Respondent failed to make on behalf of the Respondent's unit employees in accordance with *Fox Painting Co.*, 263 NLRB 437 (1982), and *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse unit employees for any expenses ensuing from the Respondent's unlawful failure to make such contributions, with interest."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

I WILL NOT tell employees to tell representatives of Teamsters Construction Workers Local Union No. 13 that the employees do not want to be represented by the Union any more and for the union representatives to leave the employees alone and stay off their jobs, and I WILL NOT tell employees that any employee who talks to a union representative will be discharged immediately.

I WILL NOT tell an employee that he would be discharged immediately if he rejoined the Union.

I WILL NOT terminate an employee from employment and fail and refuse to reinstate him because of the employee's union membership and activities.

I WILL NOT fail and refuse to meet and bargain in good faith with Teamsters Construction Workers Local Union No. 13 concerning the wages, hours, and other terms and conditions of employment of the employees in the unit described below:

> All employees employed by Jake McWhorter d/b/a McWhorter Trucking or d/b/a J & B Trucking, at the Lakewood, Colorado, location, engaged in the performance of highway, heavy engineering, utility and building construction, but excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

I WILL NOT repudiate my contract with the Union and negotiate directly with my employees in the unit described above.

I WILL NOT unilaterally grant a wage increase to my employees in the unit described above. I will recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit described above, and I WILL abide by the terms of the collective-bargaining agreement with the Union.

I WILL NOT in any like or related manner interfere with, restrain, or coerce my employees in the exercise of the rights guaranteed by the Act.

---

[1] In adopting the judge's conclusion that the Respondent's statements violated Sec. 8(a)(1) of the Act, we rely on *Rossmore House*, 269 NLRB 1176 (1984).

[2] We expand the judge's recommended Order remedying the Respondent's failure to abide by the terms and conditions of the collective-bargaining agreement to include reimbursement of any losses directly attributable to its withholding of contributions under the parties' trust fund agreement, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

I WILL make whole Donald Lambuth for his monetary loss, including appropriate interest on such money, which has resulted from the termination of Lambuth from employment on 27 July 1982 and the failure and refusal to reinstate him.

I WILL expunge from my files any reference to the termination of Donald Lambuth on 27 July 1982, and I WILL notify him, in writing, that I have done so, and that evidence of his termination from employment will not be used as a basis for future personnel actions against him.

I WILL offer immediate and full reinstatement to Donald Lambuth to his former position of employment without the loss of his seniority or other benefits but, if his former position of employment no longer exists, then I WILL offer him a substantially equivalent position of employment without the loss of his seniority or other benefits.

I WILL make whole the unit employees who have incurred losses of wages and benefits because of the failure to abide by the terms and conditions of the collective-bargaining agreement with the Union. Such monetary amounts, and appropriate interest thereon, will be computed in accordance with National Labor Relations Board decisions. In addition, I WILL pay the contractually agreed-upon trust funds in the amounts of the contributions which were not made on behalf of my employees and reimburse employees for any expenses ensuing from the unlawful failure to make such contributions, and interest thereon will be computed in accordance with NLRB decisions.

JAKE MCWHORTER, D/B/A MCWHORTER TRUCKING

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge. The unfair labor practice charge in this case was filed and served on September 3, 1982, by Teamsters Construction Workers Local Union No. 13.

The General Counsel's complaint was issued on October 19, 1982, against Jake McWhorter, d/b/a McWhorter Trucking. The General Counsel alleges that the Respondent has engaged in conduct which violates Section 8(a)(1), (3), and (5) of the Act. In the answer to the complaint allegations, the Respondent denied the commission of the alleged unfair labor practices and also raised certain affirmative defenses.

The trial in this proceeding was held on February 24 and 25, 1983, at Denver, Colorado. The time for the filing of posttrial briefs was set for April 1, 1983. Both the General Counsel and the attorney for the Respondent filed briefs. At footnote 3 on page 9 of the posttrial brief filed by for the General Counsel, a motion is made to correct the transcript of the trial proceedings in three respects. In the absence of any objection, the General Counsel's motion is hereby granted.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

From October 1978 through the end of 1981, Jake McWhorter was doing business as the sole proprietor of McWhorter Trucking. He was engaged in the business of hauling dirt, sand, and gravel. He maintained an office at Lakewood, Colorado.

According to McWhorter, he changed the name of his busines to J & B Trucking about the beginning of 1982. (See Tr. 26–27.) He remained the sole proprietor of his business and also the highest level supervisor. J & B Trucking was engaged in the business of hauling dirt, sand, and gravel. McWhorter employed at J & B Trucking most of the same employees that he had at McWhorter Trucking. McWhorter explained at transcript page 28, "I tried to retain all. There was two people that quit."

J & B Trucking used the same equipment as McWhorter Trucking had used in its business operations. The equipment consisted of five tandem dump trucks, a front end loader, and a trailer.

At the outset of the trial proceedings, the Respondent's answer to paragraphs II(c) and (d) of the General Counsel's complaint was amended to admit those allegations. (See Tr. 7.) They are:

> (c) The Respondent, in the course and conduct of its business operations annually performs services valued at in excess of $50,000 directly for other employers within the State of Colorado, each of which in turn annually purchases and receives goods and materials valued in excess of $50,000 directly from points and places outside the State of Colorado.
>
> (d) The Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

According to McWhorter's testimony at the trial, his business operations had ceased prior to the time of the trial, he had no employees, and he was unemployed. (See Tr. 26.)

In addition to the foregoing, the Respondent's answer to paragraph III of the General Counsel's complaint was amended at the trial to admit that allegation. (See Tr. 7 and 8.) Paragraph III of that document alleges:

> The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Five persons were called as witnesses at the trial of this proceeding. In alphabetical order by their last names, they are: Delbert Bixler, who is a business agent of the Charging Party Union; Robert C. Easdon, who is a vice president of the Charging Party Union; Donald Lambuth, who is the alleged discriminatee in this case;

Jake McWhorter, who is the owner of the Resoondent; and Frank Edward Scoles, who is a former truckdriver employee of the Respondent.

At the trial, the ruling was made to sequester the witnesses in accordance with the provisions of Rule 615 of the Federal Rules of Evidence and to apply the holding of the Board in its decision in *Unga Painting Corp.*, 237 NLRB 1306 (1978). (See the discussion at Tr. 8–22.)

In setting forth the findings of fact in this decision, I will base those credited facts on portions of the testimony given by each one of the five witnesses. In addition, certain findings of fact will be based on documentary evidence introduced bv the parties at the trial. In making these findings, I have given consideration to the demeanor of the witnesses, the consistency or the inconsistency of portions of their testimony with the accounts given by other witnesses, the basis for the witnesses' knowledge of the matters about which he testified, and the probability of the testimony in light of other credited or undisputed facts.

The testimony given by McWhorter was relatively brief. (See Tr. 23–35.) Some of his testimony has been referred to in section I of this decision. Most of the testimony by the other four witnesses pertaining to statements made by McWhorter and other actions taken by McWhorter were not contradicted or disputed by McWhorter. There is a significant conflict between McWhorter and Lambuth as to whether Lambuth voluntarily quit his employment with McWhorter on July 27, 1982, or whether McWhorter terminated Lambuth. McWhorter stated that Lambuth quit his employment at that time. (See Tr. 33.) Lambuth's version is that McWhorter terminated him.

At the trial, Lambuth acknowledged that McWhorter had rehired him as an employee on earlier occasions after Lambuth had quit work voluntarily on two occasions; that he and McWhorter had always gotten along; that McWhorter had thought highly of Lambuth's work, and that McWhorter had been a witness for Lambuth at Lambuth's wedding ceremony. Notwithstanding the foregoing, Lambuth testified that McWhorter had fired him because Lambuth had rejoined the Union. (See Tr. 211.) Considering the criteria mentioned earlier in this section, I found that Lambuth's account is the credible one, and the findings of fact will be based on his version.

There is also a conflict between McWhorter and Scoles as to the month in which Whorter ceased his business operations. McWhorter indicated he had ceased business about 6 months prior to the time of the trial in February 1983. That estimate would place the cessation of the business to have occurred in August 1082. On the other hand, Scoles said he was not laid off from work by McWhorter until December 1982. For purposes of deciding the issues of whether unfair labor practices had occurred in the past, it seems unnecessary to resolve that conflict at this stage of the proceeding based solely on the recollections of those two witnesses. The time of the cessation of McWhorter's business and whether McWhorter's business operation has resumed since then are matters which could be resolved more appropriately during the compliance stage of this proceeding by the examination of the pertinent business records.

Unlike the foregoing question which may be resolved at the compliance stage, there is a necessity at this stage of the proceeding to make a determination on the issue of whether the Union ever achieved majority status in an appropriate unit of the Respondent's employees. Lambuth acknowledged that he had not looked at McWhorter's payroll records, or any other kind of records, to ascertain the dates of employment of the employees about which Lambuth testified at the trial. Lambuth explained, "No. That's why I wasn't sure. That's why I tried to give approximations." (See Tr. 220 and 221.) Lambuth said he was testifying from his best recollection. I have weighed the fact that Lambuth was testifying from memory, and that his testimony in that respect was not precise with regard to the exact dates of employment of the persons in question. Nevertheless, as will be shown in the findings of fact, he did recall the names of the employees in question, approximately when they worked for McWhorter, what jobs they performed, and other matters. In addition, Lambuth gave credible testimony on other subjects during the trial. The Company's records may have been able to provide more precise dates of employment and more exact information regarding the employees in question, but those records were not produced. That observation is not made in the sense of being critical, but in the sense of weighing and considering the oral evidence that was given by Lambuth and other witnesses, as distinguished from documentary evidence which was not presented. In these circumstances, I found that the oral evidence presented a reliable basis for making the findings of fact on this issue.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Events in 1980*

Introduced into evidence as General Counsel's Exhibit 2 was a copy of the first collective-bargaining agreement between McWhorter and the Charging Party Union. (See Tr. 29–30.) The document indicates that it was executed on July 15, 1980. (See G.C. Exh. 2, p. 58.) The contract had effective dates from May 1, 1978, to May 1, 1981. (See G. C. Exh. 2, p. 57.)

Neither before nor after McWhorter signed General Counsel's Exhibit 2 was a representation election conducted by NLRB among McWhorter's employees to determine whether they desired the Union to represent them. (See Tr. 34.) Easdon acknowledged at the trial that no representation election had been held, nor had an NLRB order to bargain been issued, at any time with respect to the employees of McWhorter. (See Tr. 98.)

B. *The Events in May, June, and July 1981*

Introduced into evidence as General Counsel's Exhibit 3 was a copy of the second collective-bargaining agreement between McWhorter and the Charging Party Union. (See Tr. 31–32.) The document indicates that it was executed on July 6, 1981. (See G.C. Exh. 3, p. 31.) The contract had effective dates from May 1, 1981, to May 1, 1984. (See G.C. Exh. 3, p. 30)

During the examination of McWhorter by the General Counsel under the provisions of Rule 611(c) of the Fed-

eral Rules of Evidence, the following took place as reflected at transcript pages 28 and 29:

> Q. When you were working both as McWhorter Trucking Company and subsequently as J & B Trucking Company, did you usually use the same drivers from job site to job site?
>
> A. Pretty much so.
>
> Q. In other words, you did not lay off drivers after each job and hire a whole new crew for each job, new job, did you?
>
> A. I did not.
>
> Q. So you had a stable work force except when the drivers quit or were fired or were laid off, possibly?
>
> A. Pretty much so.

Donald Lambuth had more than just one period of employment with McWhorter. During at least two of those periods of employment, Lambuth worked as a truckdriver for McWhorter. He acknowledged at the trial that he had voluntarily quit working for McWhorter on two occasions, but that McWhorter had always taken him back to work. Lambuth was certain at the trial that McWhorter thought highly of his work. (See Tr. 211.)

Some of the precise dates of Lambuth's employment by McWhorter are not clear, but Lambuth said he began working for McWhorter about September 1980 as a mechanic on a salary basis. Around May or June 1981, Lambuth became a truckdriver for McWhorter. At that time, he was paid the wage scale which was provided for in the union contract. Sometime later in the winter of 1981, Lambuth was dispatched by the Union to work for another company. He worked for that company for 2 or 3 weeks, and then Lambuth returned to work for McWhorter about the end of December 1981. (See Tr. 211.) He was married about March 10, 1982, but the wedding ceremony was not held until July 1982. McWhorter was a witness for Lambuth at the wedding. (See Tr. 210–211.)

At the point in time when Lambuth became a truckdriver for the Respondent in May or June 1981, there were six other truckdrivers working for the Respondent. Lambuth described those truckdrivers as ones who had worked for McWhorter for more than just a couple of months, and, instead, those truckdrivers were regularly employed by McWhorter for 6 months or longer. Thus, based on Lambuth's observation, there were a total of seven truckdrivers regularly working for McWhorter at the time that Lambuth moved up from the mechanic's job to being a truckdriver in May or June 1981.

The other six truckdrivers for McWhorter in May or June 1981 were identified by Lambuth as being: Kevin Bowers, Stacy Carpenter, Terry Gettman, Marc Hobbs, Mike Luman, and Ed Scoles.

Kevin Bowers was working for the Respondent prior to the time that Lambuth began working for the Respondent as a mechanic in September 1980. Bowers continued to work as a truckdriver for the Respondent, and he was working as a truckdriver in May or June 1981 when Lambuth became a truckdriver. Bowers continued as a truckdriver thereafter.

Stacy Carpenter began working for McWhorter as a truckdriver shortly after September 1980, and he continued to work for McWhorter as a truckdriver until about March 1982.

Terry Gettman worked for McWhorter from about September 1980 to November or December 1981 as a truckdriver.

Marc Hobbs worked as a truckdriver for McWhorter prior to September 1980, when Lambuth commenced working for the Respondent. Hobbs was still employed by McWhorter at the time that Lambuth's employment with McWhorter ended on July 27, 1982.

Mike Luman began working as a truckdriver for McWhorter a couple of months prior to May or June 1981, and he continued to work for McWhorter until about November or December 1981.

Ed Scoles began working on a full-time basis as a truckdriver for McWhorter in May 1981. Previously, Scoles had worked on a part-time basis for McWhorter, whenever he was needed, and when he was not working for Giles Hauling. After May 1981, Scoles continued to work for McWhorter until McWhorter ceased his business operations.

Lambuth described two other persons who drove trucks for McWhorter from time to time. They are Jerry McWhorter, who is the son of Jake McWhorter, and Jerry Crawford, who had the job of fueling the trucks, but who drove a truck "once in a while when he was needed." (See Tr. 220.)

Another employee named Al Denver became a mechanic for McWhorter at the time that Lambuth left the mechanic's job and became a truckdriver.

Another group of employees of McWhorter was identified by Lambuth as not being employed at the point in time when Lambuth became a truckdriver in May or June 1981. They are: Mike Barrows, Ed Hawkins, Gary Hobbs, Max Melendez, Don Overton, and Mike Wiedick.

Mike Barrows was working for McWhorter prior to the time that Lambuth began working for the Respondent in September 1980, but Barrows left the Respondent's employ about 2 months later, which would have been about November 1980.

Ed Hawkins came to work for the Respondent sometime after May 1981 and worked for McWhorter for a brief period of time. According to Lambuth, "He was in the landscaping business just filling in." (See Tr. 213.)

Gary Hobbs became an employee of the Respondent sometime after the May or June 1981 time period when Lambuth first became a truckdriver for the Respondent.

Max Melendez became a truckdriver for the Respondent after the May or June 1981 time period when Lambuth became a truck river for the Respondent. According to Lambuth, Melendez worked there less than 2 months as a "stand-in driver." (See Tr. 214.)

Don Overton was employed by McWhorter prior to time in September 1980 when Lambuth became an employee of McWhorter. However, Overton quit working for McWhorter about 2 or 3 months later, which would have been November or December 1980.

Mike Wiedick became an employee of McWhorter as a truckdriver about May 1982, and he worked for less than 2 months for the Respondent. According to Lambuth, Wiedick was terminated a day or two prior to the time he was terminated on July 27, 1982.

Introduced into evidence as General Counsel's Exhibits 8(a) through 8(g) were copies of the Charging Party Union's computer printouts of information pertaining to certain of its members. Among other things, the information includes the name, address, Social Security number, sex, insurance beneficiary, and the dates and amounts of union dues paid by the member. Suspension from union membership is also indicated, as well as whether an honorable withdrawal card had been issued to a member who was not currently employed.

General Counsel's Exhibit 8(a) pertains to Robert J. Burdolski. On December 15, 1980, he made a payment of $18 for the use of the Union's hiring hall. On November 30, 1981, he paid his initiation fee in full in the amount of $225. Burdolski continued as a union member, but on March 23, 1982, he was issued an honorable withdrawal card. According to Easdon, Burdolski still remained a union member, but he was not required to pay union dues until he resumed working.

General Counsel's Exhibit 8(b) pertains to Stacy R. Carpenter. On September 15, 1980, Carpenter paid in full his initiation fee in the amount of $225. He continued as a union member until August 6, 1982, when Carpenter was suspended from union membership for his failure to pay his union dues.

General Counsel's Exhibit 8(c) pertains to Terry L. Gettman. On October 20, 1977, Gettman was initiated into the Union. He continued to be a union menber at least through February 1983.

General Counsel's Exhibit 8(d) pertains to Marc Hobbs. On July 20, 1979, Hobbs made his first payment toward his initiation fee to join the Union. On August 2, 1979, Hobbs paid his initiation fee in full. He continued as a union member thereafter. On July 16, 1982, Hobbs was issued an honorable withdrawal card, which Easdon said meant that Hobbs remained a union member, but he did not have to pay union dues.

General Counsel's Exhibit 8(e) pertains to Donald J. Lambuth. On April 9, 1979, Lambuth made his first payment toward his initiation fee to join the Union. On June 27, 1979, he paid his initiation fee in full. Lambuth remained a union member until he was suspended from union membership on September 11, 1981. On July 28, 1982, Lambuth paid a reinitiation fee to the Union, and he continued his union membership at least through January 1983.

General Counsel's Exhibit 8(f) pertains to Michal K. Luman. On September 27, 1974, Luman was initiated into union membership. He continued thereafter as a union member, but on August 6, 1982, he was suspended from union membership.

General Counsel's Exhibit 8(g) pertains to Frank E. Scoles. On January 30, 1981, Scoles transferred his union membership from Local 537 of the Teamsters union to membership in the Charging Party Local Union. He continued his membership thereafter until May 6, 1982, when he was suspended from union membership.

C. *The Events in November or December 1981*

In either November or December 1981, McWhorter held a meeting of his employees in the Respondent's shop. Both Scoles and Lambuth were present at that meeting and gave similar accounts of what transpired. According to Scoles, "all the employees" were present, and he estimated that number of employees to be approximately six. The following took place during the direct examination of Scoles as reflected at transcript page 167:

> Q. Could you tell us what was said and by whom in that meeting?
>
> A. Jake notified us that McWhorter Trucking was ceasing and that he was changing his name to J & B Trucking. It would be strictly nonunion.
>
> Q. What else, if anything, can you recall from that meeting?
>
> A. Well, he told us that we are to withdraw from the union in order to continue working, and that if we didn't, there was the door, he would square up with us right then and there.
>
> Q. Was anything said—do you recall anything being said about a wage cut?
>
> A. Yes. He said that the pay would be $7.50 an hour, we would not get paid driving time or overtime.
>
> Q. Do you recall whether any employees replied to Mr. McWhorter?
>
> A. Well, there was something said; I don't recall exactly what was said. We all continued to work there.

During cross-examination, Scoles acknowledged that he did not withdraw from the union following that meeting, and that neither he nor anyone else was "shown the door." Lambuth also acknowledged that no one was fired by McWhorter following that meeting. (See Tr. 195, and see also his account at Tr. 184 and 185.)

Bixler said that he was told by Scoles that McWhorter had told the employees to take a withdrawal from the Union, or they could no longer be employed by him. (The foregoing testimony by Bixler was not received into evidence to prove the truth of the matter asserted by the out-of-court declarant. See the discussion at Tr. 152–155 and Fed.R. Evid. 801.) Bixler said that one of his duties as a union business agent was "to police" the Union's contracts or, in other words, to ascertain whether the contract's terms are being fulfilled. According to Bixler, at one time all of McWhorter's employees were paying union dues, but subsequently they quit doing so. He acknowledged that he did not request McWhorter to terminate any employee after Bixler learned that the employee was no longer paying union dues. (See the union-security clause set forth in art. 4 of G.C. Exh. 3.)

D. *The Events in January 1982*

As indicated previously in section A of this decision, McWhorter changed the name of his business in January 1982 from McWhorter Trucking to J & B Trucking.

Shortly after January 1, 1982, there was a conversation between McWhorter and Lambuth in the shop one afternoon after working hours. Lambuth recalled that conversation as reflected in his testimony at transcript pages 185 and 186:

> Q. Could you tell us what was said and by whom in that conversation?
>
> A. Well, Jake McWhorter insisted that we take a withdrawal. At the time, that did not apply to me because I was under suspension. He had told me that we will have nothing to do with the union and we will not get above $7.50 an hour until times got better. And I presumed—he told me he was going to tell the rest of the drivers that. I presume he did, I don't know.

At the trial, Lambuth acknowledged during cross-examination that no one was fired by McWhorter at the time of his January 1982 conversation.

Also in January 1982, McWhorter telephoned Easdon. At the trial, Easdon recalled their telephone conversation as reflected at transcript page 39:

> Q. Could you tell us what was said and by whom in that conversation?
>
> A. Mr. McWhorter expressed to me that he could no longer live with the contract that he had signed, that he wanted the union to be informed that his intentions were that he was not going to live with that contract. I believe he said that he had changed the name of his company.
>
> My response was that we felt like the contract was binding through the expiration date of the contract and we expected him to live by it and that he had an obligation to do that.

E. *The Events in February 1982*

Introduced into evidence as General Counsel's Exhibit 11 was a copy of a grievance which the Union filed against the Respondent. The document is dated February 22, 1982, and it was signed by union business agent Bixler. The Union alleged that the Respondent had violated the contract with the Union in several respects, and the Union sought full backpay and payment of wages and benefits for all employees.

On February 22, 1982, Bixler took the grievance form to McWhorter's business location, and he gave the grievance to McWhorter. According to Bixler, McWhorter told him that he was not going to pay the money; McWhorter wadded up the grievance form and threw it on the floor; and then McWhorter told Bixler, "If you don't get out of my shop, I will kick your [expletive deleted]." (See Tr. 132 and 133.) Bixler then left the facility.

According to Bixler, the allegations in the Union's grievance were based on information obtained on December 15, 1981, during a visit to a McWhorter jobsite. Bixler and Dean Kitterman, who is the Union's secretary-treasurer and business representative, went to a jobsite at Broadway and Colfax. Bixler spoke with Frank Scoles, Marc Hobbs, and Donald Lambuth, who were working there. According to Bixler, Scoles told him that he did not know for sure what McWhorter was paying the employees. Hobbs did not tell anything to Bixler at that time. Lambuth informed Bixler that McWhorter was paying $7.50 an hour, which was below the union wage scale.

Introduced into evidence as General Counsel's Exhibit 12 was a copy of a letter dated February 25, 1982, from Bixler to McWhorter. In his letter, Bixler requested a meeting with McWhorter at 9 a.m. on March 2, 1982, at the Union's offices to resolve the issues raised by the Union's grievance.

F. *The Events in March 1982*

After the Union's grievance was filed, McWhorter engaged the services of Willie Anthony as a labor consultant, and McWhorter directed Anthony to meet with the Union about the grievance. (See Tr. 32.)

On March 9, 1982, Easdon and Jack Parker, who is the president of the Charging Party Union, met in the Union's offices with Anthony. According to Easdon, Anthony said, [H]e was there to attempt to settle the grievance which had been filed." (See Tr. 44.) According to Easdon, Anthony also "stated that the Company had had problens with us in the past, that they wanted to clear up those problems, that they would remain union, that they wanted to draw up a settlement that settled all matters of this grievance." (See Tr. 57.)

Introduced into evidence as General Counsel's Exhibit 4(a) was a copy of a letter dated March 10, 1982, from Easdon to Anthony with regard to the agreement which was reached between the Company and the Union. Introduced into evidence as General Counsel's Exhibit 4(b) was a copy of the agreement which is dated March 10, 1982, and which bears the signatures of McWhorter for the Respondent and Easdon for the Charging Party Union.

The foregoing matters were not received into evidence to prove the liability of the Respondent for, or the validity of, the Union's claim or the amount of that claim. (See Fed.R.Evid. 408.) Instead, the General Counsel urged that the foregoing was offered to meet the Respondent's contention in the answer to the General Counsel's complaint that the Respondent had repudiated its contract with the Union on January 1, 1982, and its affirmative defense that the Union's unfair labor practice charge, which was filed on September 3, 1982, was barred by the 6-month statute of limitations provisions, which are set forth in Section 10(b) of the Act. (See par. XI and also the "First Defense" set forth in the Respondent's answer, which was introduced into evidence as G.C. Exh. 1(e).) The General Counsel urged, "I'm trying to offer this to show that Respondent engaged in conduct that was inconsistent with its position that it repudiated the contract on January 1, 1982." (See Tr. 45 and see also the discussions at Tr. 44–56; 58–59; 61–62; and 63–66.)

G. *The Events in April 1982*

Introduced into evidence as General Counsel's Exhibit 5 was a copy of a letter dated April 13, 1982, from

Easdon to McWhorter which, among other things, alleged that the unit employees had not received their money from the Company in accordance with the agreement which was introduced into evidence as General Counsel's Exhibit 4(b).

Introduced into evidence as General Counsel's Exhibit 6 was a copy of a letter dated April 19, 1982, from the Respondent and addressed "To Whom It May Concern." A copy of the letter was received by the Union on May 3, 1982. In part, General Counsel's Exhibit 6 states, "The following employees when working for McWhorter Trucking have been paid Union Scale & Benefits from the signing of the Union Contract until McWhorter Trucking ceased operations." (The spelling of certain words appear as corrected.) Thereafter, the typed names and the signatures of certain employees appeared. They are: Don Lambuth, Marc Hobbs, Ed Scoles and Bob Burdolski. The letter was signed by McWhorter.

Lambuth recalled at the trial the circumstances under which he had signed the document which was introduced into evidence as General Counsel's Exhibit 6. Lambuth stated at transcript page 186, "I had just gotten off work. I came into the shop. Jake had asked me to read it and sign it. I had read it. I was not exactly willing to sign it. He had told me if I wanted my paycheck to sign it, so I did." Lambuth later testified, "I think shortly after that he left." (See Tr. 196.)

Scoles also recalled at the trial the circumstances under which he signed General Counsel's Exhibit 6. He said that McWhorter was not present in the shop at the time when he came in to get his paycheck. However, McWhorter had left a note on the desk for Marc Hobbs. Scoles recognized the handwriting on the note as being McWhorter's handwriting. Scoles said at transcript page 168, "He left a note for us, for Marc Hobbs to inform us that we are to sign this paper before he is to give us our checks." Scoles then signed General Counsel's Exhibit 6, and he received his paycheck.

According to Scoles, McWhorter had not been paying union scale and benefits either while McWhorter was doing business as McWhorter Trucking or while he was doing business as J & B Trucking. (See Tr. 173.) However, Scoles acknowledged that he had not made any complaints to the union or filed any grievance saying that he was not receiving union scale. (See Tr. 174.)

Easdon acknowledged at the trial that for policy reasons the Union decided not to pursue further the Union's grievance through arbitration or other legal action.

H. *The Events in May 1982*

Introduced into evidence as General Counsel's Exhibit 7 was a copy of a letter dated May 6, 1982, from Easdon to McWhorter. Easdon wrote the letter in response to McWhorter's letter which was dated April 19, 1982, and which was introduced into evidence as General Counsel's Exhibit 6. Among other things, Easdon asserted his belief in the letter that the Respondent was still in business and was still obligated to the contract with the Union.

I. *The Events in July 1982*

About 6 a.m. on July 23, 1982, union business agent Bixler and another Union Business Agent, George Del Monte, went to the area near the Respondent's shop. They watched the yard there until about 7 a.m. During that period of time, McWhorter's trucks remained in the yard. As a result of what Del Monte said he had seen earlier in the week, Bixler and Del Monte drove out Parker Road beyond Arapahoe Road South to a housing project. Bixler observed two trucks and a loader at that location. He said that McWhorter's name was on the trucks. Bixler got out of the car and went over to one of the trucks where he spoke with McWhorter's son and another person who was sitting in the truck. Bixler asked them if they were carrying union cards, and they replied, "no."

Bixler then returned to his car, and he and Del Monte drove around the jobsite. Bixler noted that there was only a truck there from a cement company. As Bixler and Del Monte were driving out, they went by the truck where McWhorter's son and another person had been sitting. McWhorter's son got out of the truck and came over to Bixler's car. McWhorter's son told Bixler that he had purchased the trucks and that they belonged to him. He referred to Bixler by a derogatory term, and he told Bixler that he did not want Bixler to stop his trucks and bother his drivers any more. (See Tr. 141.) Bixler replied that he would stop and check the trucks as long as there was a contract. Bixler and Del Monte then left the jobsite.

The foregoing conversations were not received into evidence to prove the truth of the matters asserted by the out-of-court declarants. See the discussion at transcript pages 139–141 and 142–146, and also Rule 801 of the Federal Rules of Evidence.

About a week prior to July 27, 1982, there was a meeting of employees with McWhorter in the middle of the afternoon during working hours at a jobsite across the street at Colfax and Havana. Lambuth recalled at the trial that McWhorter told the employees that they were going to get a raise to $9 an hour. Lambuth also testified at transcript page 187 that McWhorter further told the employees, "[H]e would never have anything to do with the union. Anyone talking to a business rep [expletive deleted] can go down the road and they're fired." Lambuth further testified regarding that meeting at transcript page 188, "He had said that he would like us to go down and tell the union, tell the business reps that we did not want to be represented by them anymore and to leave us alone and to stay off our jobs."

During cross-examination, Lambuth acknowledged that Bixler had come out to the jobs, that McWhorter was aware of that fact, and that McWhorter was concerned that people were talking to union representatives during working hours. (See Tr. 197.) However, he specifically denied that McWhorter asked the employees simply not to talk to the union representative during working hours. (See Tr. 198.) Lambuth acknowledged that he did not know of anyone being fired by McWhorter just for talking to union representatives.

During cross-examination, Scoles acknowledged that, at the time of the meeting described above, Scoles had already been suspended from the Union for his failure to pay his union dues. (See Tr. 174.) Scoles said that after he had ceased to pay his union dues, he did not care whether or not the union represented him. (See Tr. 175.) Scoles also acknowledged that McWhorter was aware of the fact that union representatives had attempted to talk with Scoles during his working hours by trying to stop his truck while Scoles was making a delivery. (See Tr. 176.) However, Scoles stated that McWhorter did not limit his statement to the employees at the meeting just to not talk with union representatives during working hours. Scoles testified at transcript page 176, "He told us he did not want us associating with them, talking to them, or anything, at all, period. He didn't say whether it was at home or at the job or at anywhere else. He never specified. He said period." In Scoles' opinion, the union representatives had the right to visit employees on the job. (See Tr. 176 and 177, and see also art. 12, entitled "Job Admission," on 14 of G.C. Exh. 3.)

Around lunchtime on Tuesday, July 27, 1982, McWhorter and Lambuth had a conversation in McWhorter's white Chevrolet pickup truck at a jobsite either on South Parker Road or at Colfax and Tower Road. Lambuth testified regarding their conversation as reflected at transcript page 188:

> Q. Could you tell us what was said and by whom in that conversation?
>
> A. Jake and I were alone in the pickup. We had discussed—I had told him that I was thinking about getting straight with the union. And he said he cannot use anyone that's in the union, that he will never go back into the union and if I did, he would no longer need my services.

During cross-examination, Lambuth recalled that McWhorter also told him during that conversation that McWhorter was nonunion, and that McWhorter could not afford to pay union scale. (See Tr. 200.) Lambuth acknowledged at the trial that McWhorter's statements to him in that conversation did not surprise Lambuth.

About 4:30 or 5 p.m. on July 27, 1982, Lambuth went to the offices of the Charging Party Union. Lambuth appeared before a union committee, and he sought reinstatement in the Union. During cross-examination, Lambuth acknowledged that he was told by the Union that if he was going to be a union member, he could not work for McWhorter anymore unless McWhorter paid the union wage scale. (See Tr. 202.) Lambuth told the union representatives that McWhorter "probably would" fire him if he joined the Union, and that McWhorter had said that "he needed no one that was union and anyone that was would be dismissed." (See Tr. 220.) The meeting with the union committee lasted for about an hour. Lambuth was to pay a fine of $100 and also all of his back union dues for a total of $337. Lambuth did not have that amount of money with him at that time, but he paid the full amount the following day.

At the trial, Lambuth explained his reasons for seeking reinstatement in the union at that time. First of all, he considered the years he had acquired in the union toward retirement. Secondly, he was of the opinion that he did more than the other truck drivers who worked for McWhorter, and that he deserved more than $9 an hour, which was the amount of money McWhorter was going to pay them. Lambuth said he had hopes that McWhorter would pay him the union wage scale. Lambuth also felt that he could go to work for another company and be paid the union wage scale. In fact, Lambuth did obtain such a job about a week and a half after July 27, 1982.

About 7 p.m. on July 27, 1982, Lambuth telephoned McWhorter. Lambuth explained at transcript page 190, "We do that regularly to find out what we do the next day." With regard to his telephone conversation on that particular occasion, Lambuth gave the following account at transcript page 190:

> Q. Could you tell us what was said and by whom in that conversation?
>
> A. Yes. I had called him, I had told him, "I have gotten straight with the union." He had told me, "Well, you remember what we talked about this afternoon?" I told him, "Yes." And he said, "Well, that's it, you're fired."
>
> Q. What, if anything, did you say in reply?
>
> A. I said, "If that's the way you feel, good-bye," and that was the end of the conversation.

During cross-examination, Lambuth further testified that McWhorter also told him that he was not paying union scale, and, "I don't need anybody that will join the union and I will fire him immediately, and you're no exception." (See Tr. 204.) Lambuth added that McWhorter also told him, "Pick up your check tomorrow at the shop." (See Tr. 205.)

Introduced into evidence as Respondent's Exhibit 1(b) was a copy of a grievance dated July 28, 1982, which was filed against the Respondent. Bixler was the one who wrote the language of the grievance. It was signed by Lambuth. The grievance alleges: "I was unjustly discharged for reinstating in the Union and demanding proper pay scale and further demanding back wages due as agreed to by Jake McWhorter in letter dated March 10, 1982." At the trial, Lambuth explained that Bixler had shown him a paper pertaining to McWhorter's paying back wages, but, previously, Lambuth had not made a demand on McWhorter for any kind of back wages. He explained at transcript page 209, "We couldn't get scale, much less back wages. We were trying to take one step at a time."

Bixler attempted to deliver the grievance, which was introduced into evidence as Respondent's Exhibit 1(b), on July 30, 1982. When Bixler went to the Respondent's shop, he discovered that the shop was locked, the trucks were gone, and no one was there.

J. *The Events in August 1982*

Introduced into evidence as Respondent's Exhibit 1(a) was a copy of a letter dated August 2, 1982, from Bixler to McWhorter. The letter requested that a meeting be held between the Company and the Union with regard

to the grievance pertaining to Lambuth. (See sec. I. herein and R. Exh. 1(b).) Subsequently, the letter was returned to the Union unclaimed. (See R. Exh. 1(c).) Bixler also telephoned McWhorter's office on August 2, 1982, and he was told that McWhorter was on vacation.

On August 2, 1982, Scoles received a wage increase from $7.50 an hour to $9 an hour.

On August 21, 1982, Scoles went "dirt biking" with other employees and McWhorter. Scoles recalled at the trial that some of those employees were Robert Burdolski, Mark Hobbs, Steve Crawford, and Gary Hobbs. The group had lunch at the Twin Cedars Cafe in Deckers, Colorado. During their conversation at lunch that day, Lambuth's name was mentioned. Scoles testified at transcript page 171, "Well, I don't remember who had brought up the subject. The subject came up about why Don hadn't been working. Jake said it was because of him being with the union is why he's not working. That was it. That was all that was said about anything." During cross-examination, Scoles acknowledged that McWhorter had not told them that McWhorter had *fired* Lambuth because he had joined the Union. (See Tr. 176.)

K. *The Events in November 1982*

Introduced into evidence as General Counsel's Exhibit 9 was a copy of a letter from McWhorter to Easdon, which was received in the Union's office on November 1, 1982.

In his letter, McWhorter expressed his surprise at the Union's filing of an unfair labor practice charge. McWhorter asserted that he had informed Easdon in January 1982 that "I had nothing further to do with the Union and that I was terminating the contract." McWhorter expressed his view that the Union had done nothing about the fact that McWhorter was not abiding by the terms of the contract, and, therefore, the Union had agreed to the repudiation and termination of the contract. McWhorter also asserted in his letter that since July 1981 the Union had not represented a majority of his employees.

In response to General Counsel's Exhibit 9, Easdon wrote a letter dated November 1, 1982, to McWhorter. A copy of Easdon's letter was introduced into evidence as General Counsel's Exhibit 10.

In his letter, Easdon asserted that the Union had attempted to enforce the provisions of the contract, and he listed in his letter the dates and the actions taken by the Union in that respect. Easdon also expressed a desire to settle the grievance pertaining to Lambuth, and he requested a meeting with the Company to accomplish that.

IV. CONCLUSIONS

a. *The Allegations of Conduct Independently Violative of Section 8(a)(1) of the Act*

In paragraph V of his complaint, the General Counsel sets forth three allegations with regard to conduct which he urges independently violates Section 8(a)(1) of the Act. Those three specific allegations are:

> (a) On or about July 20, 1982, Respondent, acting by and through Jake McWhorter, told Respondent's employees to tell the Union that the employees did not want the Union representatives bothering them.
>
> (b) On or about July 27, 1982, Respondent, acting by and through Jake McWhorter, told an employee that if he rejoined the Union he would be immediately discharged.
>
> (c) On or about July 27, 1982, Jake McWhorter told an employee that any employees caught talking to any Union representatives would be immediately discharged.

Without repeating here all of the findings of fact contained in section I of this decision, I conclude that a preponderance of the evidence supports the General Counsel's allegations. In this connection, I note the uncontradicted testimony given by Lambuth and the uncontradicted testimony given by Scoles with regard to the statements they attribute to McWhorter. With regard to the allegations in paragraph V(a) of the General Counsel's complaint, it will be remembered that the testimony reveals that no limitation, such as working time, was placed by McWhorter on his statement to the employees. Also, McWhorter's statement to the employees must be considered in the context of his telling employees at the meeting that anyone who talked with a union representative would be fired. That is the substance of the allegation of paragraph V(c) of the General Counsel's complaint, although paragraph V(c) alleges the date as "on or about July 27, 1982," whereas the evidence reveals it was said "on or about July 20, 1982." I conclude that the minor variance in the approximate date of the allegation does not preclude the finding of an unfair labor practice where the date is relatively close in point of time. In addition, paragraph V(c) alleges the singular term "employee," rather than the plural, but this variation also seems to be minor, particularly where there are only three allegations of 8(a)(1) conduct, and all three allegations are attributed to the same person who did not dispute the testimony. With regard to the allegations in paragraph V(b) of the General Counsel's complaint, I note the uncontradicted testimony of Lambuth, as set forth in section I herein, with regard to his conversations with McWhorter on July 27, 1982, in a pickup truck and later on the telephone.

In reaching the foregoing conclusions, I have been guided by the Board's holding with regard to allegations of 8(a)(1) conduct that "the test is whether the supervisor's conduct reasonably tended to interfere with the free exercise of the employee's rights under the Act. *Florida Steel Corp.*, 224 NLRB 45 (1976), citing *Hanes Hosiery*, 219 NLRB 338 (1975). See also *Saint Luke's Hospital*, 258 NLRB 321 (1981). Thus, an objective standard, rather than the subjective reactions of the employees, has been utilized in determining whether such statements violate Section 8(a)(1) of the Act.

b. *The Allegations of Conduct in Violation of Section 8(a)(1) and (3) of the Act*

In paragraphs VI and VII of his complaint, the General Counsel sets forth allegations with regard to the termi-

nation of Lambuth, which are urged to be in violation of Section 8(a)(1) and (3) of the Act. Those allegations are:

VI

On or about July 27, 1982, Respondent discharged Donald Lambuth, an employee at its Lakewood, Colorado location, and at all times since has failed and refused, and continues to fail and refuse to reinstate this employee.

VII

The Respondent engaged in the acts and conduct described above in paragraph VI because of said employee's membership in and activities on behalf of the Union.

As set forth in section I herein, I conclude from those findings of fact that a preponderance of the evidence establishes the General Counsel's allegations with regard to the termination of Lambuth and the failure and refusal to reinstate him. *Wright Line*, 251 NLRB 1083 (1980). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 394 (1983).

The evidence, as described in section I herein, shows union activity on the part of Lambuth in rejoining the Charging Party Union; the Employer's knowledge of Lambuth's having done so, and the immediate termination of Lambuth by McWhorter because Lambuth rejoined the Union. In addition, there is other evidence set forth in the findings of fact which shows hostility toward the Union by McWhorter, and there is also concurrent conduct described above of violations of Section 8(a)(1) of the Act. Furthermore, as described in section I herein, based on the testimony of Scoles, McWhorter told the employees regarding Lambuth, "[I]t was because of him being with the union is why he's not working." While McWhorter did not admit to the employees that he had terminated Lambuth for that reason, McWhorter's statement has to be considered in light of the other findings of fact herein that McWhorter did discharge Lambuth from employment immediately on learning that Lambuth had rejoined the union, and that Lambuth did not voluntarily quit.

c. *The Allegations of Conduct in Violation of Section 8(a)(1) and (5) of the Act*

In paragraph XI of his complaint, the General Counsel sets forth three allegations with regard to the failure and refusal to bargain with the Union by McWhorter, which the General Counsel urges to be in violation of Section 8(a)(1) and (5) of the Act. Those three specific allegations are:

(a) Since on or about February 3, 1982, Respondent has failed and refused to meet and bargain with the Union concerning wages, hours, and other terms and conditions of employment.

(b) On or about July 20, 1982, Respondent repudiated its contract with the Union and negotiated directly with its employees.

(c) On or about July 20, 1982, Respondent unilaterally granted a wage increase to its employees.

The allegations in paragraph XI(a) of the General Counsel's complaint are the only ones which allege that unfair labor practices occurred beyond the 10(b) period. I calculate that the 10(b) date is March 3, 1982. That calculation is based on the filing of the unfair labor practice charge on September 3, 1982, by the Charging Party Union, and the service of the charge by mail on September 3, 1982. (See G.C. Exhs. 1(a) and 1(b); Sec. 102.113 of the Board's Rules and Regulations, and the stipulation at Tr. 7.)

I have considered certain findings of fact which occurred before March 3, 1982, insofar as those findings shed light on the conduct which occurred on and after March 3, 1982. For example, see the findings in sections C, D, and E, all of which occurred prior to the 10(b) date, but which shed light on the events which took place after the 10(b) date. In this connection, I have been guided by the Board's holding in *Tri-City Electric Co.*, 264 NLRB 1407, 1408 (1982):

> We note at the outset that conduct which has occurred outside the 10(b) period cannot form the basis for unfair labor practice findings. However, pre-Section 10(b) evidence may be relied on for the purpose of throwing light on and evaluating conduct which occurred within the 10(b) period. *The Motor Convoy, Inc.*, 252 NLRB 1253 (1980); *Pandair Freight, Inc.*, 253 NLRB 973 (1980).

Notwithstanding McWhorter's statement to Easdon in January 1982, as set forth in section D herein, and McWhorter's statement to Bixler on February 22, 1982, as reflected in section E herein, the Respondent's agent thereafter did meet with the Union and reached an agreement with the Union which both parties signed on March 10, 1982. (See sec. F also.) The General Counsel and the attorney for the Respondent view the foregoing events from different perspectives. The General Counsel urges that the Respondent acted in bad faith and "This misconduct is tantamount to fraudulent concealment." (See pp. 20 and 21 of the posttrial brief filed on behalf of the General Counsel for a fuller argument on this point.) The Respondent urges, "In conclusion, Respondent's conduct from January 1, 1982, and thereafter, both expressed and implied, clearly evidences repudiation of the pre-hire agreement. Therefore, the record clearly supports that Jake McWhorter had repudiated the pre-hire agreement as early as January, 1982, or at the latest March, 1982. After that time, Respondent had no obligation to collectively bargain with the Union." (See pp. 7-9 of the posttrial brief filed on behalf of the Respondent for a fuller argument on this point.)

I conclude that the Respondent's failure to abide by all of the terms of the collective-bargaining agreement and the Respondent's statements to Easdon and Bixler prior to the 10(b) date show that there was no fraudulent concealment of the Respondent's action in this regard. On the other hand, such conduct does not preclude the finding of unfair labor practices based on conduct which occurred on and after the 10(b) date. See *Ellis Tacke Co.*, 229 NLRB 1296, 1296 (1977), where the Board held:

Respondent disavowed the contract in October 1975. However, even prior to that date it refused to comply with some of the terms of the agreement. In a similar case, the Board in *Nelson-Hershfield Electronics*, 188 NLRB 26 (1971), required the respondent to honor its collective-bargaining agreement retroactively to the commencement of the 10(b) period. We find that a similar refusal-to-bargain violation exists in the circumstances of this case and we hold that the Administrative Law Judge erred in ordering that Respondent honor the collective-bargaining agreement only prospectively. Accordingly, we will require Respondent to honor the collective-bargaining agreement retroactive to the start of the 10(b) period.

In view of the foregoing, we also find that the Administrative Law Judge erred in not providing for any retroactive payments to the respective trust funds pursuant to the collective-bargaining agreement. Such retroactive payments will prevent Respondent from reaping financial gain from its unlawful conduct.

After considering the foregoing, I conclude that the 10(b) date is the appropriate date for the finding of the commencement of the Respondent's failure and refusal to meet and to bargain in good faith with the Union. As indicated previously, I calculate that date as being March 3, 1982. The Union's actions in filing grievances, filing an unfair labor practice charge, and writing letters to the Respondent are indicative that the Union did not waive its right to bargain with the Respondent and did not acquiesce in the Respondent's actions.

With regard to the allegations in paragraphs XI(b) and XI(c) of the General Counsel's complaint, I conclude that the findings of fact as set forth in section I herein establish those allegations. It will be recalled that at a meeting of the employees about July 20, 1982, McWhorter announced a wage increase to $9 an hour for his employees, and McWhorter told them "he would never have anything to do with the union." (See sec. I herein.)

With regard to the 8(f) issues, I conclude that the findings of fact in section B herein establish that the Charging Party Union achieved majority status in an appropriate, permanent, and stable unit of McWhorter's employees during the period of May through June 1981 when Lambuth was promoted from the mechanic's job to the position of truckdriver. In *Giordano Construction Co.*, 256 NLRB 47, 47 (1981), the Board held:

> It is well established that a union, originally recognized under Section 8(f), can achieve Section 9(a) status in one of two ways. The first means is for the union to demonstrate that it has achieved majority status "among employees who make up a permanent and stable work force of the employer." *Precision Stripping, Inc.*, 245 NLRB 169 (1979). Where a permanent and stable work force is not employed by the employer, however, the union can attain Section 9(a) status only by demonstrating majority status of the employees employed at a particular jobsite. *Davis Industries, Inc.; Stag Construction, Inc.; and Add Miles, Inc.*, 232 NLRB 946 (1977); see, generally, *Hageman Underground Construction, et al.*, 253 NLRB 60 (1980).

In this connection, note the testimony of Lambuth regarding the length of time worked for McWhorter by the truckdrivers who were employed during the May thru June 1981 time period. Note also McWhorter's testimony regarding the stability of his work force in the sense that he did not hire truckdrivers just for one project and then lay them off from work when that project was completed. He "pretty much" used the same truckdrivers from jobsite to jobsite. See the Board's decision in *Construction Erectors*, 265 NLRB 786 (1982).

Six out of the seven employees who were regularly employed by McWhorter as truckdrivers in the May thru June 1981 time period were members of the Charging Party Union at that point in time. They were: Stacy Carpenter, Terry Gettman, Marc Hobbs, Donald Lambuth, Mike Luman, and Ed Scoles. By including in the unit Al Denver, who became a mechanic at that time, and also Jerry Crawford, who primarily fueled trucks, but who occasionally drove trucks, the Union still had a majority in the unit of six out of nine employees at that point in time.

With regard to the status of Jerry McWhorter, he comes within the definition of an individual who is employed by his parent, as set forth in Section 2(3) of the Act. That is so because the Respondent is a sole proprietorship of Jerry McWhorter's father. In *Scandia*, 167 NLRB 623 (1967), the Board stated:

> Section 2(3) of the Act provides that "the term 'employee' . . . shall not include . . . any individual employed by his parent . . . ." Where an employer does business as a sole proprietorship, it is clear that his children are statutorily excluded as individuals employed by a parent.

In accordance with the Board's decision quoted above, I conclude that Jerry McWhorter may not be included in the unit in question here.

After considering the foregoing matters, I further conclude that the bargaining relationship between McWhorter and the Charging Party Union ripened from a prehire relationship, which is permissible under Section 8(f) of the Act, into a 9(a) bargaining relationship when the Union achieved majority status in an appropriate, permanent, and stable unit of McWhorter's employees. Once the Union's majority status was achieved, the Respondent was no longer free to withdraw recognition from the Union and to repudiate the collective-bargaining agreement in these circumstances. As the Board held in *Hageman Underground Construction*, 253 NLRB 60, 63 (1980):

> Under the Board law discussed above, from that time forward Respondent was under a statutory duty to recognize the Union as the exclusive bargaining representative of the unit employees working at existing and future jobsites. And, in view of

the collective-bargaining agreement in existence, the Union was entitled to an irrebuttable presumption of majority status for the duration of the contract. Accordingly, Respondent was not free to withdraw recognition from the Union or to repudiate the collective-bargaining agreement in midterm. By doing so, we conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

Under the circumstances presented in this case, I conclude that McWhorter's decision to change the name of his business from McWhorter Trucking to J & B Trucking does not preclude the finding of unfair labor practices as alleged in the General Counsel's complaint, which was issued against "Jake McWhorter, d/b/a McWhorter Trucking." As indicated in the findings of fact, McWhorter's action merely involved a change in the name of his ongoing business enterprise at that time. He was still the sole proprietor, and he was still engaged in the same type of business activity. He had the same office as before, and he utilized the same equipment as J & B Trucking as he had used as McWhorter Trucking. He retained the same employees under the business' new name, except for two employees who quit. As described by Scoles in section C herein, McWhorter told the employees "he was changing his name to J & B Trucking. It would be strictly nonunion." Thus, I conclude that this situation truly was a mere change in the name of the business enterprise.

Finally, I have considered the fact that McWhorter testified that he had ceased business prior to the time of the trial, that he had no employees, and that he was unemployed at that time. (See section I herein.) As indicated previously in section II herein, Scoles said he was not laid off from work by McWhorter until December 1982. Under either version, it appears that McWhorter was not actively engaged in business at the time he testified at the trial. I conclude that the foregoing does not render moot the issues raised by the pleadings in this case. Those issues pertained to whether the past actions and past conduct alleged in the General Counsel's complaint constituted unfair labor practices. Thus, up to this stage of the proceeding, the evidence has focused on past events when McWhorter was actively engaged in business. However, issues regarding the time and circumstances of his cessation of business, and whether McWhorter's business operation has resumed since then, are matters pertaining to compliance with the Board's remedial Order, and such matters may be raised more appropriately and more fully in the compliance stage of this case.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce, at the times material herein, within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At the times material herein, and more particularly since May through June 1981, the Union has been the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

All employees employed by the Respondent at the Lakewood, Colorado, location, engaged in the peformance of highway, heavy engineering, utility and building construction, but excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act in the following manner:

(a) About July 20, 1982, by telling employees to tell the union representatives that the employees did not want to be represented by the Union anymore and for the union representatives to leave the employees alone and stay off their jobs, and by telling employees that any employee who talked to a union representative would be discharged immediately.

(b) About July 27, 1982, by telling an employee that he would be discharged immediately if he rejoined the Union.

5. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by about July 27, 1982, terminating Donald Lambuth from employment, and failing and refusing to reinstate him, because of Lambuth's union membership and activities.

6. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act in the following manner:

(a) since about March 3, 1982, by failing and refusing to meet and bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment of the employees in the unit described herein.

(b) About July 20, 1982, by repudiating his contract with the Union and negotiating directly with his employees in the unit described herein.

(c) About July 20, 1982, by unilaterally granting a wage increase to his employees in the unit described herein.

7. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices. I shall also recommend to the Board that the Respondent be ordered to take certain affirmative action in order to effectuate the policies of the Act. Such recommendations will be set forth in the recommended Order herein.

In addition, I shall also recommend to the Board that an expunction remedy be included in the remedial Order. *Sterling Sugars*, 261 NLRB 472 (1982).

Pursuant to the Board's decision in *Hickmott Foods*, 242 NLRB 1357 (1979), I shall recommend to the Board that a narrowly worded cease-and-desist Order, as distin-

guished from a broadly worded one, be imposed in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Jake McWhorter, d/b/a McWhorter Trucking and d/b/a J & B Trucking, Lakewood, Colorado, his agents, successors, or assigns, shall

1. Cease and desist from

(a) Telling employees to tell the union representatives that the employees do not want to be represented by the union anymore and for the union representatives to leave the employees alone and stay off their jobs, and telling employees that any employee who talks to a union representative would be discharged immediately.

(b) Telling an employee that he would be discharged immediately if he rejoined the Union.

(c) Terminating an employee from employment, and failing and refusing to reinstate him, because of the employee's union membership and activities.

(d) Failing and refusing to meet and bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment of the employees in the unit described herein.

(e) Repudiating his contract with the Union and negotiating directly with his employees in the unit described herein.

(f) Unilaterally granting a wage increase to his employees in the unit described herein.

(g) In any like or related manner interfering with, restraining, or coercing his employees in the exercise of the rights guaranteed to them by the Act.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Make whole Donald Lambuth for his monetary loss, including appropriate interest on such money, which has resulted from the Respondent's termination of him from employment, and the Respondent's failure and refusal to reinstate him. Such monetary amount is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with the Board's decisions in *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977); and *Olympic Medical Corp.*, 250 NLRB 146 (1980).

(b) Offer immediate and full reinstatement to Donald Lambuth to his former position of employment with the Respondent, without the loss of his seniority or other benefits but, if his former position of employment no longer exists, then offer him a substantially equivalent position of employment with the Respondent, without the loss of his seniority or other benefits.

(c) Recognize and, on request, bargain collectively with the union as the exclusive collective bargaining representative of the employees in the unit described herein, and abide by the terms of the collective bargaining agreement between the Respondent and the Union.

(d) Make whole the unit employees who have incurred losses of wages and benefits because of the Respondent's failure to abide by the terms and conditions of the collective-bargaining agreement between the Respondent and the Union. Such monetary amounts are to be computed in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon as prescribed in *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980). In addition, the Respondent shall pay the contractually agreed-on trust funds in the amounts of the contributions which the Respondent failed to make on behalf of the Respondent's unit employees in accordance with the Board's decision in *Fox Painting Co.*, 263 NLRB 437 (1982), with any interest applicable to such payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Expunge from the Respondent's files any reference to the termination of Donald Lambuth on July 27, 1982, and notify him, in writing, that this has been done, and that evidence of his termination from employment will not be used as a basis for future personnel actions against him.

(g) Post at its Lakewood, Colorado facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) In the event that the Respondent has not resumed his business operation by the time of the commencement of compliance with the terms of the Board's Order, then, in lieu of posting the notice to employees as described in paragraph (g) above, the Respondent shall mail a copy of the notice to the last known address of each unit employee who was employed by the Respondent at the time of the cessation of the Respondent's business operation.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dawson Carbide Industries, Inc. *and* Carol Ann Kustosz *and* David Lincoln *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 157. Cases 7–CA–21026, 7–CA–21238, and 7–RC–16764

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 30 March 1984 Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating, threatening, and promising benefits to employees, and by publishing a plant rule restricting notice posting because of its employees' union activities, and violated Section 8(a)(3) by discriminatorily laying off Carol Ann Kustosz and Howard Churchwell on 30 July 1982 and David Lincoln on 17 September 1982.[4] We disagree only with the judge's finding that Lincoln's layoff violated Section 8(a)(3).[5]

The Respondent hired Lincoln in early 1982 primarily to perform work on turnover dies at the Respondent's small manufacturing shop. Carol Ann Kustosz triggered an organizational campaign on 29 July when she discussed the need for a union with Lincoln and other employees at lunch. Lincoln was an open union supporter.[6]

During his employment, Lincoln spent about a quarter of his time on turnover dies because turnover die orders were not consistent. The rest of his time he did machine work that other employees also performed. From early August until his layoff in mid-September there was no turnover die work.

The Respondent's business experienced a general decline in the fall of 1982. Although sales income due to labor work at the shop tripled from June to July and remained high through September, orders began to slow down in September; labor sales dropped sharply in October and remained depressed for several months.[7] On 17 September, 2 weeks before the representation election, the Respondent laid off Lincoln, the most junior employee in the shop, along with the three other employees who had the next lowest seniority rankings, Gerald Schornack, Dennis Demers, and John Zielinski.

At the time of the layoffs the Respondent had been notified it would receive an order of turnover dies on 1 October. When the order arrived Lincoln's supervisor was able to perform the work. The Respondent hired no one to replace the four employees for at least a year.

Lincoln, Schornack, Demers, and Zielinski filed a charge with the Board on 29 September alleging that their layoffs were unlawful. On 10 November the Board's Regional Director for Region 7 dismissed the portions of the charge relating to the layoffs of Schornack, Demers, and Zielinski, and amended the General Counsel's complaint against the Respondent concerning the 30 July layoffs to include Lincoln's layoff. On appeal, the General Counsel upheld the dismissals for lack of evidence establishing discriminatory motive in light of the Respondent's apparent business decline and the three employees' low seniority.

The judge found that the Respondent's knowledge of Lincoln's role as a union supporter and

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the parties' positions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge recommended a broad cease-and-desist order. In *Hickmott Foods*, 242 NLRB 1357 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. We do not find that the instant violations meet such a test. Consequently, we modify the recommended Order to require the Respondent to cease and desist from violating the Act in any like or related manner.

We decline to address the Respondent's contention that the Board should not award backpay to any reinstated employees for certain periods when they would have been laid off regardless of their union activities because of economic difficulties in late 1982. The issue may, of course, be raised in compliance proceedings.

[4] All dates refer to 1982 unless otherwise indicated.

[5] In affirming the judge's finding that Kustosz and Churchwell were discriminatorily laid off, we find it unnecessary to rely on the lack of notice given before the layoffs, or the fact that employees continued to work overtime after the layoffs.

[6] When management called Kustosz to the front office on 29 July to talk about the organizing, Kustosz requested that Lincoln accompany her. Management refused to allow Lincoln to be present. On 2 August the Union informed the Respondent that Lincoln was an organizing committee member.

[7] The Respondent's monthly labor sales, representing dollars earned for work performed on the products it shipped, were as follows: June—$30,989; July—$85,793; August—$89,020; September—$74,818, October—$31,689. The judge did not state that the figures are in dollars. Also, the judge's September shipment figure incorrectly includes costs for materials that were passed on to the buyers.

Kustosz' ally, coupled with the timing of the layoff and the Respondent's demonstrated union animus, made out a prima facie case of unlawful discrimination. The judge dismissed the Respondent's economic defense, finding that Lincoln should have been retained despite the layoff of more senior employees.[8] Noting that at the time of the layoffs a turnover die order was expected to arrive within a couple of weeks, the judge found that Lincoln should have been retained even if there had been a shortage of turnover die work because the need for his special skill might recur in the future.

We disagree with the judge's finding on the Respondent's economic defense. The Respondent's economic decline in the fall of 1982 justified layoffs. Four employees were laid off in September and they were not replaced. At the time of the layoffs, Lincoln had the lowest seniority in the plant. He possessed a special skill, but the Respondent's need for that skill had declined sharply, and Lincoln's supervisor was able to meet that need without assistance after Lincoln was laid off. Thus, the record does not support the judge's suggestion that Lincoln was indispensable.

We conclude that the Respondent would have laid off Lincoln absent his union activities and therefore Lincoln's layoff did not violate Section 8(a)(3) of the Act.[9]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 5.

"5. Respondent engaged in unfair labor practices in violation of Section 8(a)(3) of the Act by terminating Carol Kustosz and Howard Churchwell because of employees' union activities."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Dawson Carbide Industries, Inc., Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee concerning the employee's union activity.

(b) Threatening any employee with unspecified reprisals for engaging in union activities.

(c) Threatening employees with plant closing and termination if employees select union representation.

(d) Promising any employee a wage increase in order to persuade such employee to back off from efforts to secure union representation.

(e) Publishing any plant rule prohibiting the posting of notices anywhere in the plant without prior consent of Respondent because of employee union activities.

(f) Threatening any employee with strict rules and regulations if employees select union representation.

(g) Terminating or laying off any employees because of employee union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Carol Kustosz and Howard Churchwell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Rescind the no-posting rule it unlawfully promulgated so as to permit the posting of union-related material on company bulletin boards or other appropriate locations without prior approval.

(e) Post at its facility in Warren, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediate-

[8] See *Wright Line*, 251 NLRB 1083 (1981), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] Our analysis of Lincoln's layoff does not affect the judge's finding that the 30 July layoffs of Kustosz and Churchwell violated Sec. 8(a)(3) of the Act. Although the Respondent proved a business decline in the fall of 1982, there was no demonstrated decline in July or August.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ly upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the challenges to the ballots cast by Carol Ann Kustosz and Howard Churchwell in the representation election held 30 September 1982 are overruled, and Case 7–RC–16764 is remanded to the Regional Director for Region 7 for the ballots to be opened and counted and a revised tally of ballots isssued

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate any employee concerning the employee's union activities.

WE WILL NOT threaten any employee with unspecified reprisals for engaging in union activities.

WE WILL NOT threaten employees with plant closing and termination if employees select union representation.

WE WILL NOT promise any employee a wage increase in order to persuade such employee to back off from efforts to secure union representation.

WE WILL NOT post or maintain any plant rule prohibiting posting on bulletin boards or anywhere in the plant without prior permission because of employee union activities.

WE WILL NOT threaten any employee with strict rules and regulations if employees select union representation.

WE WILL NOT terminate or lay off our employees because of their support for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 157, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Carol Kustosz and Howard Churchwell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to the unlawful layoff and that the layoff will not be used against them in any way.

WE WILL rescind the no-posting rule that we unlawfully promulgated so as to permit the posting of union-related material on company bulletin boards or other appropriate locations without prior approval.

DAWSON CARBIDE INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD, JR., Administrative Law Judge. I heard these consolidated cases on January 11 and 12, 1983, in Detroit, Michigan, pursuant to consolidated complaint issued November 10, 1982, and order consolidating the representation and unfair labor practice cases on January 4, 1983. The issues are whether the Respondent terminated employees Carol Ann Kustosz, Howard Churchwell, and David Lincoln due to employees' support for the Union in violation of Section 8(a)(3) of the Act in consequence of which, inter alia, their challenged ballots in Case 7–RC–16764 should be opened and counted and, further, whether the Respondent engaged in various conduct alleged to violate employees' rights under Section 7 of the Act during the period surrounding the July and September 1982 employee terminations.[1]

On consideration of the entire record, including the witnesses' demeanor and briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

[1] The tally of ballots for the election held on September 30, 1982, shows the following ballots were cast: two yes, three no, and six challenges, of which three challenges were later sustained, leaving the status of ballots cast by Kustosz, Churchwell, and Lincoln for determination herein.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, a Michigan corporation engaged in manufacture and sale of tool components at its plant in Warren, Michigan, annually ships products valued in excess of $50,000 directly to points outside Michigan. As admitted, I find that Respondent is an employer engaged in commerce within the meaning of the Act. The Union is the Petitioner in the companion representation case, and its status as a labor organization within the meaning of the Act is established.

II. THE UNFAIR LABOR PRACTICES

A. *The Layoff of Carol Kustosz*

Carol Kustosz was hired in October 1981 as a machine operator and also to perform inspection work, then being performed by Kenneth Bratt, general manager in Respondent's tool component grinding and production shop where up to 14 employees were assigned to machine operating tasks.

Kustosz inspected studs under a shadow graph checking for correct tolerances, then cleaned and packaged them for shipment. She also did chamfering production work, deburred burrs on studs, used the grinding machine, and when such jobs were completed returned to inspection work. A month after Kustosz was hired Respondent's owner, Oscar Guensche, openly and warmly praised Kustosz on the shop floor to Edward Bernacki, vice president, for her fine work performance. Shortly afterward, Kustosz received a wage increase although she had only been working 5 weeks and the established waiting period was 90 days. Within a few weeks Kustosz received a second wage increase after devising a time saver on the chamfering machine. She received yet a third raise only a few weeks later, being informed by her floor manager, the owner's son, Clayton Guensche, that the reason for the raise was because she deserved it. Respondent General Manager Kenneth Bratt testified that during his interview of Kustosz he only promised her an increase after 90 days, and that her wage increases were unusual in the shop. By the time of later events described below, Kustosz, who had taken training at the Chrysler Learning Training Center before being hired by Respondent, and who sought college training for a journeyman's card as a general machinist during her tenure, had performed numerous tasks in the shop, including operation of grinders, Harding lathe, larger lathe, speed lathe, and a centerless grinder, all in addition to inspection work.

The events directly preceding Kustosz' layoff occurred on July 29 and during the morning of July 30, 1982.

Kustosz spoke with Clayton Guensche at 7 a.m. Thursday, July 29, in the front inspection room, reminding him about earlier assurances concerning a pay raise and asking what her chances were. When Guensche responded negatively, Kustosz described how she would be better off given family problems at home and the only slight difference between her present pay and the amount she would receive on layoff if Respondent would simply put her on such status noting, in addition, that work looked slow to her anyway. Guensche told her he could not do that, explaining that the shop had a lot of work, a large order of studs was coming in and there was a lot of work she did not know about.

Later in the same morning, Kustosz explained her family problems to Bratt, again asking if there was any chance for a promised raise and, when told no, asked about a layoff. Bratt responded no to this request as well. About a half hour later Bratt went to Kustosz and asked her who she thought she was "to say when she deserved a raise." Kustosz asked if he was so upset then why not give her a layoff, and Bratt replied because the Company did not lay off people for no reason.

During the lunch break, Kustosz told other employees that the employees needed a union, and phoned Attorney Webb to whom she described the situation at the shop and how employees were seriously considering a union for representation.

Kustosz then returned to her work station and prepared three signs which she then wore on her person, one on each shoulder, and one on her back. One contained the handprinted words, "THIS PLACE NEEDS A UNION," a second, "I don't want to be layed [sic] off! Carolann," and the third, also handprinted, "DAWSON INC. NEEDS A UNION." Kustosz stated that she signed the second one because she did not want anyone to think she wanted to be permanently laid off.

It did not take very long before Kustosz' actions caused a considerable stir. Respondent Vice President Edward Bernacki walked by, stopped to talk to Oscar Guensche's nephew, and the two looked over at Kustosz. Moments later, Respondent Owner Oscar Guensche came by and noticed the signs. Kustosz testified: "He stood directly in front of me and just leaned forward and had a pouting expression on his face, and then he walked up front, and all of them [Guensche, Bernacki, and Guensche's nephew, a shop employee] were just talking."

Employee Timothy Ray then told Kustosz he was ordered by Clayton Guensche not to come and speak to her, and employee David Lincoln told her that Kenneth Bratt had just approached him and told him, "Carol's crazy." Lincoln, who testified that Bratt added, "that's all this place needs is a union," also advised Kustosz not to talk to management alone as she was in trouble and would need witnesses.

An hour later, around 2:30 p.m., both the plant manager and Clayton Guensche went to Kustosz at her work station. According to Kustosz, Guensche pointed his finger at her and screamed, "Are you doing this to me?" and when Kustosz asked, "doing what to you," Guensche said, "Bringing this union thing in here." She replied she had discussed her raise with him that morning, that it was not him, it was the Company. Guensche then said, "I am taking this on a personal note" and that he was very disappointed in Kustosz after all he had taught her. At one point Kustosz was told there would be more conversation in the office with her concerning the matter and she indicated she wanted employee Lincoln to be with her. When told Lincoln was not going to

be present, Kustosz replied that she then had nothing to say.

I find, based on the foregoing, that Respondent, through admitted Supervisor Clayton Guensche, unlawfully interrogated Kustosz concerning her union activities as his questioning accusation, whether rhetorical, as contended by Respondent on brief, or not, was calculated to instill fear in the employee in connection with the exercise of Section 7 rights. *Detroit Tubing Mill*, 268 NLRB 1104 (1984); *K-C Machine & Tool Co.*, 268 NLRB 1474 (1984). Further, I find that by pointing and screaming at Kustosz concerning her sign-wearing and intentions to bring in a union coupled with the admitted statement, sinister in this context, that he was "taking this on a personal note" after all he had taught her, Guensche, and thereby Respondent, unlawfully threatened Kustosz with unspecified reprisals because she engaged in activities in support of union representation thereby further violating Section 8(a)(1) of the Act. *Montgomery Ward & Co.*, 234 NLRB 13, 53 (1978), and *Misericordia Hospital Medical Center*, 246 NLRB 351 (1979).

Kustosz, after the above, had another conversation with Guensche that day wherein she attributes the following comments to Guensche, who did not deny the attributions but merely could not recall his statements, wherefore Kustosz, whose demeanor and testimonial performance warrant such, is credited.

She testified that during this second conversation Guensche remarked that "Well, you're drowning . . . why are you taking me down with you," explaining that "If you bring a union in here, I'm going to lose my job." Kustosz testified further that Guensche then said, "If a union comes in that his father [Oscar Guensche] would lay everyone off and close the place down." This undenied statement by Supervisor Clayton Guensche, son of Respondent Owner Oscar Guensche, is found to be an unlawful threat of plant closing and employee termination should employees secure union representation, a further violation of the Act. *Purolator Armored, Inc.*, 268 NLRB 1268 (1984), and *K-C Machine & Tool Co.*, supra. Guensche accused Kustosz of screaming union because she did not get her way and asked, "Why don't you just leave."

When Kustosz sought a compromise with Guensche the latter told her the whole front office was against her but made it clear if she backed out he could keep her on, stating, "I can do anything." Guensche then asked Kustosz what she wanted, offering her $8 an hour to back out.[2] Kustosz declined the offer, expressing concern that if she backed down she would be out on the street. She informed Guensche she expected a call from a lawyer that evening explaining what employee rights were for a union. Based on the foregoing, it is concluded that by offering Kustosz a wage increase to drop the union efforts, Respondent unlawfully promised a benefit to discourage employee exercise of rights guaranteed by Section 7 of the Act, thereby further violating Section 8(a)(1) of the Act. *Telegram-Tribune Co.*, 268 NLRB 1114 (1984); and *Haddon House Food Products*, 242 NLRB 1057 (1979). As their conversation drew to a close Kustosz asked why it was not possible to compromise and make arrangements in regard to even a layoff. She was told it could not be done because this would be illegal as, "we have a lot of work here" and a large order of studs was coming in.

Respondent's reaction to the conduct of Carol Kustosz on July 29 picked up even further momentum the next morning, when employees arrived to see posted what was to them a brand new rule which stated, "Employees shall not post any notices anywhere in the plant or on bulletin boards without the prior consent of the General Manager." The notice was signed by Kenneth Bratt, general manager. Respondent, on brief, argues that this was merely "republication" of an existing rule hence valid, but there is no merit in such contention. Employees were unaware of any such rule being in existence in the past. Further, although Respondent proffered an *extract* from alleged plant work rules, Respondent's own general manager admitted that there was no employee manual for this shop, that to his knowledge rules have not been printed up or distributed to Respondent's employees, and that there was no personnel manual. Bratt admitted further on cross-examination that the work rules had been posted on a neighboring company's (Harboe Company) side of the plant property where Respondent's employees are not employed. Moreover, given its unexplained appearance otherwise out of the blue it can only be concluded that such rule was discriminatorily motivated by Kustosz' conduct the day before. Such being its purpose and content requiring prior approval for any posting, the rule can only be considered yet another Respondent interference with its employees' exercise of Section 7 rights violative of the Act. *Liberty House Nursing Home*, 236 NLRB 456, 461 (1978).

When Kustosz saw the rule that morning, she made a placard containing the picture of her two children, wrote the word "United" under it, and wore it on her shoulder.

At 9:30 a.m. Kustosz telephoned her mother and told her the fellows were coming over for a meeting that night and to be sure the coffeepot was ready. When she turned around she saw Kenneth Bratt close behind her listening to her talk on the phone. Kustosz noticed Bratt leave and go to Clayton Guensche's area and that the latter, together with Bratt and Comapny Vice President Edward Bernacki seemed to be in a huddle. After morning breaktime, without warning, Bratt handed Kustosz a termination slip, citing lack of work as the reason.

Analysis of Kustosz' Termination

There are numerous factors which militate towards a conclusion that Kustosz' termination was an unlawful act. A preponderance of the evidence discloses that Kustosz was an unusual, highly prized employee until her sudden termination only 1 day after angering Respondent by her open union advocacy. The record plainly established her high fitness for the many and varied tasks assigned to her for which she was rewarded with early

[2] Respondent's counsel on brief points to variances in this conversation as reported by employee Lincoln, who overheard it, and Kustosz, who participated in it. Those variances are not unusual however, when two witnesses describe the same conversation, and in this instance the gist in the incident emerges unchanged; more significantly, Guensche, who failed to remember numerous events and conversations, could not recall his remarks during this one as well, but did not deny the attributions.

wage increases and praise by high management officials, including Respondent owner Oscar Guensche, who personally singled her out on the plant floor for special praise. Her union activities were open, substantial, and well known to management and the record is clear that those activities stirred immediate and considerable Respondent animus towards her, including coercive questioning and accusation, unlawful promise of benefit, unlawful curtailment of employee expression concerning union representation in the plant, threats of unspecified reprisals, and threats of termination and plant closing should employees secure union representation. These indicia of unlawful motivation behind the termination are augmented by the fact that Respondent gave no notice whatsoever to Kustosz concerning her layoff, when it is reasonable to suppose that such notice would normally have been extended to an employee with her record.

Respondent claims however, based on Bratt's testimony, that there was a policy against giving an employee advance notice of layoffs because of possible employee reprisal while the employee was on the job between the time of such notice and the employee's actual last day of employment. In this connection, Bratt testified that the decision concerning Kustosz was made in June due to a shortage of work.

The obvious fallacy in Bratt's defense is that if, in fact, the decision to lay off Kustosz had been made in June, then there was no reason Bratt and Clayton Guensche should deny her initial requests for a layoff on July 29 if indeed Bratt had scheduled her for a layoff the very day following her request—especially since Kustosz had pressed her inquiry so steadfastly. It is strongly worthy of note that Respondent's policy of avoiding reprisal by not giving advance notice of layoffs would hardly be applicable to a case where the employee herself had sought the layoff, for in such instance, it would not reasonsbly be expected that there would be any reprisal—nor is it reasonable to suppose the 1-day notice involved in this layoff, involving so valuable an employee, would likely occasion harm to Respondent's property. I conclude that the failure to give notice to Kustosz arose from Respondent's animus-fueled decision to rid itself of a prounion employee activist rather than any valid "policy." *Autoglass & Upholstery Co.*, 264 NLRB 149 (1982); *Class Watch Straps Co.*, 267 NLRB (1983).

If these considerations did not already suffice to establish the unlawful discharge, other factors serve to confirm such a finding. Respondent's first witness to support its defense that lack of work led to an earlier decision to lay off employees was Vice President Edward Bernacki, who was mainly fed leading questions and therefore his testimony is really the testimony of Respondent counsel, who was not on the witness stand. Bernacki merely "assumed" he had spoken with Guensche and Bratt earlier about the subject of layoffs and concurred. He testified, "I may have made the recommendations," and that, after leading by counsel, to wit, "June or July?" he answered, "It is very possible, yes."

But if he was vague in responding to leading questions, Respondent's next witness on its shortage of work defense engaged in exaggeration. Thus, Bratt testified that in early May he knew "we had *far* too many people and if we could not develop other business there would have to be *drastic* layoffs." Bratt stated (in June), "We were very short of work. Many other small parts were put on hold or delayed and canceled and *all kinds of things had happened" to him*. It turned out that only two employees were laid off at that time. This testimonial overkill arose in the context of an operation which clearly and admittedly had its ups and downs and the references to being very short of work and all kinds of things having happened to him [Oscar Guensche, the owner] are simply not tied in clearly to any rationale for terminating Kustosz and they detract from Respondent's defense. *Telegram-Tribune Co.*, supra at 39. Nor was Oscar Guensche, owner of this relatively small shop and assumedly an authoritative and knowledgeable figure who could explain such matters, called upon by Respondent to testify at all.

Respondent's economic defense is rendered further dubious by its own exhibit, introduced by the Charging Party, which shows an improved record in shipments for July 1982—85,793 as against 30,989 for the previous June 1982—nor was this a mere flash in the pan, as August showed still more improvement to 89,020, and September 109,450.

It is undenied that the employees remaining after the layoff worked overtime for substantial periods, which indicates there were other options to losing Kustosz open to Respondent were this action against her merely caused by work shortage, that is, a redistribution of the work, and no valid reason was tendered for not avoiding the layoff of a valued employee. It defies belief that Respondent would reject such an alternative because it believed it would lose employees, who would allegedly quit their work in a well-known job-depressed Detroit, Michigan area rather than lose overtime.[3]

With respect to Respondent's contention that Kustosz was laid off in seniority the record supports the view that there was no uniformly followed policy according seniority rights to employees in times of layoff. In fact Respondent had passed over Kustosz and another employee, as well, to lay off a more senior employee (W. Darlak) because of comparatively better work performance (skill in Lincoln's case) in the junior employees (Kustosz and Lincoln). No reason was advanced why, in this case, especially since there was inspection work left to be down by Bratt, and she had been told only 1 day before (as later confirmed by employee Lincoln below) that there was plenty of work to be done, Kustosz was not retained to do such work but instead was terminated the very next day. Based on all the foregoing, I find that counsel for the General Counsel has established by a strong preponderance in the evidence, including allowable and compelling inferences therefrom, that Respondent discriminatorily terminated Carol Kustosz in violation of Section 8(a)(3) and (1) of the Act because she engaged in activities in support of union representation. *Purolator Armored, Inc.*, 268 NLRB 1268 (1984), and

[3] Clayton Guensche's testimony that 3 employees told him this in June would hardly dictate the enactment of policy in a shop employing at one time 14 employees, especially given the harshness of such a policy in an admittedly job-depressed area and expectable repercussions from employees affected by its implementation.

cases cited therein; *Universidad Interamericana de Puerto Rico*, 268 NLRB 1171 (1984); *Class Watch Straps Co.*, supra, 267 NLRB 276 (1983), and *Autoglass & Upholstery Co.*, supra, 264 NLRB 149 (1982).

The Layoff of David Lincoln and Related Events

Respondent General Manager Bratt was surprised, on Monday, August 2, following Kustosz' layoff, when he confronted a stranger in the plant, one Peter Bernert, a former fiance of Kustosz, who was delivering a letter from Charging Party Counsel L. Rodger Webb. The letter informed Respondent that the Union was organizing its employees and identified members on the organizing committee, including employee David Lincoln. Bratt insisted that Bernert enter via the front door and announce himself to the receptionist. In an ensuing commotion, I find that Bratt, in the presence of an office clerical employee and others, and in a voice loud enough with others shouting to be heard but not then understood by plant employees, twice exclaimed while trying to oust Bernert and while throwing the letter on the floor that, "We don't need a union in here. If a union comes in here we'll close this place down." I find that Respondent, through General Manager Bratt, as undenied, threatened employees with plant closing if employees selected union representation thereby further violating Section 8(a)(1) of the Act.

By letter to Respondent dated August 3, 1982, the Union's Local vice president sent Respondent a letter similar to Webb's, again naming Lincoln as a member on the organizing committee.

About 5 weeks after Respondent laid off Kustosz, Lincoln testified that Bratt came to his machine and told him he was going to explain unions to employees, about procedures, and "how that if you get a union in, there's going to be strict rules and regulations," and that unions were bad because they made companies noncompetitive. I find that Bratt made this statement with no valid prefatory context or explanation leaving a sinister impact and thereby threatened an employee with strict rules and regulations, in effect, less desirable working conditions, if employees selected union representation, thereby violating Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), and in relevant part *Mark I Tune-Up Centers*, 256 NLRB 898, 906 (1981). Lincoln, who in an earlier discussion with Bratt had informed him that he did not think that unions were all that bad, countered that there was an employee, Tim Ray, who was among the highest in seniority but the lowest paid. Bratt replied that "if the union came in here, that man would probably be out the door," thereby further threatening employee termination if employees selected a union, again violating Section 8(a)(1) of the Act. When Lincoln continued to express his views by asking Bratt about Carol Kustosz, Bratt said, "Well, she was laid off primarily because of her attitude," a comment lending further support, in my view, for the finding that Kustosz was discriminatorily discharged.

Revealingly, when Lincoln asked if there would be any more layoffs after Kustosz and Churchwell, Bratt told him no. This was the same answer Lincoln had been given by Bratt just after the layoffs of Barlak and Jakel on May 21, 1982, at which time Bratt had answered him "we were going to be able to ride out the storm." In any event, this assurance was also to prove inaccurate.

Early in September 1982, after he had signed a union card, Lincoln notified Bratt he was receiving or had received an NLRB subpoena and was to appear before the NLRB to make an affidavit. Shortly after lunch, Lincoln testified that Oscar Guensche walked by his work station and gave him a dirty look while on the way to his office, "a scowling look." On September 17, 1982, Respondent terminated Lincoln indefinitely. Lincoln testified that same morning he went into the inspection room as usual to see if there were any more dies and saw an order on the table for 30 dies, scheduled to come in on October 1, 1982. In addition, Bratt had told Lincoln 6 weeks earlier that three orders were coming in, and offered no reason why, as in the earlier May terminations, Lincoln, a speciality skilled machinist, was not retained because of such special skill even if he had to do run-of-the-mill shopwork thereby wisely having him on hand to do the special turnover die work for which he possessed such valuable skill and experience when such need were to recur, even assuming, without accepting the assertion, that there was a shortage in that type work. Charging Party's Exhibit 1, in this regard, shows more than a four fold increase in shipments in September, the month of Lincoln's discharge and the previous February.

In assessing the allegation that Respondent discriminatorily terminated Lincoln, certain relevant factors are governing. Lincoln was a known ally to Carol Kustosz, who requested he be allowed to accompany her to the front office in the very midst of her most irritating prounion behavior. Lincoln defended the idea of a union to management, specifying an employee who might thereby be helped. He was expressly identified in two letters from the Union to Respondent as a member on the organizing committee, signed a union card and told Respondent he was complying with a subpoena to make an affidavit before the NLRB's Regional Office soon after which he was, in the face of earlier reassurances to the contrary, laid off indefinitely less than 2 weeks before a Board-conducted representation election in circumstances which fail to provide economic justification for such action. Given Respondent's knowledge of Lincoln's activities and support for the Union, its animus as demonstrated by its numerous unlawful actions against employee statutory rights, the timing, and unjustified, or pretextual, nature of the advanced reasons for its action, I find on the bases of the above-cited authorities that Respondent discriminatorily terminated employee David Lincoln in violation of Section 8(a)(3) of the Act. *McCarty & Son, Inc.*, 268 NLRB 1136 (1984).

The Layoff of Howard Churchwell

Howard Churchwell was hired April 13, 1982, as a machinist, and ran several different types. He received, on request, a wage increase on the Monday before his layoff on July 30 with Kustosz. It is, at the outset, a further basis to those explained above, to question whether Respondent would bother giving employee Churchwell a raise on Monday if, as alleged, Respondent had already

decided a month beforehand to terminate him 4 days later. It seems further proof that Respondent actually reached its decision regarding the July 30 terminations on July 29 or 30 on the heels of the above-described union activities. In any event, Churchwell testified without contradiction that there were substantial orders in the plant, and that employees were taken off them to work on another order about 2 weeks prior to his termination. He testified that while departing the plant on July 30, after being terminated, Clayton Guensche advised him to return in a couple weeks, as "we might have some work for you."

Counsel for the General Counsel contends that Respondent, in order to shore up its defense that it terminated Kustosz according to seniority, had to terminate Churchwell, who was junior to Kustosz, in order to get to her and thus his termination was unlawful, as part of an unlawful design to terminate Kustosz.

The fact that Respondent failed to clearly support a pre-July 29 or 30 decision for layoffs makes the July 30 layoffs suspicious in origin, since this action seems to have arisen only from Kustosz' conduct in support of union representation for employees. The suspicion deepens when Respondent's reasons for any layoff are not persuasively tendered in testimony or other evidence. The undenied fact that Respondent told Churchwell, or invited him, to return for possible work in a couple of weeks belies a drastic need for any layoffs rather than, for example, reduction in overtime, with a redistribution of work, and raises the question why the offer was tendered to Churchwell and not Kustosz, the senior in terms of plant seniority. A reasonable inference is that Respondent desired him to return, and not her, and also that all along there was available work to keep them both busy. Laying them both off while extending an invitation only to him to return served the dual purpose of "following seniroity" in Kustosz' termination while designedly resecuring the services of Churchwell a short time later. The Board has held in the context of a union organizing drive that an employer's discharge of uncommitted, neutral, or inactive employees in order to "cover" or to facilitate discriminatory conduct against a targeted union-supporting employee or to discourage employee support for the union is violative of Section 8(a)(3) of the Act. *Stratford Lithographers*, 168 NLRB 469, 476, 477 (1967); and *Majestic Molded Product*, 143 NLRB 71 (1963), enfd. 330 F.2d 603, 606 (2d Cir. 1964). See also *NLRB v. Rich's Precision Foundry*, 667 F.2d 613 (7th Cir. 1981). Necessarily, such findings depend on inferences arising from the surrounding circumstances as such employees, like Churchweli, are pawns in an unlawful design, rather than direct targets. *Stratford Lithographers Inc.*, supra at 477. I draw the inference here that in Respondent's angry resolve to terminate Kustosz it unlawfully removed Churchwell to validate such action, thereby violating Section 8(a)(3) of the Act. In doing so, I note Respondent's failed attempts to establish an economic defense before me as to matters which, had the contentions been based on fact, would have easily lent themselves to demonstration—for example, records showing hours worked per part number or type, or orders on hand translated into the hours of employee work necessary to fill such orders. Instead, the vagueness and contrasting overkill in testimonial deliveries on such matter, and the unspecific, nondeterminative nature of Respondent's proffered exhibits, coupled with the inherent improbability in its witnesses' explanations, left Respondent's assertion of an economic defense unsupported. By contrast, Charging Party's Exhibit 1 established, to the contrary, that work was high at critical points. At best, the operation was one with ups and downs and, as noted in Respondent's brief, a long-delayed order did come in after layoffs, a common enough expectation to have forestalled any determination by Respondent that drastic layoffs were necessary, unless, as I conclude herein, the advent of its employees' union activities and the soon-to-arrive Board election to determine union representation provided such need in Respondent. I conclude this was the case.[4]

Representation Case 7–RC–16764

In view of the foregoing it shall be recommended that the challenges to the ballots cast by Kustosz, Churchwell and Lincoln be overruled and their ballots be opened and counted, and that a revised tally of ballots issue, all to follow the recommended remand of said case to the Regional Director of Region 7 for said purposes.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, found to constitute unfair labor practices occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent officials Oscar Guensche, Kenneth Bratt, and Clayton Guensche at all times material herein were supervisors and agents for Respondent acting on its behalf within the meaning of the Act.

4. Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Coercively interrogating an employee concerning the employee's union activity.

(b) Threatening an employee with unspecified reprisals for engaging in union activities.

[4] Counsel for Respondent makes the cogent observation on brief that the Regional Office "found" declining orders in Respondent's operations to buttress its position or economic defense in the present proceeding. The Region's report, GC–1k, reads, in the context of evaluating whether certain employees (whose ballots were challenged) had a reasonable expectancy of recall, that "there is no evidence to rebut the Employer's projection of declining business volume . . . at the time of September 17, 1982." At this hearing, however, the issue was business activity at the time of the layoffs and CP–1 rebuts the defense.

(c) Threatening employees with plant closing and terminations if employees selected union representation.

(d) Promising an employee a wage increase in order to persuade the employee to back off from efforts to secure union representation.

(e) Publishing a plant rule prohibiting the posting of notices anywhere in the plant without prior consent of Respondent because of employee union activities.

(f) Threatening an employee with strict rules and regulations if employees selected union representation.

5. Respondent engaged in unfair labor practices in violation of Section 8(a)(3) of the Act by terminating Carol Kustosz, David Lincoln, and Howard Churchwell because of employees' union activities.

6. Respondent did not engage in conduct creating the impression that employees' union activities were being kept under surveillance.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in the unfair labor practices set forth above, I will recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully terminated Carol Kustosz, David Lincoln, and Howard Churchwell, I will recommend that Respondent be ordered to offer them immediate and full reinstatement to their former or substantially similar position, without prejudice to their seniority or other rights and privileges, and that Respondent make them whole for any loss of pay they may have suffered by reason of Respondent's discriminatory actions by payment to them of a sum equal to that which they would have normally received as wages from the date of their termination until Respondent offers them reinstatement, less any net earnings in the interim. Backpay, with interest, is to be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[5]

I further will recommend that Respondent make available to the Board, on request, payroll and other records in order to facilitate checking the amount of backpay due them and other rights they may be entitled to receive.

As Respondent's conduct found unlawful herein goes "to the very heart of the Act," a broad remedy is warranted.[6]

[Recommended Order omitted from publication.]

---

[5] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] *Hickmott Foods*, 242 NLRB 1357 (1979).

The Washington Star Company *and* Columbia Typographical Union No. 101. Case 5–CA–13812–2

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 21 March 1983 Administrative Law Judge Sidney J. Barban issued the attached decision. Exceptions to the judge's decision were due 29 April 1983. The Respondent's exceptions and supporting brief postmarked 29 April 1983 were received 2 May 1983. The Respondent's exceptions were rejected by the Board as untimely. On 1 June 1983 by telegraphic order, the Board denied the Respondent's "Motion for Reconsideration" and on 7 June 1983 the Board issued an order adopting the judge's rulings, findings, and conclusions.

On 24 April 1984 the United States Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's order and remanded the case to the Board for consideration of the Respondent's exceptions. By an order dated 12 June 1984 the Board rescinded its order of 7 June 1983. The Respondent has filed exceptions to the judge's decision and a supporting brief. The General Counsel has filed an answering brief to the Respondent's exceptions and brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, the Washington Star, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge. This matter was heard at Washington, D.C., on August 23 and October 15, 1982, on a complaint issued on December 21, 1981 (all dates are in 1981, unless otherwise noted), pursuant to a charge filed by the above-named Charging Party (the Union) on October 20. The complaint alleges that the above-named Respondent[1] violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by declining to furnish the Union, as requested, with a copy of the contract between Respondent and the Washington Post Company (The Post) regarding the purchase by the Post of certain equipment and Respondent's Washington facility, which information, it is alleged, is necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the employees in the alleged appropriate bargaining unit.[2] The answer denies the unfair labor practices alleged.

On the entire record in this case, from observation of the witnesses, and their demeanor, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

For several years prior to August 7, 1981, Respondent published in the District of Columbia an evening newspaper of general circulation (The Evening Star). During the annual period prior to that date, similar to its operations in previous years, Respondent subscribed to interstate news services, published nationally syndicated features, and had a gross annual volume of business exceeding $200,000. The Evening Star ceased publication on August 7, 1981. However, it was stipulated that Respondent at the time of the hearing continued to be an employer engaged in commerce within the meaning of the National Labor Relations Act, and I so find.

The answer to the complaint admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. SUMMARY OF FACTS AND ISSUES

For a number of years, Respondent recognized the Union and several other labor organizations as the bargaining representatives of various separate bargaining units of Respondent's employees. As has been noted, Respondent's bargaining contract with the Union, by its

[1] Respondent's name as corrected at the hearing.

[2] The complaint alleges, and I find, that an appropriate unit for the purpose of collective bargaining within the meaning of the Act consists of Respondent's employees performing work in the composing room, as set forth in Sec. 7 of the bargaining agreement between Respondent and the Union effective from January 1, 1979, to December 31, 1983, which unit was described by William J. Boarman, president of the Union, as "the composing room unit which consists of operators at typesetting machines, makeup persons who would make up and assemble the newspaper, proofreaders, ad makeup people, and machinists who perform maintenance [on] the equipment which the [unit] employees operate."

terms runs to December 31, 1983. Among the provisions of that contract are clauses (considered in more detail hereinafter) referred to as "lifetime job guarantee" and "successorship" clauses, which are significant to the issues in this matter.

After the owners of Respondent, apparently in July 1981, decided to cease publication of the Evening Star, for reasons not disclosed on this record, the various labor organizations involved, including the Union, were notified, and Respondent met jointly, at first, with all these Unions to answer questions and deal with problems of common interest. Thereafter, Respondent met with these Unions separately. During these separate meetings, the Union advised that it would continue to assert the continued viability of the lifetime job guarantee in its bargaining agreement.

On August 7, as has been noted, Respondent ceased publication of the Evening Star.

On September 2, The Post, publisher of the morning newspaper in the District of Columbia (The Washington Post) put out a news release to the effect that the owners of The Evening Star had agreed to sell the plant formerly used by Respondent in the District and most of its equipment to The Post. A lengthy news article to this effect also appeared in The Washington Post. By letter dated September 4, the Union requested that Respondent furnish the Union with a copy of "the purchase and sale agreement" between the Post and Respondent referred to, though stating no specific reason for the request. However, at a meeting with Respondent on September 30, the Union contends that it specifically informed Respondent that it needed the sales agreement in order to determine whether there had been a violation of the lifetime job guarantee and the successorship clauses of the bargaining contract. Respondent denies this, and claims that the failure of the Union to demonstrate that the information requested was reasonably necessary and relevant to the administration of its bargaining contract with the Union and the asserted confidential nature of the document, relieves Respondent of any obligation to provide that information. It is further contended, as discussed, that certain alleged procedural errors at the hearing prevented Respondent from fully attacking the credibility of union representatives' testimony as to statements assertedly made at the September 30 meeting.

During this same period, the Union, which apparently had a bargaining agreement with the Post similar to that with Respondent, was attempting to secure a copy of the sales agreement from the Post. The Union also apparently filed an unfair labor practice charge against the Post when that publisher refused to provide the Union with a copy of the sales agreement, but seems to have withdrawn the charge.[3] Respondent contends, quite vigorously (on the record Respondent stated that this "goes to the essence of the case"), that the Union's real purpose in seeking the sales agreement from Respondent was *not* to administer its contract with the Respondent, but to attempt to have the Post comply with the lifetime job guarantee in the Post's bargaining agreement, and thus the Union's request of Respondent had no relevance to *Respondent's* bargaining agreement.

Respondent further contends that the sales agreement contains "sensitive" and "confidential" material, and that it had an understanding with the Post not to disclose the document. In a somewhat related argument in its brief (p. 14), Respondent asserts that the sales agreement relates to Respondent's "business decision to terminate its operations," and, arguing that Respondent would not be required to bargain over its decision to close, "[Respondent] does not have the attendant duty to disclose information, such as the sale agreement, that is relevant only to that decision."

III. THE COLLECTIVE-BARGAINING AGREEMENT

The significant clauses in the bargaining contract (G.C. Exh. 3) are contained in the Memorandum of Agreement attached to and made a part of the contract. These clauses, in relevant part, are the following (particular provisions have been italicized for emphasis):

(1) Job Guarantee

> (a) Each employee whose name appears on the list of employees to be known as the Job Guarantee Roster will be entitled to the benefits set forth in paragraph (b).
>
> (b) The publisher agrees that all of its composing room employees whose names appear on the Job Guarantee Roster wil be guaranteed a regular full-time situation . . . with the publisher in accordance with the provisions of the latest Collective-Bargaining Agreement for the remainder of their working lives until they vacate same through retirement, resignation, death, or discharge for cause; *provided, however, in the event the Publisher permanently ceases publication such guarantee will thereupon cease.* . . .
>
> . . . .
>
> (e) In the event the Publisher *merges with any other publisher or acquires or consolidates its business in any manner or changes its operation in any manner,* such change of circumstances will in no manner abrogate or alter this job Guarantee, and *any successor employer, publishing company, or enterprise will be fully bound by the terms of this Job Guarantee* as if such change or successor enterprise had been an original party thereto.
>
> . . . .
>
> (g) The Job Guarantee will not be subject to amendment or revision in future collective-bargaining negotiations.

[3] During the hearing there was considerable dispute as to whether the filing of such a charge against the Post was relevant. It was held that the filing of a charge against the Post was not relevant to this proceeding and I adhere to that view. However, for the purpose of this decision I have assumed that such a charge was filed. The numbering of this case indicates that a closely related charge was filed. The president of the Union testified that though the Union is not currently pursuing anything against the Post it had done so at one time.

IV. THE REQUESTS FOR INFORMATION

A. *The Written Request*

By letter dated September 4, William J. Boarman, president of the Union, wrote John Dawson, then director of human resources of Respondent, as follows:

> The recent news stories about the purchase of the Washington Star Building and equipment by the Washington Post has necessitated this letter.
>
> This is an official request by this organization for a copy of the purchase and sale agreement entered into by the Washington Star Company or Time Inc. and the Washington Post Company covering the above-referred to transaction.

Boarman received no written reply to this request.

B. *The September 30 meeting*

At a meeting on September 30 with Dawson to discuss other matters, Boarman brought up his request for the sales agreement and reaffirmed it. There is some conflict among the witnesses as to what then occurred, as discussed in some detail below.

Boarman testified that at this meeting "[Dawson] said that if I could tell him what part of the document I was interested in, he could perhaps get that for me. But if I was asking him for the whole document, he thought the answer would be 'no' . . . I told John that I didn't know what part of the document I wanted because I didn't know what it contained. And that we would have to have the whole document. . . . I explained to him about the successorship clause in the contract and the lifetime job guarantees which were part of great importance to the Union and its members, and that we needed that purchase and sale agreement to properly administer our contract and see if there had in fact been a violation of those clauses." Boarman asserts that after this explanation, Dawson "just reiterated his position that if we could tell him what portion it was [that we wanted] . . . perhaps he could give it to us. But if it was the whole document, he thought the answer would be 'no,' and that's where we left it."[4]

The secretary-treasurer of the Union, Robert Petersen, who also attended this meeting, testified that Boarman asked Dawson for a copy of the sales agreement "to ascertain whether or not [Respondent] had violated at least two provisions of our negotiated agreement, one dealing, of course, with the successorship and one pertaining to the lifetime job guarantee provision of the contract." Petersen recalled that Dawson said that "he didn't think" he could secure a copy of the sales agreement, to which the union representatives replied that "it was absolutely essential that we have a copy of it to ascertain whether or not a violation [of the collective-bargaining] had occurred." According to Petersen, Dawson "then said something to the effect that if we could be specific about some provision of the agreement; and we said we thought we were being specific, we had come to ascertain if a violation had occurred in those provisions we have indicated." Petersen's recollection is that Dawson ended the discussion by saying that he would see what he could do, but that Respondent never provided the Union with the sales agreement.

Dawson, on the other hand, denies that "at any time during this meeting, the Union "ever provide[d] . . . a reason for requesting" the sales agreement, testifying that he does "not recall" Boarman raising the subject of the successorship clause with him during that meeting. Dawson testified that when Boarman, at this meeting, asked about the sales agreement, he (Dawson) told Boarman that "I thought that turning over the entire document would be inappropriate, particularly since he had not given me any reasons as to why he wanted the document. I further told him that if he could give me some specific reasons as to why he wanted the document or parts of the document that I would pursue his request."[5] Dawson states that Boarman said he wanted the entire document.

Though Dawson avers that he indicated to Boarman at this meeting that some parts of the document might be disclosed if the Union were more specific, he admits that he did not indicate what parts he felt could not be disclosed. Further, in seeming contradiction to his testimony on direct examination, Dawson, on cross-examination stated that he did not tell the Union that if they gave a specific reason for their request, he would seek to obtain the agreement for them, because, he says, at that time the Union was seeking the entire document. Dawson says, "[w]hile I never argued with the fact that there may be specific provisions of that purchase and sale agreement that might have relevance to the Union's interest, I had to know what those were before I could take a request to [Respondent's management] to find out whether we could get it or not."

Finally, Zachery Fasman, one of Respondent's attorneys, who was present at the meeting on September 30, recalls that Boarman asked if Respondent were going to provide the Union with a copy of the sales agreement as he had previously requested; that Dawson asked "why he wanted it"; and that, though Fasman does not recall the specific words used, Boarman replied that he wanted to examine the document "an see if it was relevant to the

[4] At the hearing, Boarman testified that the sales agreement was necessary so that the Union could determine whether a grievance should be filed alleging that Respondent had violated the bargaining agreement. He also stated that the Union was not interested in the dollar amounts involved, and that if the document merely showed a sale of assets and equipment, the Union would probably do nothing. It is not indicated that this was stated at the September 30 meeting however.

[5] Dawson testified during the hearing that in the absence of "any specific reason or reference why the Union wanted [the document], I was unable to go back to management [of Respondent] and give them some coherent reason why it was necessary [to honor the Union's request]"; also that since parts of the sales agreement were "highly sensitive," it could not be released "unless we had some reason for their request." Later, however, Dawson admitted that he had cause to believe, and did assume, that the Union's request was based on the successorship and lifetime job guarantee provisions in the bargaining agreement and, in fact, he had discussed this with Respondent's management in connection with the Union's request for the sales agreement.

Finally, contrary to the testimony set forth in the text, Dawson also testified that he did not ask Boarman at this meeting to specify the reasons the Union wanted the sales agreement.

contract between the [Union] and the [Respondent]: "but he says Boarman did not specify the provision in the bargaining agreement to which he had reference.[6]

From my observation of the witnesses, the nature of their testimony, and the record as a whole, I credit Boarman and Petersen as to what Boarman told Dawson at the September 30 meeting. It is clear from Dawson's testimony that it was fairly obvious that the Union's reason for requesting the sales agreement was rooted in the lifetime job guarantee and successorship clauses of the bargaining agreement, and it was reasonable to assume that was the case. Indeed, he did so. If Dawson, in fact asked Boarman for the reasons for his request, as both Dawson (at one time) and Fasman testified, it is difficult to believe that Boarman would have failed to give these reasons, which were so self-evident that Dawson says he inferred them. I do not find persuasive Respondent's argument that Boarman was so preoccupied with securing the document to assist the Union in bargaining with the Post that he refused or failed to give reasons for seeking the document from Respondent.[7]

I was not favorably impressed with Dawson's testimony, which as I have noted herein, tended to be inconsistent, and something less than candid, as when he insisted that he was hindered in discussing with management the Union's request for the sales agreement because he did not know the reasons for the Union's request, though he concedes that he had readily inferred those reasons, and had discussed them with Respondent's management. I have given consideration to the fact that at the time he testified Lawson had not been employed by Respondent for nearly a year. Perhaps his memory was not as clear as it might have been. I have also considered Respondent's argument that it was hindered in cross-examining Boarman by procedural rulings. These are discussed hereinafter.

C. *Respondent's Asserted Reasons for Refusing the Union's Request*

Dawson was the only witness to testify concerning Respondent's reasons for refusing to give the Union the sales agreement. However, it is clear that he did not participate in that decision,[8] nor was he engaged in the negotiations between Respondent and the Post which led to the sales agreement, which he did not see until after he had left Respondent's employ. Thus, Dawson's testimony on this point appears to be what he says Hoyt told him were the reasons for not complying with the Union's request.

Originally, Dawson says, Respondent did not give the Union the sales agreement because, when the Union made its request, the sales agreement had not actually been signed but, as he recalls, the agreement was signed before September 30.[9] He also avers that at the outset it was Respondent's position that the document was not relevant to the Union's interest, since Respondent considered it to be a sale of assets.

At another point, Dawson testified that the reasons for Respondent's refusal were that the Union failed to give specific reasons for requesting the document and, "additionally, the contents of that document, or at least parts of that document were highly sensitive." When asked what he meant by the term "sensitive," Dawson explained that (1) the document contained the sale price and "the understandings and agreements" between the parties (not otherwise detailed), and (2) that other negotiations were going on simultaneous with Dawson's discussions with Boarman concerning the sale of an editorial computer system and Respondent's fleet of trucks, and "to permit the document . . . to go public or where the people who were negotiating with the [Respondent] at the point in time would have been damaging to our interests."[10] Dawson added that Respondent also "took into consideration" the wishes of the Post that the document be kept confidential. Dawson says that the Post "felt it was to their disadvantage if the purchase price, the conditions under which the transfer of assets was made public."

On cross-examination, when asked what reasons he was given by Hoyt for refusing the Union's request, Dawson testified only that originally he was told that the sales agreement was in draft form and had not been executed, and later that there was an understanding between the Post and Respondent "with respect to confidentiality," and that "there was a great deal of information in that document that would be of no interest, value, to the [Union]."

Finally, testifying as to what he told the Union with respect to Respondent's reasons for refusing the Union's request, Dawson stated, "I believe we talked about it generally. I told [Boarman] there was some sensitive information in that document that I felt was inappropriate to release . . . and that, as importantly, there was an understanding between [Respondent] and The Post that the document would remain confidential."

To summarize, Respondent's asserted reasons for refusing the Union's request for the sales agreement are the following: *First*, the document had not been executed. This, of course, was no longer true as of September 30, when Respondent first answered the Union's request. *Second*, the Union failed to give specific reasons for the request. This also, was no longer true after September 30. *Third*, the Post did not want the agreement disclosed

[6] However, Fasman also testified that during this meeting the Union never offered a reason for requesting the document.

[7] Though Dawson testified that Boarman never gave any reason for seeking the sales agreement, it would appear from Fasman's testimony that Boarman did say he wanted to enforce the bargaining agreement. Fasman, nevertheless, also asserts that Boarman gave no reason for his request.

[8] Dawson, at one point, testified that the publisher of the Evening Star, George Hoyt, made the decision to refuse the union request, after consultation with Dawson. Elsewhere, Dawson asserted that he did not know who actually made that decision.

[9] Respondent's brief (p. 5) says that the "formal agreement" was executed September 25.

[10] I find this reference to asserted ongoing negotiations with Respondent vague and confusing. At the hearing it was my impression that, at this point, Dawson was referring to negotiations between Respondent and the Post. But, by September 30, the sales agreement between the Post and Respondent was complete. And, of course, "the people" who Dawson says were negotiating with Respondent would not have been the Post, since their management knew the terms of the sales agreement. On the face of it, I am inclined to think that this was a make-weight thrown in by Dawson on the spur of the moment.

because it contained the sales price and the terms and conditions of the transaction. These are terms which Dawson characterized as "highly sensitive." However, Respondent did not, so far as the record shows, indicate any intention to discuss these matters in any constructive detail.[11] *Fourth*, disclosure would interfere with Respondent's interests in certain unspecified negotiations with some unidentified people, and *lastly*, Respondent did not think that a great deal of the information in the document would be of interest or value to the Union.

V. THE ASSERTED PROCEDURAL ERRORS

Respondent complains that the rejection of Boarman's affidavit, offered by Respondent, deprived Respondent of its "right to impeach the credibility of Mr. Boarman's hearing testimony" that he explained at the September 30 meeting that the Union sought the sales agreement "to assess the applicability of the successorship clause of the collective bargaining agreement." (Br. 21.)

Respondent also complains that revocation of its subpoenas to the Regional Director for Region 5 and to the Union for information concerning the Union's dealings with The Post, "severely handicap[ped] Respondent's ability to present relevant evidence in defense against [the complaint]" (Br. 11), asserting that "the subpoenae were designed to secure information that would enable [Respondent] to prove that the [Union], in fact, was attempting to secure the agreement from [Respondent] for use in bargaining with the Post."

1. *The subpoenas.* From the outset of the hearing, as has been noted, Respondent insisted that the Union, in seeking the sales agreement from Respondent, desired to use the document in administering its bargaining agreement with The Post. After much argument, it was ruled that whether or not the sales agreement would assist the Union in administering its contract with the Post was not relevant or material to the resolution of the issue in this case, which is whether the document would assist the union in administering its contract with Respondent. Thus, if it is shown that the sales agreement would likely assist the Union in determining whether its contract with Respondent had been violated, it is of no consequence that the information sought might be of use to the Union for other legitimate purposes as well. As the Board stated in *Associated General Contractors of California*, 242 NLRB 891, 894 (1979):

> [I]t is well established that, where a union's request for information is for a proper and legitimate purpose, it cannot make any difference that there may be other reasons for the request or that the data may be but to other uses. *Utica Observer-Dispatch, Inc.* v. *N.L.R.B.*, 229 F.2d 575 (2d Cir. 1956).

See also *East Dayton Tool & Die Co.*, 239 NLRB 141, 142 fn. 6 (1978).

On the other hand, of course, if it *were shown* that the Union's request was relevant and necessary to the Union's obligation to represent the unit employees, it would also not make any difference whether the Union may have had any other purpose in mind, for in such case no obligation on Respondent's part would arise.

For these reasons, and others set forth in the orders issued on the Motions to Revoke Subpoenas, the motions to revoke were granted and both subpoenas were revoked.

2. *The affidavit.* Respondent contends that it was prevented from placing in evidence Boarman's pretrial affidavit with attachments, which, it is asserted, contain prior statements inconsistent with his testimony in this proceeding. As was pointed out to counsel at the hearing (Tr. 78, 86), the Federal Rules of Evidence (Rule 613(b)) provide that "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is given an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon." See also *NLRB v. Tahoe Vangas*, 517 F.2d 747 (9th Cir. 1975).

So far as I have been able to determine, Respondent does not claim that there are any specific statements in Boarman's affidavit which are inconsistent with his testimony. Indeed, Respondent's counsel stated at the hearing that he was "not concerned about the affidavit. What I want to do is examine the witness about documents attached [to the affidavit as] exhibits." (Tr. 78, see also Tr. 52.) These exhibits were identified at the hearing as correspondence between the Union and The Post. From the record I assume, and assumed in ruling on the offer of the affidavit, that these exhibits would show, in some detail, that Boarman sought to secure from the Post a copy of the sales agreement between The Post and Respondent in order to administer the Union's separate bargaining agreement with the Post. Boarman testified to this effect at the hearing.

In essence, Respondent argues, not that the affidavit contains any statements which are inconsistent with Boarman's testimony, but that the documents attached thereto, if admitted, would show that the Union vigorously sought to obtain the sales agreement from the Post "for purposes having to do with the [Post]," which Respondent asserts is inconsistent with Boarman's testimony that he sought the sales agreement from Respondent for purposes having to do with Respondent. (Tr. 85–86.)

On consideration of the above, and the record as a whole, I reaffirm the ruling rejecting Boarman's affidavit and attachments, on the basis that Respondent has not shown a sufficient basis for their admission within Rule 613(b) set forth above, as interpreted in *Vangas*, supra.

Analysis and Conclusions

As stated by the Board in *Westinghouse Electric Corp.*, 239 NLRB 106 at 107 (1978) (footnotes omitted):

> It is well established that a labor organization, obligated to represent employees in a bargaining unit

[11] It appears that Dawson offered to "pursue" the Union's request if they would tell him what parts of the agreement they wanted. Boarman replied that since he did not know what was in the document, he could not tell what parts he wanted and, therefore, insisted on the entire document. As the Supreme Court once observed, Respondent was, in essence, requiring the Union "to play a game of blind man's bluff." See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 fn. 8 (1967).

> with respect to their terms and conditions of employment, is entitled to such information from the employer as may be relevant and reasonably necessary to the proper execution of that obligation. The right to such information exists not only for the purpose of negotiating a contract, but also for the purpose of administering a collective-bargaining agreement. The employer's obligation, in either instance, is predicated upon the need of the union for such information in order to provide intelligent representation of the employees. The test of the union's need for such information is simply a showing of probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. The union need not demonstrate that the information sought is certainly relevant or clearly dispositive of the basic negotiating or arbitration issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation on the part of the employer to provide it. The appropriate standard in determining the potential relevance of information sought in aid of the bargaining agent's responsibility is a liberal discovery-type standard.

See also *Boeing Co.*, 182 NLRB 421 (1970), and cases cited in both decisions.

Respondent does not dispute these principles, but argues that in the circumstances of this case, the Union's request for information was not sufficiently specific to raise an obligation on Respondent's part to provide the information sought. This is based on its contention that the Union failed, or refused, to tell Respondent the purpose for which the Union needed the information, that is, that the Union needed the information in order to intelligently enforce its bargaining agreement, or specific portions of that agreement. It is not necessary here to consider whether, in the situation here presented, such specificity was required. The facts show that Respondent could reasonably conclude from the facts at its disposal that the Union wanted the information sought in order to administer the "life-time job guarantee" and the "successorship" provisions in the current bargaining agreement and, indeed, that Respondent, in fact, did assume that was the Union's purpose. The Board has on several occasions held that such constructive notice is sufficient, in these circumstances, to raise an obligation on a respondent to provide the relevant information sought, see, e.g., *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1018–19 (1979); *Westwood Import Co.*, 251 NLRB 1213 (1980), as is the notice of the Union's purposes which Respondent received at the hearing. See *Brazos*, supra. In any event, as has been found, contrary to Respondent's position, the Union, in fact, did advise Respondent of its purposes in requesting the information sought.

Nevertheless, Respondent argues that the sales-purchase agreement between Respondent and The Post sought by the Union is not relevant to the Union's enforcement of the contract clauses set forth. Respondent initially asserts that the sales agreement merely involves liquidation of Respondent's assets pursuant to its decision to terminate Respondent's operations, and has no bearing on the wages, hours, or working conditions of employees in the bargaining unit who were displaced when Respondent ceased publication. Respondent argues that since it had no obligation to bargain with the Union concerning the decision to go out of business, it had no obligation to furnish the sales agreement which, it argues, "is relevant only to that decision."[12] A major difficulty with this argument and several like arguments asserted by Respondent is that it assumes a fact that may be critical to the proceeding, i.e., whether the sales agreement is *solely* a sale of assets or may be, in whole or in part, a transaction within the successorship provision of the bargaining agreement. The Union says that if the sales agreement involves merely a transfer of assets, it probably will not pursue the matter. Respondent has so far refused to disclose the agreement or any part of it. Thus, in absence of disclosure, the document appears to have a potential relevance to the enforcement of the bargaining agreement and is, therefore, relevant to the working conditions of the employees whose rights were established by that agreement. As the Board stated in *Westinghouse*, supra, it is not necessary to find here that "the information sought is certainly relevant or clearly dispositive of the basic . . . issues between the parties," "[t]he fact that the information is of probable or potential relevance is sufficent."

The Board has on a number of occasions held that where the union bargaining representative has received information that the employer may be subcontracting unit work or has or may be transferring its business to another, the union is entitled, on appropriate request, to information bearing on that issue, so that the union may properly represent the unit employees. See, e.g., *Westwood*, supra; *Air Express International Corp.*, 245 NLRB 478 (1979). Respondent, however, asserts that those cases involved transfer of "going concerns" (Br. 15–16), which, it is argued, distinguishes those cases from the present matter. However, as Respondent has noted, each of these cases must be determined on its own circumstances (Br. 11). Here, the bargaining agreement provides that in the case Respondent merges with another, or is acquired, "or consolidates its business . . . or changes its operation in any manner," the resulting publisher shall be bound by the lifetime job guarantee in the bargaining agreement. Two facts are self-evident: unit employers who were guaranteed lifetime jobs by the bargaining agreement have been dismissed from their employment by Respondent and, as part of the circumstances involved, Respondent has transferred the building in which these employees were employed and apparently a major part of its equipment to another publisher by terms of a written document which Respondent refuses to disclose. In the circumstances there is not only a probability that the sales agreement would be useful to the Union in deciding whether to file a grievance on behalf of the unit employees or take other action against Respondent for failing to comply with the bargaining

[12] Respondent cites *C. Elton Johnson*, 262 NLRB No. 9 [rescinded by Order dated June 11, 1982] which I find inapplicable to the situation in this case.

agreement, but the document is probably essential to that purpose.[13]

Respondent's reasons for refusing to disclose the agreement, considered at some length hereinabove, seems to boil down to one point, that Respondent and The Post did not want to disclose the sales prices and "the understandings and agreements" between the parties. In other words, Respondent says that the sales agreement was "confidential" and need not be disclosed, citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In that case, the employer refused to disclose to the union *directly* certain psychological test material used to determine whether union-represented employees should be promoted, but agreed to disclose the material to a certified psychologist chosen by the union there involved. The employer also refused to give the union test scores of employees who took the tests, unless the employees specifically agreed to waive their right to confidentiality of this material. The Board held that in both situations the material should be disclosed directly to the union, subject only to a protective order restricting disclosure of the material by the union.

The Supreme Court, first of all, found that the reasonableness of the employer's concern for secrecy was not in question, a point not at all evident here.[14] Because of the procedural posture in which the case was presented, the Supreme Court held, as to the psychological test material, only that the Board's remedy in ordering the test material be given directly to the union, rather than to a certified psychologist, was in error. In respect to the test scores, the Court stated that the employer's conditional offer to disclose the test scores was warranted and reasonable in the circumstances.

What is most evident in *Detroit Edison*, however, is the fact that at no time did the employer there claim the right to absolutely refuse to provide the information or documents required by the union in the performance of its duty to represent the employees, but in all situations offered the union reasonable means of securing the necessary information. See *Air Express International Corp.*, supra. Here Respondent, though admitting that at least parts of the sales document were relevant to the Union's interest, insisted on a unilateral privilege to withhold the entire document. Nor may Respondent's obligation to provide the sales agreement be defeated by a private agreement between Respondent and The Post, as Respondent claims. See *General Electric Co. v. NLRB*, 466 F.2d 1177 (6th Cir. 1972); cf. *Detroit Edison*, supra, at 348 (indicating that staturory duties cannot be defeated by the standards of a private group).

[13] Respondent also points out that the bargaining agreement provides that its obligation to provide lifetime jobs under the bargaining agreement ceased when Respondent ceased publication. However, this is a matter of contract interpretation, in light of all the facts, to be made by the arbitrator, if a grievance is filed. It is not my function to pass on the merits of the contract dispute.

[14] One may have some appreciation for Respondent's desire to keep secret the sales prices involved, but there is little to support a finding of need for such secrecy. In any event, Respondent did not identify this as a concern to the Union during their discussions. At the hearing, the Union made clear that it was not interested in the sales prices. Respondent continues to refuse to disclose the material requested.

On the basis of the above, and the entire record, I find that by failing and refusing to provide the Union with the sales agreement between Respondent and The Post, Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The unit set forth in footnote 1 above is appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material to this proceeding the Union has been the exclusive representative of the employees in the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act by failing and refusing to grant the Union's demand for a copy of the sales agreement Respondent and The Washington Post Company entered into between September 2 and September 30, 1981, which is relevant and necessary to the Union's obligation to administer and enforce its collective-bargaining agreement with Respondent.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has violated and continues to violate the Act by failing and refusing to grant the Union's demand for a copy of the sales agreement between Respondent and The Washington Post Company entered into in September 1981, it will be recommended that Respondent cease and desist therefrom and supply the Union, on request, with that document, provided, however, that Respondent may first delete therefrom the sales prices contained therein. The Union may see, study, and use the information provided to the extent required to protect the rights of the unit employees under the collective-bargaining agreement with Respondent, but shall not otherwise disclose the sales agreement to the employees or others.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, The Washington Star Company, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Columbia Typographical Union No. 101 by refusing to furnish the Union with a copy of the sales-purchase agreement be-

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tween Respondent and The Washington Post Company entered into during September 1981, or other information relevant and reasonably necessary to the Union's duty to administer and enforce the collective-bargaining agreement between the Union and Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Furnish to the Union, on request, a copy of the sales-purchase agreement between Respondent and The Washington Post Company, entered into in September 1981, in accordance with the provisions of the section entitled "The Remedy."

(b) Mail to each employee in the appropriate unit covered by Respondent's collective-bargaining agreement with the Union during August 1981, at the employee's home address, a copy of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be immediately mailed to the employees designated above. Five additional signed copies shall be provided to the Union for posting at its offices and meeting places, if it desires.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with the Union by refusing to furnish the Union with the sales-purchase agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guranteed by Section 7 of the Act.

WE WILL, on request, furnish to Columbia Typographical Union No. 101 a copy of the sales-purchase agreement entered into between The Washington Star Company and The Washington Post Company during September 1981, in order to assist the Union in protecting the rights of employees in the composing room covered by the Union's bargaining agreement with The Washington Star Company.

THE WASHINGTON STAR COMPANY

Fedco Freightlines, Inc. and KTY Leasing Co., Inc. *and* Robert Rogers. Case 9–CA–17745

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 4 May 1984 Administrative Law Judge James T. Youngblood issued the attached decision. The Respondent KTY Leasing Co., Inc. filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified.[3]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off drivers Hofer, Thornton, Muncy, and Evans, and mechanic Jones 16 October 1981,[4] because of their union and/or concerted activities. We agree with the judge's conclusion, but modify his rationale as described below.

In assessing the legality of the layoffs, we are guided by our *Wright Line*[5] analysis. Our initial inquiry under *Wright Line* concerns whether the General Counsel has shown that protected activity was "a motivating factor" in the employer's decision to lay off the alleged discriminatees. For reasons fully set forth in the judge's decision, we find that the General Counsel has sustained this burden. Briefly, the undisputed record shows that each of the five employees had become the object of management's attention and animosity by seeking to enforce their contractual rights, indicating their preference for a rival union, or engaging in other protected activity.

As the General Counsel has made out a prima facie case of unlawful motivation, the remaining question under *Wright Line* is whether the Respondent has demonstrated that the layoff of the five named employees would have occurred absent their protected activity. Both in its layoff letter sent to employees and at the hearing, the Respondent alleged "a severe downturn in business" as the justification for the layoff. In concluding that the asserted reason was "purely and simply a pretext" designed to "rid itself of the Union and all of the Union adherents including the five alleged discriminatees," the judge stated that "[a] review of the financial information submitted . . . indicates that [Fedco's] load level was increasing not decreasing prior to the layoff." Contrary to the judge's finding, the relevant exhibits show that the load level had declined for 4 straight weeks preceding the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that Trans-State was not a successor to Fedco and KTY under the standard set forth in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

The judge found Fedco and KTY are a "single integrated enterprise and a joint employer." We find, as the complaint alleges, that Fedco and KTY simply constitute a single employer.

To determine whether two entities are sufficiently integrated to be considered a single employer, the Board and courts examine four principal factors: (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; (4) common ownership. *Radio Union v. Broadcast Service*, 380 U.S. 255, 256 (1965); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982); *Shellmaker, Inc.*, 265 NLRB 749, 754 (1982). While none of these factors, viewed separately, has been held controlling, the Board has stressed the first three factors, particularly centralized control of labor relations. *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973). Single-employer status depends on all of the circumstances and has been characterized as an absence of the "arm's length relationship found among unintegrated companies." *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

While we agree with the judge that all four factors are present here, we emphasize certain evidence supporting the findings of common management and centralized control of labor relations.

Loren King, president and sole owner of Fedco and KTY, exercised complete control of labor relations and personnel policies for both entities including hiring, firing, wage rates, and fringe benefits. King's son, Maynard, was general manager of Fedco and a supervisor at KTY and made recommendations concerning hiring and firing for both concerns. The drivers at both locations performed identical work under the same work rules and conditions, and were supervised, dispatched, and disciplined by the same individuals.

We disavow fn. 2 of the judge's decision concerning Fedco's recognition of the Congress of Independent Unions because, as the judge noted, it is not an issue in this case.

[2] In fn. 9 of the decision, the judge found that, by Maynard King's statement to employees present at a spring 1981 safety meeting that he would close the doors if the Teamsters came to Fedco, the Respondent violated Sec. 8(a)(1) of the Act. As the statement was not alleged as a violation in the complaint, nor fully litigated at the hearing, we reverse. See *Cardivan Co.*, 271 NLRB 563 (1984), *NLRB v. Pepsi Cola Bottling Co.*, 613 F.2d 267, 273–275 (10th Cir. 1980). In any event, finding the violation would be cumulative and would not affect the remedy, as the judge found a similar statement made in September 1981, and alleged in the complaint, constituted a violation of Sec. 8(a)(1).

We will amend Conclusion of Law 4 to reflect the judge's finding the Respondent violated Sec. 8(a)(3) and (1) by "laying off" rather than "terminating" employees Rich Hofer, Charles Thornton, Rufus Muncy, Wes Evans, and Mike Jones.

[3] We will amend the Order to reflect the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by threatening to transfer employee Jones to the third shift for filing a grievance and to include broad remedial language consistent with *Hickmott Foods*, 242 NLRB 1357 (1979). We will also issue a new notice to employees.

[4] All dates are 1981 unless otherwise indicated.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

layoff.[6] In addition, the total monthly load level, though somewhat erratic, had generally been declining since May 1981.[7]

Week	*Loads/Unit*
Sept. 18	176
Sept. 25	162
Oct. 2	152
Oct. 9	145
Oct.16	114
Month	*Loads*
January	813
February	712
March	689
April	732
May	819
June	707
July	763
August	633
September	631
October	655
November	456
December	498

Nevertheless, we find the Respondent's economic defense lacks merit. Of the 17 employees laid off on 16 October, 8 were employed at the Cincinnati facility and 9 at the Effingham, Illinois terminal.[8] The nine Effingham employees were placed on voluntary layoff and given the option of transferring to Cincinnati, although none chose to do so. The five alleged discriminatees were Cincinnati-based employees. They were placed on involuntary layoff and told they could return only if business improved. Since the Respondent offered Effingham employees work at its Cincinnati facility, a decline in business there cannot account for the layoff of the alleged discriminatees unless there is a neutral reason, such as seniority, for giving the Effingham employees the opportunity to transfer.[9] No such reason is evidenced in the record[10] or, in any event, advanced by the Respondent.

In fall 1980, the Respondent began a "Driver of the Year" contest to encourage driver safety and better work performance. Drivers were ranked numerically by Maynard King based on information he obtained in discussions with the safety director, operations manager, dispatchers, department supervisors, and the operations manager at the other terminals.[11]

The Respondent contends the "Driver of the Year" ranking was the sole criterion used to determine the 16 October layoffs. However, the record shows, as the judge found, that many of the employees retained either were not rated or did not even work for the Respondent during the relevant period,[12] while two of four employees laid off were on the ranking list.[13] Additionally, the Respondent has failed to explain why the four alleged discriminatees were laid off, when three drivers with lower ratings than Thornton and one driver with a lower rating than Evans were given the option of continuing to work.[14]

An examination of Fedco's hiring practices before and after the layoff conclusively establishes that the layoff could not have been due to a decline in its need for drivers. Prior to the layoff, the Respondent had been using temporary drivers and had actually used them with increasing frequency in the 2 months preceding 16 October.[15] Most significantly, the judge overlooked undisputed evidence that Loren King hired as many as four new permanent drivers between 16 October and the following 1 June. Though hired ostensibly by KTY Leasing, the new drivers performed the same work and drove the same trucks as the laid-off Fedco employees.[16] The Respondent offered no explanation for failing to recall its experienced drivers other than Loren King's statement that he "didn't want to."[17] When an employer lays off employees

[6] G.C. Exh. 14 indicates the following load per unit figures calculated on a weekly basis:

[7] The monthly load level in 1981 was:

[8] The judge inadvertently stated 16 rather than 17 employees were laid off 16 October. We correct the error.

[9] We also rely on Dispatcher-Supervisor Heritage's unrefuted statement that he was "just as desperate to move loads the day before the layoff as . . . 6 months before the layoff," as indicating business had not slowed such as to create the need for layoffs.

[10] Loren King admitted seniority was not the basis for the transfer offers made to Effingham employees, and the record fails to disclose another legitimate basis.

[11] The information obtained by Maynard King was used to make numerical entries on driver rating forms, filled out on a quarterly basis. Points were deducted for various deficiencies in work performance with accident record and attitude being of primary importance in the calculation. Drivers were later ranked according to the most points accumulated for the year.

[12] For example, the Respondent recorded no yearly ranking for drivers Webster, Pelcha, Molt, and Troutman, apparently because they had not worked for the entire rating period. Nevertheless, all four employees were retained, while Thornton and Evans, two ranked drivers, were laid off. Drivers Lorentz and Jim Rogers, former employees of Fedco, were working for other companies during the summer, yet were still retained.

[13] The drivers were Charles Thornton and Wesley Evans. We correct, however, the judge's inadvertent error in stating that Thornton ranked 2d rather than 17th on the "Driver of the Year" list.

[14] Hoard, Croy, and Brooks, three of the voluntary layoffs from Effingham, were ranked lower than Thornton on the list. Brooks was also ranked lower than Evans.

[15] In sec. III, par. 11, of his decision the judge stated Fedco continued to use temporary drivers after the layoff. Though there is no evidence the Respondent did not continue using temporaries after the layoff, the record fails affirmatively to so state.

[16] In any event, as we have found, Fedco and KTY are a single employer.

[17] At one point in his testimony Loren King stated that he did not recall laid-off employees because the new hires were paid less, and he felt the laid-off employees would not want the lower paying jobs. The record, however, clearly indicates the laid-off employees wanted the jobs and had even filed a grievance over the matter.

assertedly for economic reasons, then hires new employees to replace them, it is patent evidence that its assertion is pretextual.[18] Accordingly, we find the Respondent has not overcome the General Counsel's prima facie case and that laying off employees Hofer, Thornton, Muncy, and Evans violated Section 8(a)(3) and (1) of the Act.

We also find that the layoff of mechanic Jones was unlawful. Jones was laid off at a time when the Respondent's volume of business would suggest a continuing if not increasing demand for his services. Jones testified without contradiction that the mechanics were unable to keep up with demand for repair services during the entire month preceding the layoff, and that one mechanic worked overtime.

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 4.

"4. By discharging Robert Rogers because of his union and protected concerted activities, and by laying off Rick Hofer, Charles Thornton, Rufus Muncy, Wes Evans, and Mike Jones because of their union activities and protected concerted activities, the Respondent has violated Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fedco Freightlines, Inc. and KTY Leasing Co., Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

"(b) Threatening to transfer employees for filing grievances."

2. Substitute the following for paragraph 1(d).

"(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the attached notice for that of the administrative law judge.

[18] See *Sumco Mfg. Co.*, 251 NLRB 427, 436 (1980), enfd. mem. 678 F.2d 46 (6th Cir. 1982); *Waukegan-North Chicago Transit Co.*, 225 NLRB 843, 847–848 (1976).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with closure of our facility because of your union support or activities.

WE WILL NOT threaten to transfer you for filing grievances.

WE WILL NOT coercively question you about union support or activities.

WE WILL NOT lay you off or otherwise discriminate against any of you for supporting the Congress of Independent Unions or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Rogers, Rick Hofer, Charles Thornton, Rufus Muncy, Wes Evans, and Mike Jones immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

FEDCO FREIGHTLINES, INC. AND
KTY LEASING CO., INC.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge. The amended complaint which was issued on April 7, 1983, alleges that Fedco Freightlines, Inc. (Fedco) and KTY Leasing Co., Inc. (KTY and collectively Respondents) are joint employers within the meaning of the Act and that Trans-State Express, Inc. (Trans-State) is a successor employer to the garage operations of Respondents Fedco and KTY. The complaint also alleges that Respondents discharged Robert Rogers and laid off certain other employees in violation of Section 8(a)(3) and (1) of the Act, and engaged in other threats and interrogations of its employees in violation of Section 8(a)(1) of the Act. Respondents deny the commission of any unfair labor practices. In addition, Trans-State raises the question of the Board's jurisdiction over it in this matter because of insufficient service of process.

A hearing was held on April 18 through 21 and August 30, 1983. All parties were represented at the hearing, and Respondent KTY, the General Counsel, and

the Charging Party filed briefs which have been duly considered.

On the entire record in this matter, and from my observations of the witnesses and their demeanor and after due consideration of the briefs filed herein, I make the following

FINDINGS AND CONCLUSIONS[1]

I. THE BUSINESS OF THE COMPANIES INVOLVED

Fedco at all times material herein until it ceased doing business in December 1982 was a contract freight carrier operating under an ICC permit. It maintained an office and place of business at 4870 Este Avenue, Cincinnati, Ohio, where it was engaged in the operation of an interstate trucking service, and it maintained terminals in Ohio and Illinois.

Also at all times material herein KTY, an Illinois corporation, maintained an office and place of business at Effingham, Illinois, and 4870 Este Avenue, Cincinnati, Ohio, where it was engaged in the business of leasing trucks and furnishing truckdrivers to Respondent Fedco and of leasing trucks to other customers. Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Around December 1, 1982, Trans-State began operating as an Illinois corporation with an office and place of business in Cincinnati, Ohio, and since that time has been engaged in the interstate transportation of freight and general commodities.

II. THE LABOR ORGANIZATIONS INVOLVED

The Respondents admit, and I find, that Congress of Independent Unions (CIU) is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act. Respondents admit, and I find, that at all times material herein International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

During the period 1979 until it ceased business in December 1982, Fedco was a contract freight carrier with its principal terminal located in Cincinnati, Ohio, where it was engaged in hauling freight for Proctor & Gamble in Indiana and Illinois. Proctor & Gamble was its only customer. Fedco maintained terminals in Chicago, St. Louis, and at one time in Tennessee. Its home office was in Effingham, Illinois. KTY, a leasing company, provided all of Fedco's trucks, most of its trailers, and its garage and office equipment. KTY's only location was a garage in Effingham, Illinois, where it also maintained an office. Approximately 75 percent of KTY's total business consisted of leasing trucks to Fedco. Fedco in turn employed truckdrivers to drive the leased equipment from KTY and additionally employed a few owner-operators. Loren King was the owner and president of Fedco and also owned KTY. Maynard King, the son of Loren King, was the general manager of Fedco. These two in turn were the supervisors of KTY. Thus, it is clear that Loren King and Maynard King, the president and general manager of Fedco, controlled not only Fedco but KTY as well. Prior to October 1981, KTY employed no drivers. In the spring of 1980, Fedco recognized the CIU as the representative of its drivers and mechanics and signed a contract which included a union-security clause. In the summer of 1980, Bob Rogers was elected union steward for the CIU.

During the fall of 1980, Fedco began a "Driver of the Year" program as a part of Fedco's safety program to reduce insurance cost. The prize for the top driver was a trip to Hawaii. Maynard King and Safety Director Jim Lankster prepared the forms for rating the drivers, which were to be gathered quarterly. The information compiled was used to determine each driver's numerical standing. In this connection Maynard King spoke to the safety director, the garage employees, the supervisors, the dispatchers, the operations manager, and the terminal managers at Fedco's other locations to determine the drivers' ratings. At the spring 1981 safety meeting, which was held at a Cincinnati restaurant, the rankings and point totals of the Fedco drivers were announced. During that meeting, Maynard King told the assembled drivers that if they tried to bring in the Teamsters Union Fedco could not afford it and they would close the doors.[2] In the early summer of 1981 certain drivers heard that Loren King planned to sell some of the KTY trucks to existing drivers. Some of the drivers met to discuss what terms they would seek if any of them did purchase a truck and to ensure whatever protection from arbitrary treatment they could obtain by acting in concert as opposed to negotiating separately with King. At the same time the drivers contacted Union Representative Richard Davis concerning the possible sale of trucks. In late August or early September 1981, Bob Rogers, the union steward, put a notice on the wall of the drivers' room announcing a meeting for all "Road Boss" drivers. The term "Road Boss" is a make of truck and KTY owned several of these trucks which it had leased to Fedco. It was these trucks that King had indicated an interest in selling. On August 28, 1981, Bob Rogers met with Richard Davis, the union representative, and Loren King to discuss the rumored sale of the trucks and the

[1] The facts found herein are a compilation of the credited testimony, the exhibits, and the stipulations of fact viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required, I will set forth specific credibility findings.

[2] Although it is not alleged as a violation, it appears that the General Counsel feels that the CIU recognition was not totally aboveboard in that to a certain extent it was employer sponsored. The record also reflects that many of the employees were unaware of the CIU's existence until they were notified to pay their union dues or be discharged. The record also reflects that there was some dissatisfaction with the CIU as the representative of the employees.

forced resignation of driver Terry Hamblin. On August 29, 1981, Richard Davis met with all of the drivers to discuss their complaints.

Bob Rogers had been an active union steward since his election in the summer of 1981 and was the primary conduit between CIU and management and earned a reputation as a forceful, effective representative. It was obvious that management resented his actions. In this regard Rogers engaged in both concerted and union activities as a spokesman for the employees shortly before his discharge when he set up the Road Boss drivers' meeting. Additionally, he advised mechanic Mike Jones about the contract provisions regarding the payment of overtime when Jones worked a double shift. According to the credited testimony of Rogers, he presented employee problems to members of management and discussed these problems with management on the average of two to three times a week. He talked to Maynard King about payment for glass loads delivered to Marian and Winchester, Indiana, when the drivers received only $10 for such loads and the contract called for $40. Rogers also complained to the dispatchers and to Maynard King about desirable loads not being assigned to the more senior drivers. At least on one occasion he threatened to take the Company to court if they deducted the amount of shortages from the drivers' paychecks.

In the summer of 1981, Rogers represented employee Rufus Muncy, who was to be discharged for supposedly refusing to carry a load. After Rogers' intervention, Muncy was returned to work and Rogers even attempted to get Muncy pay for the time he had lost during his disciplinary meeting.

Also during the summer of 1981, Jim Heritage, a dispatcher-supervisor, warned Rogers that he was stirring up trouble and bringing pressure on the Company.[3]

[3] The General Counsel alleges and Respondents deny that James Heritage, a dispatcher, was a supervisor within the meaning of the Act. Heritage was employed as a dispatcher and worked primarily on the second shift from 4 p.m. to midnight. Heritage was the only member of management present on most days after 5 p.m. He was responsible for resolving any and all problems that arose during his shift, which might include mechanical problems with company vehicles, labor relations matters, and customer demands. Heritage testified that he had discharged an employee for refusing to take a load. In this case a driver refused to take a truckload to Chicago for unknown reasons and Heritage ordered that driver to return to the terminal as a passenger in another company vehicle. The driver was then fired. Heritage made other arrangements to have that load delivered to the customers. Heritage credibly testified that he recommended the hire of an employee and had the authority to pledge a substantial sum of Respondents' credit by hiring drivers from Transportation Unlimited. In this connection, Heritage would determine his need for drivers and then contact Transportation Unlimited and advise them to provide the needed number of drivers. Any driver who experienced difficulty while on the road from 4 p.m. to midnight would contact Heritage. It was Heritage's responsibility to take any action necessary to resolve these problems.

Respondents complain that Heritage is not a statutory supervisor because he had to check with members of management before taking any action regarding problems or hiring. The facts in this case do not bear out Respondents' contention. It is clear that Heritage was the only person with any authority after 5 p.m. in the evening. It is unlikely that Respondents would leave the operation totally unattended without any member of management or any supervisory authority during the period from 5 p.m. until 7 a.m. the following morning. The factors enumerated above clearly indicate to me that Heritage was a supervisor as defined in the Act, and I so find.

On September 24, 1981,[4] Rogers returned to the Cincinnati terminal from a run about 3 or 3:30 p.m. He was driving truck No. 93, a sleeper, at the time, which he parked in the lot before going home. Although he was not scheduled to work on September 25 he went to the terminal around noon to submit his paperwork and log and to pick up his paycheck.

The record reflects that early in the morning on September 25 Maynard King had found a small foil-wrapped package in truck No. 93 under the mattress. When Rogers arrived at the terminal he was told by dispatcher Galen Kirby that Maynard King wanted to see him. Rogers went to King's office, and King asked for his registration and told him that he had found something in Rogers' truck. Rogers indicated that he was not surprised because people leave things in his truck all the time. Maynard King advised Rogers that he had found marijuana and that if Rogers did not resign he would have him arrested. Rogers refused to resign and King called the police. When the police officer arrived, King told the officer that the marijuana was found in Rogers' truck and that Rogers had admitted ownership. Rogers denied this. The police officer cited Rogers for possession of marijuana. As indicated, Rogers was discharged on September 24 when he refused to resign. A trial date was eventually set for October 28, but the case was dismissed for lack of prosecution. After the charges of possession of marijuana were dismissed, Rogers returned to Fedco and requested his job back.

According to the credited testimony of Jim Heritage,[5] on the evening of September 25 when he arrived at work, he was called into Maynard King's office and informed of the events leading up to the discharge of Rogers. He testified that it was mentioned that Rogers had admitted that the marijuana belonged to him. Heritage testified that later that evening or the following evening a driver named Wesley Evans, after learning that Rogers had been discharged, admitted that he put the marijuana in the truck. Heritage said the next day he brought this to the attention of Maynard King and when he mentioned it to King almost simultaneously King stated that he knew Wesley Evans had put the marijuana into the tractor. As noted above, Rogers' trial date was eventually set for October 28, but the case was dismissed for lack of prosecution. After the charges of possession of marijuana were dismissed, Rogers returned to Fedco and requested his job back. His request was refused. It is apparent that, when Rogers returned in October to ask for his job back, Fedco was aware of the fact that the marijuana did not belong to Rogers, that it had been put in Rogers' truck by Wesley Evans, and that it was put in there for another individual who Evans thought would be driving that truck. In other words, Respondents knew completely that Bob Rogers was totally innocent of the

[4] Unless otherwise indicated all dates refer to 1981.

[5] I have carefully reviewed the testimony of both Maynard and Loren King and have concluded that their testimony is not worthy of belief. In this connection it is my conclusion that both of the Kings had a very selective memory. Their testimony was not straightforward and did not have a ring of truth. Therefore to the extent that their testimony is contrary to that of other of the General Counsel's witnesses their testimony has not been credited.

charge of possessing marijuana, using marijuana, or in any way carrying marijuana on Respondents' vehicles. Nevertheless, Respondents refused to reinstate Rogers to his job. This record makes it very clear that Fedco made no further attempt to investigate the marijuana problems at its premises or to discipline any of the other employees involved in the incident.

Rogers filed a grievance over his discharge and eventually an arbitration award was granted in his favor; however, Fedco has refused to abide by the terms of this award.

On October 16, 16 Fedco employees were laid off. These included drivers based in Effingham as well as Cincinnati. Among the drivers laid off were Rick Hofer, Charles Thornton, Rufus Muncy, Wesley Evans, and mechanic Mike Jones, along with dispatchers Jim Heritage, Galen Kirby, and Kim Bannings. These employees were laid off allegedly for lack of work. This record reflects that at the time the layoffs occurred Fedco was very busy. It had been using temporary drivers[6] frequently in the weeks immediately preceding the layoffs and, in fact, had recently hired five drivers in Herrin, Illinois, less than 1 month before the layoffs. This record also reflects that following the layoffs Fedco continued to use temporary drivers. Also the record reflects that shortly after the layoffs Fedco's business increased so much that it needed to hire more drivers. However, it did not recall any of its experienced laid-off drivers, but hired new drivers.

In this regard, the new drivers ostensibly were not hired by the entity Fedco. Loren King hired the new road drivers and made them employees of KTY and assigned them to drive for Fedco. These employees were paid on a mileage basis rather than by load. Also, new city drivers were hired rather than recalling the old employees.

After the discharge of Rogers several of the drivers, including Charles Thornton,[7] discussed going out on strike to protest his discharge because in their view Rogers had been set up and discharged because of his activities as a union steward. When the drivers learned that employee Wes Evans had placed the marijuana in Rogers' truck and that this fact had been communicated to management, they reconsidered the strike and no strike occurred.

A review of the financial information submitted during the course of this proceeding indicates that Fedco's load level was increasing and not decreasing prior to the layoff of October 16. Also its gross revenues were showing a steady increase during the several months prior to the layoff. It is apparent from this overall record that Respondent Fedco had some financial problems which ultimately resulted in its bankruptcy during the instant hearing. However, the economic information available suggests that business was getting stronger, not weaker, during the months preceding the layoff in October. On the evidence as presented I cannot conclude that Fedco's layoff of October was economically justified. Additionally, James Heritage testified that he overheard Operations Manager Gary Krutsinger refuse loads from Proctor & Gamble on several occasions prior to the layoff. This would also suggest that there was no merit to the claim that business was declining. Although Respondent may have wanted to get out of the trucking business, it does not appear that the motive for that was lack of business. Moreover, it would appear that much of the loss or debts attributed to Fedco were debts which it owed to KTY, the other Respondent, which is wholly owned by Loren King, the owner of Fedco. This debt was merely a paper transaction.

Respondents also contend that the employees were allegedly selected for layoff on the basis of their numerical standing in the driver-of-the-year contest. However, this record does not support this contention for many of the employees retained were either not rated during this time or did not even work for Respondents during this entire period of time.

As indicated, the General Counsel contends that the layoff of the five named employees was because of their concerted activities and activities on behalf of the Union and not as alleged by Respondents.

Charles Thornton had the second highest rating of those employees rated in the driver-of-the-year contest and also had been elected union steward on August 28. His election as union steward was at the union meeting which the drivers had demanded because of their dissatisfaction with the Company and the Union. Thornton protested many practices of Respondents, including the dispatching of casual drivers when regular road drivers were available. He consistently complained to the dispatchers about Fedco's failure to pay for certain runs to Winchester and Marion, Indiana, the so-called glass loads, in accordance with the rates specified in the contract. He complained to dispatcher Jim Heritage about Fedco's failure to pay for a motel room for a driver who was sleeping on the floor of his cab. He assisted employee Mike Jones in contacting the Union about an overtime problem, and spoke to Gary Krutsinger about the basis for computing vacation pay. He had numerous conversations with other drivers in which he encouraged them to get behind the Union as a group to get their problems rectified. Around October 1, Heritage advised Thornton that since he was made union steward he was drawing the attention of the front office about the many complaints he was making.

Rufus Muncy at one time had been close to Maynard King. At one point he wanted to get out of driving and because of his friendship with King he was allowed to take a job as a mechanic. When he was tired of being a mechanic he was allowed to go back on the road. However, when he went back to driving in August he showed a propensity for enforcing his contractual rights and for engaging in certain other activities. In this regard he attended the Road Boss meeting set up by Rogers. He also discussed with other drivers their problems in getting paid according to the CIU contract and also the possibility of voting out the CIU and getting the Teamsters in. He talked to Maynard King about these prob-

[6] These temporary drivers were supplied to Fedco by Transportation Unlimited, Inc., a company specializing in driver leasing.

[7] Thornton had been elected union steward on August 28 at a union meeting over dissatisfaction with the Company and the Union.

lems and advised King that all the drivers were having problems with dispatching and with the pay for the Winchester loads under the contract. He also told Maynard King the drivers could vote out the CIU and vote the Teamsters in. Maynard King replied that Fedco would lock the gates before it would let the Teamsters in. To demonstrate that Respondents were aware of the Road Boss meeting, Maynard King asked Muncy what had happened at that meeting.

In September Muncy asked Bob Rogers to accompany him as union steward to a meeting with management as Muncy was fearful he might be discharged for refusing to take a load. After the meeting Maynard King immediately told Muncy that he did not need Rogers. After it had been agreed that Muncy's failure to take the load resulted from a misunderstanding, Rogers asked Fedco if they would pay Muncy for losing a day's pay. When King refused, Rogers threatened to file a girevance. Following this meeting Muncy was told that he had a bad attitude and immediately assigned to drug loads. Because of the idle time involved the drug loads were considered to be the least favorable driving job. On one occasion because he liked to keep his equipment in safe operating condition, Muncy went to the head mechanic, Maynard King, Gary Krutsinger, and finally Loren King before a bad tire on his truck was fixed. Thus, it is apparent that Respondents knew that Muncy was around, and that he would exercise his rights and use the union contract and insist upon it being enforced.

About a month prior to the layoff, Muncy, Rogers, and several other drivers were arguing with dispatcher Gary Krutsinger about pay for the Winchester loads. Muncy told Krustinger that, if the Company and the Union could not get them pay for these loads, they would get the Teamsters in. Thus, it is also apparent that Respondents were aware that the employees were not only dissatisfied with Respondents' treatment, but also they were dissatisfied with the Union and at least on two occasions had mentioned the fact that they might attempt to bring in another union, namely, the Teamsters.

Rick Hofer, who was laid off on October 16, was also vocal in pointing out situations to management involving himself and other drivers which he felt should be remedied by management. Thus, about 1 month before the layoff he protested to Gary Krutsinger about the way driver Roger Baker was being dispatched out of Chicago. Additionally, he attended a meeting of drivers who planned to organize their efforts in case they were approached to buy trucks. He also attended the union meeting on August 29 and the Road Boss meeting called by Rogers. He had made many oral grievances to management shortly before the layoff and had complained to Gary Krutsinger and Maynard King about being lied to by dispatcher Galen Kirby concerning a rush load in Chicago which had cost him a speeding ticket. He made several complaints about the safety of his truck and finally threatened to redline it (take it out of operation) until it was repaired. On one occasion he directed a new driver to call the dispatcher for money for a layover and to use Hofer's name. He also talked to Gary Krutsinger about the Company's failure to pay for loading tractors. At one point he told Jim Heritage that he would like to have the Teamsters in so they could get some representation. He also complained about and refused to perform city work for the Chicago terminal where Fedco was working the men in violation of the union contract. Hofer had no complaints about his work, no accidents, and in the summer of 1981 Gary Krutsinger had told him to keep up the good work.

Employee Wesley Evans, who as indicated was involved in the marijuana incident with Bob Rogers, was also laid off on October 16, allegedly for lack of work. Evans like the other four employees had made several complaints with Rogers and Muncy concerning the lack of pay for glass loads in Marion and Winchester, Indiana. He also made complaints about the time drivers were forced to wait for glass loads without any compensation. He complained to management about running to Chicago without a sleeper truck because you could not turn around without an 8-hour break under DOT regulations. He did not take an 8-hour break because Fedco would not pay for a motel room. He had been told by Jim Heritage and Gary Krutsinger that he could not get a motel room unless he had to layover to wait for a load. He also complained to Maynard King about the condition of his truck and met with other drivers and discussed bringing the Teamsters into the shop.

Mike Jones, the other employee laid off on October 16, was a mechanic and normally assigned to work on the second shift. However, in August and September, he was consistently assigned to work a double shift on Friday nights. He felt he should be paid time and a half for working over 8 hours and with this in mind he talked with Garage Superintendent Dan Muller and Union Stewards Bob Rogers and Charles Thornton. After Jones had talked to Muller he was called into a meeting with Loren and Maynard King, who asked what were his problems. When he explained why he wanted overtime pay Loren King made a statement that he would move him permanently from second to third shift. Loren King asked Jones why he had gone to the Union in the first place instead of coming to management and also asked Jones which of the truckdrivers he had talked to.

On December 18, 1982, Fedco ceased its operations and went out of business. At that time Bill Edmund, who had been hired as Fedco's general manager on June 1, 1982, announced the closing at a meeting of Fedco's employees.[8] At the close of the meeting he informed the employees present that he was starting his own trucking company, Trans-State a general commodities carrier, and that he would be employing only owner-operators and would be soliciting new customers.

It appears that in September 1982 Edmund had purchased operating rights from Glaze Trucking Company of Columbus, Ohio. Additionally, he purchased the garage and office equipment which had been used by Fedco from KTY. He operated out of the same facility which had been used by Fedco, leasing it from Proctor & Gamble on a month-to-month basis, and also negotiated leases for terminals in Chicago and St. Louis which

[8] All Fedco employees, including the drivers hired as KTY drivers and loaned to Fedco, were terminated.

were located in facilities previously used by Fedco. Edmund also has terminals or agencies in Columbus, Ohio; Toledo, Ohio; Harold, Illinois; West Memphis, Arkansas; and Clear Water-Tampa, Florida.

Most of the former Fedco and KTY drivers purchased trucks and went to work for Edmund. Six of Fedco's eight office employees went to work for Edmund including Pat Perin, Jack Hunt, Jim Lanster, Harriet Ferrell, Evelyn Molt, and Tim Rogers. Some of these individuals had different positions under Trans-State. Trans-State employed city drivers, including former Fedco employee Sam Curry, Terry Hamblin, and Rod Allen. Trans-State also uses two garage employees, Tom Dippold and Rod Koch, who were both Fedco garage employees. Their pay and benefits remain basically the same under Trans-State. The mechanics are peforming basically the same work that they performed under Fedco and under the same supervision. The only apparent difference in their work is that the owners of the individual trucks now determine what work is to be performed, rather than Fedco management.

The General Counsel contends that Trans-State is a successor to, at least, the garage operations of Respondents Fedco and KTY and that, as it acquired successor status with knowledge of the pending unfair labor practice proceedings, it is jointly and severally liable for backpay with Fedco and KTY.

Discussion and Conclusions

Bob Rogers was discharged by Respondent Fedco on September 24, allegedly because marijuana was found in his truck. The General Counsel contends that the reason assigned for the discharge of Bob Rogers was merely a pretext and that he was actually discharged for his concerted and union activities.

This record reflects that Bob Rogers was an extremely active and vocal union steward. Other employees were aware of this fact, and knew that he was willing to take their problems to management on their behalf. The records clearly reflect that Rogers went to management with the complaints of the other drivers. The records also clearly reflect that Rogers was becoming a thorn in the side of management because Jim Heritage warned Rogers that he was causing too much trouble for Respondent Fedco. Heritage stated that Gary Krutsinger said that Rogers' complaints would ultimately hang him. Thus, it is apparent that the management of Fedco was unhappy with the numerous complaints and grievances of its employees. It was also unhappy with its union stewards because they brought the complaints to management's attention.

It is my conclusion that Fedco was looking for an excuse to rid itself of its chief troublemaker Bob Rogers when Maynard King went searching the trucks to see what he could find, and low and behold he found marijuana in the truck of union antagonizer Bob Rogers. Respondent Fedco wasted no time in calling Rogers to account, and even gave him an opportunity to resign before it discharged him without even making an investigation. Rogers denied that the marijuana was his and informed management that many people left things in the truck for him, particularly things dealing with union business. And even after Fedco learned that Rogers knew nothing about the marijuana, and that it was put in his truck by Wesley Evans, Fedco refused to rehire Rogers. This, in my view, clearly closes the door on any argument by Fedco that it was merely attempting to rid itself of people who would violate the law by using marijuana. Moreover, Respondent Fedco made no investigation of the marijuana incident, it took no action toward either Wes Evans or Tim Rogers for whom the marijuana was destined, and as mater of fact seem totally unconcerned with the marijuana problem once Rogers was gone. Under all the circumstances, it is my conclusion that Fedco's reasons for the discharge of Bob Rogers were clearly pretextual, and that it discharged Bob Rogers because of his concerted and union activities in violation of Section 8(a)(3) and (1) of the Act.[9]

As indicated, the complaint also alleges that Respondents violated Section 8(a)(3) and (1) of the Act by their layoff of five employees allegedly for economic reasons. The record reflects that in the spring of 1980 the Union claimed to represent a majority of the Fedco employees and that Loren King recognized the Union as the representative of the drivers and mechanics and signed a collective-bargaining agreement which included a union-security provision. Shortly after the Union was recognized, Maynard King, the general manager of Fedco, contacted employee Rufus Muncy and asked him to be the union steward, for which he would receive $100 a month. Muncy refused because he did not want the problems associated with the union steward job and thereafter another driver, Don Rowlette, was named union steward.

By the spring of 1981 Maynard King apparently learned that some of the employees were dissatisfied with the incumbent union, and told the employees at the spring safety meeting in Cincinnati, Ohio, that if they tried to bring in the Teamsters Union Fedco could not afford it and would close its doors.

Later, in the summer, some of the drivers learned that Loren King planned to sell certain of the KTY trucks. KTY owned several trucks called Road Boss which it leased to Fedco. It was these trucks which King had indicated an interest in selling. When the drivers learned of the probable sale of these trucks, they met to discuss what terms they would seek if any of them purchased a truck and to ensure whatever protection from arbitrary treatment they could obtain by acting in concert as op-

[9] The complaint alleges several independent violations of Sec. 8(a)(1) involving interrogation and threats to employees. Several instances of 8(a)(1) conduct were credibly testified to by the General Counsel's witnesses and none were specifically denied by Respondents' witnesses. Additionally, if there were specific denials by Maynard or Loren King, those denials would not be credited. In any event, these facts were fully litigated and I find that Respondents violated Sec. 8(a)(1) by the following: (1) Maynard King's statement at the spring safety meeting that if the Teamsters come in Fedco would close its doors; (2) Maynard King's statement to Rufus Muncy in September that if the Teamsters come in his father would close the doors; (3) Maynard King's interrogation of Rufus Muncy in September concerning a drivers' meeting held for the purpose of discussing union and protected activities; (4) Loren King's interrogation of Mike Jones concerning his conversations with other employees concerning contractual matters and the filing of grievances; and (5) Loren King's threat to transfer Jones to the third shift if he filed a grievance for overtime.

posed to negotiating separately with King. The drivers contacted Union Representative Richard Davis concerning the sale of these trucks. In August Bob Rogers, the union steward, put a notice on the wall of the drivers' room announcing a meeting for all Road Boss drivers. On August 28, Bob Rogers met with Richard Davis and Loren King to discuss the rumored sale of the Road Boss trucks and the forced resignation of driver Terry Hamblin. On August 29, Richard Davis met with all of the drivers to discuss their complaints. These several incidents were a beginning of the employee discontent and the employees taking their complaints to management. This was not to the liking of the Kings because they intended to operate Fedco and KTY as they pleased, with no interference from their employees or outsiders. Like Rogers, each of the employees named above, Hofer, Thornton, Evans, Muncy, and Jones, had in some way upset the Kings. Thus, Jones had gone to the Union about overtime pay. Muncy brought a union steward to what he believed was a discriminatory interview, which action was strongly opposed by Maynard King. Additionally, Muncy was the employee who told Maynard King about the drivers' intentions to seek representation by the Teamsters. Thornton was the union steward, and with Hofer showed signs of attempting to enforce the contract, DOT regulations, and safety precautions. Each of these five employees in some way, as described above, brought management attention to themselves.

Respondents decided early that the way to rid itself of these problems was to get rid of the employees. In this regard it decided that a layoff would be the most feasible way to get rid of those employees that were complaining, and all the other employees, as it intended to put Fedco totally out of the trucking business. Thus, in the guise of a layoff Fedco terminated most of its employees, but included in those 16 employees were the 5 employees that were giving it the most problems.

Fedco assigned economics as the reason for the layoff. However, as I have indicated, the financial information submitted does not support the proposition that Fedco's load level was decreasing at the time of the layoff. In fact, the evidence shows that prior to the layoff of October 16 the load level was increasing. Moreover, it appears that Fedco had been turning down loads that were offered it by Procter & Gamble. Thus, in my view, Respondent Fedco's financial problems were more of a smokescreen than anything else and were set up to justify the layoffs.

This appears to be borne out by the facts of the layoffs and the fact that, when Fedco needed additional drivers, it did not recall the laid-off employees, but in fact hired new drivers from Transportation Unlimited. In any event, all of Respondent's actions were designed to put Fedco completely out of the trucking business. It is my conclusion that Fedco did this with an eye to rid itself of the Union and all of the union adherents, including the five alleged discriminatees. It is my conclusion that Respondents' assigned reason, that these employees were laid off for economic reasons, is purely and simply a pretext. Respondents set upon a course of action to rid Fedco of the Union and to put Fedco totally out of business. It engaged in the foregoing conduct to discourage membership in the Union and to discriminate against its employees in violation of Section 8(a)(3) and (1) of the act, and I so find.

The General Counsel alleges that Fedco and KTY are joint employers within the meaning of the Act, and that any order issued herein should run jointly and severally against both.

Certain critical criteria considered by the Board in determining whether two employers are a joint employer or common employer include common ownership or financial control, integration of operations, common management, and centralized control over labor relations. Here there is no question but that there is common ownership and financial control. There certainly is an integration of operations in that KTY supplied the trucks and Fedco supplied the employees for one common purpose—to operate a trucking company. There is no question but there was common management and that the Kings exercised control over both corporations. There is no question but whatever labor relations existed at KTY were controlled by the Kings as well as the labor relations of Fedco. It is my conclusion that the testimony in this case makes it clear that Fedco and KTY meet all the criteria established by the Board for finding a joint employer relationship. While there may have been in fact a corporate separation, this appears to be only an illusion. One company was totally dependent on the other and I conclude that they were a single integrated enterprise and a joint employer of the employees involved herein. Therefore, it is my conclusion that KTY is jointly and severally liable with Fedco for remedying any unfair labor practices found herein, including reinstatement and backpay which shall be ordered.

The General Counsel also contends that Trans-State is a successor to the garage mechanic operations of Respondents Fedco and KTY. The General Counsel's argument seems to be that, as Trans-State purchased from KTY the garage equipment which had been used in the Fedco garage and retained two of the three mechanics and continued to use the same facility, it somehow became a successor to Fedco and KTY. Consequently, having taken over this operation knowing about the pending unfair labor practices, Trans-State somehow must share the liability for the unfair labor practices of Fedco and KTY. Thus, the General Counsel argues that Trans-State, insofar as the garage is concerned, meets the test set out in *Golden State Bottling Co.*, 187 NLRB 1017 (1971), enfd. 467 F.2d 164 (9th Cir. 1972), affd. 414 U.S. 168 (1973), for the finding of a successor. I do not agree. The facts herein indicate only that Trans-State retained two employees out of a much larger number of employees, all of whom constituted an appropriate unit. This alone is sufficient to conclude that Trans-State did not employ a majority of the former employees, and could not be a successor. I conclude that the General Counsel's evidence is totally insufficient to establish that Trans-State is a successor. Therefore, I shall recommend that the complaint be dismissed in its entirety insofar as it relates to Trans-State.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth above, occurring in connection with Respondents' operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor dispute, burdening and obstructing commerce and free flow of commerce.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondents discriminatorily discharged Robert Rogers on September 16, 1981, in violation of Section 8(a)(3) and (1) of the Act, and unlawfully terminated Rick Hofer, Charles Thornton, Rufus Muncy, Wesley Evans, and Mike Jones in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondents be ordered to offer immediate and full reinstatement to these employees, unless reinstatement has already been offered, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings they may have suffered as a result of the Respondents' discrimination against them, until such time as Respondents make them a valid offer of reinstatement, with interest. See *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

On these findings of fact and and the entire record, I issue the following

CONCLUSIONS OF LAW

1. Fedco Freightlines, Inc. and KTY Leasing Co., Inc., Respondents, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Fedco Freightlines, Inc. and KTY Leasing Co., Inc., Respondents herein, are a single integrated business enterprise and constitute a single integrated employer within the meaning of the Act.

3. By threatening employees that if the Teamsters Union got in Fedco would close its doors; by interrogating its employees concerning their meetings and other concerted and protected activities, including the filing of grievances; and by threatening to transfer employees because of their filing grievances, Respondents have engaged in conduct violative of Section 8(a)(1) of the Act.

4. By discharging Robert Rogers because of his union and/or concerted activities and by terminating Rick Hofer, Charles Thornton, Rufus Muncy, Wesley Evans, and Mike Jones because of their union and/or concerted activities or because of their support of or assistance to the Union, Respondents have discouraged membership in the Union in violation of Section 8(3) and (1) of the Act.

5. Trans-State Express, Inc. has not violated the Act as alleged in the complaint.

6. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondents, Fedco Freightlines, Inc. and KTY Leasing Co., Inc., Cincinnati, Ohio, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closing of Respondents' facilities if they continue their support of the Union or continue to engage in union activities or other concerted activities.

(b) Interrogating employees concerning their union activities or their support for the Union.

(c) Laying off, discharging, or otherwise discriminating against its employees because of their activities on behalf of the Union or any other labor organization to discourage membership in the Union or any labor organization of its employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Robert Rogers, Rick Hofer, Charles Thornton, Rufus Muncy, Wesley Evans, and Mike Jones, unless reinstatement has already been offered, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

(b) Post at their facilities in and around Effingham, Illinois, and Cincinnati, Ohio, and any other location where they do business, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondents' authorized representative, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

---

[10] I recognize that Fedco is no longer in business and that KTY is not a trucking operation. This, however, is a compliance problem.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondents has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

Consumat Systems, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers. Cases 5–CA–14719 and 5–CA–14826

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 10 March 1983 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

As set forth in detail in the judge's decision, on 27 August 1981 the Union was certified by the Board as the collective-bargaining representative of the Respondent's employees and the parties commenced bargaining. The Union contends that on 26 August 1982[3] it accepted the Respondent's contract proposal. Several days later and prior to the execution of the contract, the Respondent refused to sign the agreement and subsequently withdrew recognition of the Union. The Respondent maintained it was privileged to refuse to sign the agreement and to withdraw recognition as, relying on a petition signed by a majority of employees, it had a good-faith belief based on objective considerations that the Union no longer represented a majority of the Respondent's employees.

In evaluating the Respondent's contentions, the judge concluded that the Respondent failed adequately to demonstrate a reasonably based good-faith doubt of the Union's majority status. The judge based this conclusion on the fact that only one page of a two-page petition proclaiming the signatories no longer wanted the Union to represent them was admitted in evidence. This one page contained signatures of only 18 of the 60 unit employees. In its exceptions and brief, the Respondent does not contend the judge erred in refusing to admit page two of this petition, but rather argues the Respondent's reasonably based good-faith doubt of the Union's majority status existed as evidenced by both pages of this petition.

After closely examining the record, we agree with the judge. During the hearing, the Respondent moved that page two of the petition be admitted into evidence. The judge refused on the ground that it had not been properly authenticated. The Respondent never again requested that this document be admitted into evidence. Therefore, the only evidence before us of the Respondent's good-faith doubt of the Union's majority status is the one-page document containing signatures of 18 employees. We thus conclude, in agreement with the judge, that this is insufficient evidence of a reasonably based good-faith doubt that the Union retained majority status.[4] Accordingly, as the Respondent was not privileged to refuse to bargain or to withdraw recognition from the Union, those actions constituted violations of Section 8(a)(5).

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The remedy section of the judge's decision is amended only to the extent that backpay, if any, shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] All dates are 1982 unless otherwise indicated.

[4] In light of this finding, we find it unnecessary to pass on the issue of whether, as found by the judge, the Union's telegram of 26 August and the Respondent's letter of 1 September, respectively, constituted a request and refusal to sign the collective-bargaining agreement. An unequivocal request to sign the contract was contained in the Union's letter of 10 September. Therefore, as the Respondent has failed to show sufficient evidence that it had a good-faith doubt of the Union's majority status on 14 September when it refused to comply with the Union's 10 September unequivocal request to sign the contract, we find that it violated Sec. 8(a)(5).

Additionally, in light of the finding that the Respondent did not have a reasonably based good-faith doubt of the Union's majority status when it refused to execute the contract, Chairman Dotson and Members Hunter and Dennis find it unnecessary to rely on the judge's finding that once final agreement on the substantive terms of the contract was reached, regardless of the status of any written agreement, the Respondent was not free to refuse to bargain even if it then had lawful grounds for believing that the Union had subsequently lost its majority status.

Member Zimmerman would adopt the judge's findings that the Union's telegram constituted a request and the Respondent's reply letter constituted a refusal to sign the collective-bargaining agreement, and that such refusal was unlawful. He, like the judge, finds that even if the Respondent had been able to establish that as early as 1 September it had a reasonable doubt of the Union's continued majority status, so as to legitimize its withdrawal of recognition from the Union, the Respondent would still have been obligated to execute its 26 August 1982 collective-bargaining agreement with the Union, and its failure to do so would still have been, as it was here, a violation of Sec. 8(a)(5). The Respondent's obligation to execute the collective-bargaining agreement arose, and is retroactive to, 26 August, when the Union notified the Respondent of the former's acceptance of the latter's 8 June offer. Subsequent manifestations of possible loss of majority support for the Union would not serve to relieve the Respondent of its obligation to execute and give retroactive effect to the agreement it had reached with the Union on 26 August. *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975); *Utility Tree Service*, 215 NLRB 806 (1974), affd. 218 NLRB 784 (1975). See also *Raybestos-Manhattan, Inc.*, 183 NLRB 213, 217 (1970).

Member Dennis also notes that while the Respondent raised the existence of a "decertification petition" supporting its 14 September refusal to execute the contract, the record shows that no question concerning representation existed until 21 September when a petition was actually filed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consumat Systems, Inc., Mechanicsville, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(a).

"(a) On 14 September 1982, failing or refusing, on request, to execute and give effect to a written agreement incorporating the agreement reached with the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers."

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On August 27, 1981, the National Labor Relations Board in Case 5–RC–11447 certified Charging Party International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (Union) as the collective-bargaining representative for a unit of "all production and maintenance employees employed at Consumat Systems, Inc.'s Mechanicsville, Virginia location, excluding office clerical employees, professional employees, technicians, over the road truckdrivers and their helpers, guards and supervisors as defined in the National Labor Relations Act." Thereafter, about September 4, 1981, Respondent and the Union commenced bargaining and on February 9, 1981,[1] negotiators displeased with the offer, presented it to the union membership, who promptly rejected it.

Little progress was made over the next several months. Rather, Respondent's financial position, none too good to begin with, became worse. Contracts were lost or postponed, some indefinitely. As a consequence, on June 8, Respondent renewed its previous written offer, with three modifications: it withdrew its prior opposition to the checkoff of union dues and initiation fees, it reduced its wage offer of an annual 5-percent increase for 3 years to no increase at all,[2] and it orally agreed to a 1-year contract,[3] rather than the 3-year contract it originally proposed. The union negotiators were no more pleased with this proposal than they were with the one in February; but they did not outrightly reject Respondent's latest proposal either, again stating that they would take up the proposal with the membership. That, however, did not occur until Thursday, August 26, the last day of the Union's first year as the employee's collective-bargaining representative, when Bartley sent the following mailgram to Thomas J. Manely, Respondent's attorney and principal negotiator:

> Please be advised that the employees of Consumat Systems, Inc. voted this day to accept the Company's offer made to the Union on 6/8/82. I will be in contact with you in the very near future for the purpose of signing this agreement.

On Monday, August 30, the next business day,[4] word of the membership ratification spread quickly. Two employees, incensed that the contract (with no wage increase) had been ratified and that they had been given insufficient notice of the action to be taken at the union meeting the prior Thursday, circulated a petition stating the desire of the signatories for a "fair meeting with advance notice of a vote before a labor contract is made with" Respondent. A telephone call on Tuesday evening from one of the employees to Bartley met with a firm reply that the Union had already accepted the agreement and no new vote would be taken.

On Wednesday, September 1, in response to Bartley's refusal to conduct another vote, the same two employees circulated a new petition proclaiming that the signatories no longer wanted the Union to represent them. That was forwarded to the Regional Office of the Board on September 2, and a copy of it, allegedly signed by 35 of 60 employees,[5] was presented to Ron Mancuso, Respondent's director of manufacturing. The employees' petition apparently led to the filing of a formal decertification petition on September 21.

In the meantime, delivery of Bartley's mailgram had been delayed. Manley testified that he received it in his office no earlier than Monday, August 30, although it was sent the prior Thursday and although Bartley received a confirmation copy on Friday. I find it surprising that Manley did not forward it to his client immediately; in any event, Mancuso, who had been told on Monday by a union negotiating committee member that the contract had been ratified, said he did not receive the mailgram until Tuesday, August 31, the same day, he testified, that he was presented with the first petition.[6] The following day Mancuso wrote to Bartley that, before receiving the mailgram, he had "received information that a majority of the men believed the vote referred to was improper and questioning the Union's representation." (Any "questioning [of] the Union's representation" ocurred, however, no earlier than September 1, the day *after* Mancuso received the mailgram.) He further stated

[1] Unless otherwise indicated, all dates refer to the year 1982.

[2] Union International Representative Phillip Bartley testified that the wage offer was orally withdrawn in March.

[3] Other than this oral agreement, the contract proposal was written.

[4] Respondent was then working a 4-day workweek, Monday through Thursday.

[5] The entire petition was never properly authenticated and admitted in evidence. Thus, the record proof does not adequately demonstrate that a majority of employees did not desire the Union to represent them and Respondent had a good-faith doubt that the Union represented a majority. See *Dresser Industries*, 264 NLRB 1088 (1982). However, in the event that the failure to introduce the entire petition was merely the result of inadvertent and excusable error, and on the assumption the document demonstrates that the Union lost majority support, this decision would be no different.

[6] Mancuso prepared a memorandum which noted that he received the first petition on September 1, not August 31. It is unnecessary to resolve this inconsistency, first, because good-faith doubt obtained after the agreement was made is irrelevant and, second, because the first petition indicated only employee disagreement with the ratification vote and not a clear intention that a majority of the employees no longer wished to be represented by the Union. *Gregory's Inc.*, 242 NLRB 644, 648 (1979).

that because Respondent had received no response to its last offer from the Union for several months, he was in doubt as to the "lawfulness" of concluding or not concluding a contract.

On September 10 Bartley wrote Manley requesting signed copies of the "recently negotiated" contract for his signature. Manley replied on September 14 that Respondent had not received any explanation or clarification as requested in the September 1 letter, that the employees did not wish to be represented by the Union, that the employees did not authorize the Union to conclude an agreement with Respondent, and that the employees had petitioned the Board for a decertification election. "Under the circumstances Consumat does not believe it is lawful or appropriate to conclude a labor contract with your union." Again, by letter dated October 18, Mancuso advised Bartley that because he had received no clarifications from the Union in reply to his earlier September 1 and 14 letters, because Respondent's employees had advised Respondent that they no longer wished to be associated with the Union, and because they had filed a decertification petition, Respondent "does not believe it may any longer lawfully recognize or bargain with your union as the representative of our employees."

Two complaints herein, as consolidated,[7] allege that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151, et seq., by refusing since September 14 to execute a written contract embodying the agreement which the Union accepted on August 26 and that on October 18 Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of its production and maintenance employees. Respondent denied that it violated the Act in any manner.[8]

In the absence of unusual circumstances, a certified union's majority status must be honored for 1 year, even if an employer has evidence of the union's loss of majority. That rule was established in order to permit collective bargaining to function and to stabilize industrial relations. Even if the decertification petition had been filed prior to August 26, although it would have possibly permitted an election to be held, but only after the expiration of the 1-year period, Respondent would not have been permitted to rely thereon and cease bargaining during the 1-year period. Once having continued to bargain, an employer would be bound by any agreement it struck during the year.

That being stated, the first issue presented is whether a contract was made on August 26. Respondent made its last complete proposal on June 8. The Union did not reply to that offer until August 26, a fact which Respondent admitted in its September 1 letter. I refuse to credit Mancuso's testimony that, in a telephone conversation with Bartley on August 26, Mancuso told Bartley that the offer had been withdrawn by Respondent. Bartley denied such statement, and none of Respondent's letters rely on its withdrawal of the offer, or on the Union's rejection of it, or on the fact that the offer had lapsed by the passage of time.[9]

"The Board is [not] strictly bound by the technical rules of contract law." *NLRB v. Donkin's Inn*, 532 F.2d 138, 141–142 (9th Cir. 1976); *Penasquitos Gardens*, 236 NLRB 994, 995 fn. 8 (1978), enfd. 603 F.2d 225 (9th Cir. 1979). Even when a contract proposal has been rejected, the Board has frequently held that the proposal survives, enabling the party which previously rejected it to reverse itself and accept it. The Board affirmed this view in *Pepsi-Cola Bottling Co.*, 251 NLRB 187, 189 (1980), as follows:

> [A] complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance.

See also *Presto Casting Co.*, 262 NLRB 346 (1982). *Pepsi-Cola* was enforced at 659 F.2d 87 (8th Cir. 1981), the Court noting at 90 fn. 3, that there appears to be contrary authority, some cited by Respondent, which can be explained solely by the fact that the Board is continuing to develop the law in this area.

Respondent's offer was on the table for 2-1/2 months before the Union accepted it. The Board has held that 4 months before acceptance is not unreasonable delay, barring intervening events that make it unfair to do so. *Worrell Newspapers*, 232 NLRB 402 (1977); contra, *Scientific Research Co.*, 110 NLRB 393 (1954). Respondent offers no cogent showing of unfairness. That it has suffered losses of business is not attributed to labor costs; and its contract offer of no wage increase is not claimed to be a further impairment of its financial condition.[10] Finally, I

[7] The relevant docket entries are as follows: The Union filed an unfair labor practice charge in Case 5–CA–14719 on September 27, 1982, and a complaint issued on October 26. The Union filed its charge in Case 5–CA–14826 on October 29 and a compliant issued on November 22. The complaints were consolidated by order of the Regional Director for Region 5 on November 23 and a hearing was held before me on January 3 and 4, 1983, in Richmond, Virginia.

[8] There is no question as to jurisdiction herein. Respondent admits, and I find, that it is a Virginia corporation with an office and place of business in Mechanicsville, Virginia, where it engaged in the manufacturing of energy recovery incinerators. During the 12 months preceding the issuance of each complaint, it sold and shipped products valued in excess of $50,000 directly to points outside the State of Virginia. I conclude that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union, as admitted by Respondent, is a labor organization within the meaning of Sec. 2(5) of the Act.

[9] Mancuso testified that Bartley, prior to conducting the union vote, called Mancuso to tell him that the employees were getting ready to vote and inquired about the effective date of the agreement. Mancuso asked what the Union was voting on. When Bartley replied the June offer, Mancuso testified, he told Bartley that the present condition of Respondent and the delay of 2 months in the Union's response made the offer "no longer available." Bartley testified, however, that an entirely different conversation took place; that he called Mancuso to inquire about whether the effective date of the contract would be June 8, the date of the last offer, or that day, August 26, when the Union accepted the offer, and that Mancuso replied that the contract became effective only when it was accepted. I credit Bartley's version.

[10] The record is barren of what, if any, financial gains were made by the Union.

find that Respondent's June offer was a continuing offer. Indeed, the day after it was made, Bartley telephoned Manley's legal assistant to advise that he was going to reevaluate the Union's position and, if Respondent changed its position, that Respondent should so advise him. Respondent never advised Bartley that it withdrew its offer or amended it in any way.

The Union's acceptance occurred when the Union notified Respondent of that fact; and it was the transmittal or the mailgram, not its receipt by Respondent, that governs the date of acceptance and the contract. *Raybestos-Manhattan*, 183 NLRB 213, 218 (1970). Bartley's mailgram of August 26 to Respondent notifying that he would soon be in contact for the purpose of signing the agreement gave Respondent sufficient notice of a request for its execution. Mancuso's reply of September 1 setting forth his "doubt" about concluding the agreement demonstrated that Mancuso understood what Bartley was requesting and constitutes a refusal to execute the agreement. It is well settled that the failure to sign, on request, a written memorandum of the agreement made is a per se refusal to bargain. Section 8(d) of the Act; *H.J. Heinz v. NLRB*, 311 U.S. 514 (1941); *Big Run Coal & Clay Co.*, 152 NLRB 1144 (1965), enfd. 385 F.2d 788 (6th Cir. 1967); *Lozano Enterprises v. NLRB*, 327 F.2d 815 (9th Cir. 1964).

However, by the time it received Bartley's August 26 mailgram, Respondent argues, it already knew of employee discontent with the method of the ratification vote and, a day or two later, employee desire no longer to be represented by the Union. Thus, the remaining issue is whether employee action after the contract had been made permitted Respondent to avoid what was otherwise its obligation under Section 8(a)(5). To paraphase the Board in *North Bros. Ford*, 220 NLRB 1021, 1022 (1975), on facts strikingly similar to those herein, final agreement was reached no later than August 26, well before the employee petitions disavowing representation by the Union and for decertification were filed. Once final agreement on the substantive terms of the contract was reached, and regardless of the status of any written instrument incorporating that agreement, Respondent was not free to refuse to bargain even if it then had lawful grounds for believing that the Union had subsequently lost its majority status. See, e.g., *Utility Tree Service*, 215 NLRB 806 (1974), enfd. 539 F.2d 718 (9th Cir. 1976); *Raybestos-Manhattan*, supra.

Finally, to the extent that Respondent continues to urge that I erred in excluding testimony regarding the validity of the Union's ratification vote, I adhere to my prior rulings at the hearing. Although the Union clearly stated that ratification by its membership was necessary for it to make a final and binding agreement, no agreement was made by the parties that made ratification necessary and no requirement that this occurrence was incorporated into the written contract proposal prepared by Respondent. *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). "Furthermore, even if ratification were a precondition . . . Respondent has no standing to question the validity of the procedures used by the Union in ratifying the agreement. It is well settled that ratification is an internal union matter which is not subject to question by an employer." Id.; *M&M Oldsmobile*, 156 NLRB 903, 905 (1966), enfd. on other grounds 377 F.2d 712 (2d Cir. 1967); *London Chop House*, 264 NLRB 638, 639 (1982).

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by failing to execute the agreement and by withdrawing recognition from the Union. These activities occurring in connection with Respondent's operations have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

I will, accordingly, recommend that Respondent be ordered to cease and desist from its illegal activities and take certain affirmative action necessary to effectuate the polices of the Act. I shall also recommend that Respondent be ordered to execute the agreement which it negotiated, on request of the Union, comply with all the provisions thereof retroactive to August 26, 1982, the date such agreement was consumated, and make all employees whole for any losses they may have suffered by Respondent's failure to sign the agreement. Backpay, if any, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[11] It is possible that the 1-year agreement will have expired before Respondent complies with the order recommended herein. In such event, the recommended Order will provide an option to the Union to request that Respondent sign the agreed-upon contract or resume bargaining and, if an agreement is reached, embody it in a signed agreement. *Big Run Coal & Clay Co.*, supra; *Worrell Newspapers*, supra.

On these findings of fact and conclusions of law and on the entire record,[12] I issue the following recommended[13]

ORDER

The Respondent, Consumat Systems, Inc., Mechanicsville, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing, on request, to execute and give effect to, retroactive to August 26, 1982, a written agreement incorporating the agreement reached with the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers.

---

[11] See generally *Isis Plumbing Co.*, 139 NLRB 716 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963).

[12] The General Counsel and Respondent both moved to correct the official transcript in certain respects. There being no opposition to Respondent's motion and Respondent having agreed to the General Counsel's motion, the motions are granted and the transcript amended accordingly.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Failing or refusing to recognize and bargain with the Union concerning issues which have arisen, or may arise, during the terms of the aforesaid agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action found necessary to effectuate the policies of the Act.

(a) On request of the Union, execute and give effect, retroactive to August 26, 1982, to the written agreement embodying the terms reached between it and the Union, deliver an executed copy to the Union, and make the employees whole for any losses they may have suffered by its failure to sign the aforesaid agreement, with interest, as provided in the remedy section of this decision.

(b) On request of the Union, bargain collectively with the Union concerning any question which has arisen or which may arise under the terms of the aforesaid agreement, including the settlement of grievances and disputes entitled to arbitration as therein provided.

(c) In the event that the term of the aforesaid agreement has expired before it is signed by Respondent, and on request of the Union, bargain with the Union as the collective-bargaining representative of its employees in a unit composed of all production and maintenance employees employed at Respondent's Mechanicsville, Virginia location, excluding office clerical employees, professional employees, technicians, over-the-road truckdrivers and their helpers, guards, and supervisors as defined in the Act, and if an agreement is reached, embody the same into a signed contract.

(d) Post at its plant in Mechanicsville, Virginia copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[14] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail or refuse, on request, to execute and give effect to, retroactive to August 26, 1982, a written agreement incorporating the agreement reached with the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers.

WE WILL NOT fail or refuse to recognize and bargain with the Union concerning issues which have arisen, or may arise, during the term of the aforesaid agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, execute and give effect, retroactive to August 26, 1982, to the written agreement embodying the terms reached between us and the Union, deliver an executed copy thereof to the Union, and make our employees whole for any losses they may have suffered by our failure to sign the aforesaid agreement, with interest.

WE WILL, on request of the Union, bargain collectively with the Union concerning any question which has arisen or which may arise under the terms of the aforesaid agreement, including the settlement of grievances and disputes entitled to arbitration as therein provided.

WE WILL in the event that the term of the aforesaid agreement has expired before it is signed by us and, on request of the Union, bargain with the Union as the collective-bargaining representative of our employees in a unit composed of all production and maintenance employees employed at our Mechanicsville, Virginia location, excluding office clerical employees, professional employees, technicians, over-the-road truck drivers and their helpers, guards and supervisors as defined in the Act and, if an agreement is reached, embody the same into a signed contract.

CONSUMAT SYSTEMS, INC.

The General Store No. Two, Inc. *and* United Food and Commercial Workers Union, Local No. 576. Case 17–CA–11529

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 December 1983 Administrative Law Judge Steven M. Charno issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in this case alleges that the Respondent, General Store No. Two, Inc., threatened its employees in order to coerce their acceptance of wage and benefit concessions at midterm of the collective-bargaining agreement. The judge agreed, finding that certain statements made by the Respondent in the course of discussing with its employees the need for concessions amounted to threats in violation of Section 8(a)(1) of the Act.

The issue before us is whether, under the particular circumstances of this case, the Respondent's statements did in fact constitute threats which impaired employee rights under Section 7 of the Act. We answer in the negative and we will dismiss the complaint.

The Respondent owns and operates three grocery stores in the Kansas City, Missouri area. It is a member of the Retail Grocers Association of Greater Kansas City (the Association), an employer's association consisting mostly of independent grocers. United Food and Commercial Workers Union, Local No. 576 (the Union) is the exclusive representative of the sales employees of the Respondent and of the employees of a number of other grocery store operators in the area. The collective-bargaining agreement between the Respondent and the Union during the events of this case ran from 10 May 1981 through 10 September 1983.

By a memorandum of agreement dated 24 February 1983[1] the Union granted substantial wage and benefit concessions to Milgram Food Stores, a grocery chain in the Kansas City area. Milgram is in direct competition with the Respondent and other independent grocers who are members of the Association.[2]

On 8 March representatives of the Association met with the president of the Union to discuss the possibility of the Union's granting Milgram-type concessions to the independent grocers of the Association. It is apparent from the record that the Union's president indicated that the union leadership had no objection to granting the same concessions to the independent grocers, but he also indicated that final approval would hinge on a vote by the bargaining unit members who would be affected by the concessions. The president stated that, as a prerequisite to the vote, it would be necessary for each of the employers to meet with its employees in order to inform them of the particulars of the Milgram concessions and to "condition" them concerning the similar concessions contemplated by the Union and the Association members. When the Association's representatives objected to this direct approach, the Union's president stated that the Union would not file unfair labor practice charges as a result of the employers' directly approaching their employees to discuss the concessions.

The Association members, including the Respondent, met 14 March to discuss the union leadership's position on the concessions proposal. The members were given printed information concerning the Milgram concessions and copies of a form letter to be sent to the Union requesting equivalent concessions. The form letter had been approved previously by the Union's president. The members also were instructed to meet with their employees prior to the vote on concessions in order to "condition" them as suggested by the Union's president.

On 16 March the Respondent's owners, Alan Gailey and Jim Marsh, met with five of their bargaining unit employees. Two of the employees worked at the Respondent's Kansas City store, two worked at the North Kansas City store, and one worked at the Raytown store. The five were considered influential with the Respondent's other employees. Each was either a produce manager or a head clerk.[3]

Alan Gailey began the meeting by describing the nature of the Milgram concessions. He then explained the impact of the concessions on independent grocers like the Respondent in the Kansas City area. He emphasized that the Respondent needed similar concessions in order to continue operating

[1] All dates refer to 1983 unless otherwise indicated.

[2] The record indicates that the Milgram chain is also a member of the Association. The record is not clear however on whether Milgram and the independent grocer/members were parties to a single collective-bargaining agreement with the Union.

[3] No issue has been raised as to the possible supervisory capacity of any of these employees.

on a competitive basis and to maintain its fair market share of the local grocery business. He indicated that the independent grocers had approached the union leadership with a request for Milgram-type concessions and that the Union had been receptive to the request. After some discussion Gailey informed the five employees that all of the bargaining unit employees would be voting on the concessions within a few days. Should the unit employees vote to reject the proposal, Gailey stated that (1) the Respondent would roll back wages unilaterally; (2) the Respondent's North Kansas City store would have to be either sold or closed; and (3) the Milgram concessions would be the Respondent's only contract offer at negotiations following expiration of the current contract in September.

On the following day, 17 March, one of the five employees who had been present at the above meeting discussed the meeting and the proposed concessions with the store manager of the Respondent's North Kansas City store. During this discussion the manager reiterated the Respondent's position that it would have to close the North Kansas City store if the employees did not accept the concessions.

No vote on the concessions was taken among the bargaining unit members following these incidents and there is no indication that the Respondent implemented any of the alternatives of which Gailey spoke at the 16 March meeting.

The judge found Alan Gailey's three statements of alternatives made on 16 March and the related statement of the Respondent's store manager on 17 March to be violative of Section 8(a)(1). He concluded that they were threats which interfered with the employees' right to bargain collectively as to the terms and conditions of their employment. For the reasons given below we do not agree.

It is clear that at the 8 March meeting the union leadership gave at least tacit approval to the Association's proposal for concessions equivalent to those which the Union had granted to the Milgram chain. The Union's president later approved the form letter to be used by the Association members to formally request Milgram-type concession. Further, the Union's president not only agreed to allow the employers to approach their employees directly to "condition" them to the concessions, he suggested this course of conduct in the first instance. The Union drew no limits on the nature or extent of the "conditioning" approach to be taken by the Employers. The Union also promised not to file charges as a result of the Employers' direct, individual approach. We interpret the Union's position in these circumstances as one of broad endorsement, broad enough to include the reasonably foreseeable consequences of the employers' desire to persuade their employees to accept the concessions.

The judge's reliance on *Admiral Merchants Motor Freight*, 265 NLRB 134 (1982), to support the 8(a)(1) findings is misplaced. In that case the employer bypassed the exclusive representative to bargain directly with employees concerning benefits concessions. The Board found independent 8(a)(1) violations in threats made by the employer, in addition to the 8(a)(5) and (1) violations with regard to the employer's bypassing the union to bargain with employees. The critical factor which is absent in the *Admiral Merchants* situation but present here is the consent of the union to the employer's conduct. In *Admiral Merchants* the 8(a)(1) threats, while independent violations, grew out of the 8(a)(5) context: the employer's ignoring the union to negotiate directly with employees.[4] In the present case the Respondent did not bypass the Union; it acted with the approval and consent of the employees' exclusive representative and at its suggestion.

Given the particular circumstances of the case we find that the statements of the Respondent which the judge found violative were part of a course of conduct which the Union had encouraged and broadly approved. The statements made by Alan Gailey on 16 March were part of a communication with the employees which was supported by the Union. The statement made by the Respondent's store manager on 17 March was a continuation of that communication. Under these particular circumstances we conclude that the Respondent's statements did not reasonably tend to interfere with, restrain, or coerce the employees in the exercise of their rights under the Act. Therefore we do not adopt the judge's conclusions of law and we will dismiss the complaint in its entirety.[5]

---

[4] *Admiral Merchants Motor Freight*, above at fn. 5.

[5] We also note that Alan Gailey's 16 March statements were preceded by an explanation of the nature of the Milgram concessions, their economic impact on independent grocers in the area, and the Respondent's need to maintain a competitive position in its market. Under the circumstances, where there is no indication whatsoever that the Respondent had bypassed the Union and where the Respondent has prefaced its statements with relevant, objective, economic considerations, we find that the 16 March statements were a legitimate expression of the Respondent's reasonable economic alternatives, protected by Sec. 8(c). The 17 March statement, as a continuation of the Respondent's communication with its employees, carried the same 8(c) protection.

With respect to our colleague's dissenting opinion, we disagree with his rhetorical inferences and evaluation of the circumstances of this case. As our analysis indicates, the facts here do not support the conclusion that the Respondent's conduct contravened the Sec. 7 rights of its employees.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

I do not agree with my colleagues that under the circumstances here the Respondent was privileged to threaten its employees with plant closure, job loss, unilateral wage cuts, and immutable bargaining demands. On the contrary, I would find that—despite the Union's request that the Respondent "condition" employees for wage concessions—the Respondent's statements unlawfully interfered with the employees' Section 7 right to engage in collective bargaining.

At a meeting with five key employees the Respondent's co-owner declared that if the employees failed to vote for midterm wage concessions the Respondent would (1) close or sell one of its three stores, (2) unilaterally reduce wages and fringe benefits, and (3) make the proposed concessions its only offer at the expiration of the collective-bargaining contract. The next day a store manager reiterated to an employee the threat to sell a store if concessions were not forthcoming.

My colleagues have reversed the judge's findings that these statements were violative of Section 8(a)(1) on the grounds that the Union suggested and consented to the Respondent's approaching the employees for "conditioning," and that the Respondent's statements were protected by Section 8(c) of the Act.

With respect to the first ground, the majority reasons that the Respondent's conduct was a "reasonably foreseeable consequence" of the Union's tentative endorsement of the wage concessions. In asking the Respondent to "condition" employees to accept concessions, the Union's statement cannot reasonably be interpreted as encouraging the Respondent to threaten employees with job loss or unilateral cuts if they did not agree to the concessions. That the Respondent may have so interpreted the Union's statement as permission or acquiescence does not make the threats permissible. At issue is the right of *employees* to be free of restraint or coercion with respect to their Section 7 rights; interference with that right cannot be excused simply because the Union may have encouraged the Respondent's conduct.

In addition I find no basis for my colleagues' conclusion that the threats expressed by the Respondent are the type of legitimate expression of views or economic predictions protected by Section 8(c). Accordingly, I would affirm the judge and I dissent from my colleagues' dismissal of the complaint.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to a charge filed March 16, 1983, a complaint issued on April 22, 1983, alleging that The General Store No. Two, Inc. (Respondent)[1] had violated Section 8(a)(1) of the National Labor Relations Act by threatening its employees with closure of a facility, unilateral wage reductions, and a refusal to bargain in good faith with the United Food and Commercial Workers Union, Local No. 576 (Union). Respondent's answer denied the commission of any unfair labor practice.

A hearing was held before me in Kansas City, Kansas, on July 5, 1983.[2] Briefs were filed by the General Counsel, the Charging Party, and the Respondent under due date of August 9, 1983.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Missouri corporation engaged in the retail sale of groceries, produce, meat, and related products at its facilities in Kansas City, Raytown, and North Kansas City, Missouri. Respondent's gross volume of business at these facilities exceeds $500,000 annually. In the course and conduct of its business operations within Missouri, Respondent annually purchases goods and services valued in excess of $50,000 from sources outside the State. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At all times relevant the Union has been the exclusive collective-bargaining representative of Respondent's sales employees. Respondent and the Union have been parties to a series of collective-bargaining agreements, the most recent of which was in effect from May 10, 1981, through September 10, 1983.[3] The Union also represents the employees of other grocers doing business in the Kansas City area and, by a February 24 contract supplement, it granted significant wage and benefit concessions to the Milgram grocery chain. Milgram's stores and those of Respondent are direct competitors.

Respondent is a member of the Retail Grocers Association of Greater Kansas City (Association). One of the Association's functions as a trade organization is to represent its members, including Respondent, in labor negotiations.

On March 8 the Association's executive director and its attorney met with Carl Nothnagel, the Union's president, to discuss the availability of the Milgram conces-

[1] Respondent was incorrectly identified in the complaint as "General Store Nos. 1 & 2, d/b/a Justrite Nos. 1, 2 and 3." On joint motion of the parties at the hearing, the complaint was amended to reflect Respondent's correct name.

[2] Transcript errors have been noted and corrected.

[3] All dates are in 1983, unless otherwise indicated.

sions to grocers who were members of the Association. Nothnagel stated that, before the Union could grant concessions to the Association's members, it would be necessary for the grocers to meet with and "condition" their employees concerning the concessions. The Association's attorney, citing the National Labor Relations Act, objected to the grocers talking directly to their employees. Nothnagel stated that no charges would be filed and that it would be necessary for the grocers to meet with their employees and discuss the concessions with them. Nothnagel also noted that an employee vote would have to be held on the question of whether to grant concessions.

On March 14, a meeting was held of the Association's membership. Representatives of the members, including Respondent's owners Jim Marsh and Alan Gailey, were told what had transpired at the March 8 meeting with Nothnagel, and each of the representatives was given a copy of the Milgram contract supplement, a letter from Milgram's president to its employees, and a handwritten chart showing the impact of the Milgram concessions on the members' employees. Also distributed was a draft letter to the Union requesting concessions similar to those granted Milgram in order to allow the Association's members to remain competitive. Gailey subsequently executed and mailed a copy of this letter to Nothnagel.

B. *The March 16 Meeting*

On March 16, Alan Gailey called a 9 a.m. meeting at his office in the Raytown store. Present were Gailey, Marsh, and five employees: the Kansas City store's produce manager Ronald Lybarger and Head Clerk Richard Sanchez, the North Kansas City store's produce manager William Stewart and Head Clerk Ruben Chavez and the Raytown store's produce manager Ralph Weant.

Gailey explained the Milgram concessions, as well as their impact on the grocery industry in the Kansas City area, and stated that Respondent needed comparable concessions to remain competitive and to maintain its market share. The Milgram contract supplement, the letter from Milgram's president, and the chart prepared by the Association were passed around. Gailey stated that the Union would soon hold a meeting to vote on whether to grant similar concessions to Respondent and other independent grocers. Gailey further stated that, even if the concessions were not approved by that vote, there would be a wage rollback in the relatively near future. He went on to explain that the moneys not paid to employees because of the rollback would be held in a escrow account pending the outcome of anticipated litigation.[4]

Gailey also told the assembled employees that, when the collective-bargaining agreement between Respondent and the Union expired in September, Respondent's only contract offer to the Union would be the Milgram concessions.[5] During the meeting, Stewart stated that he would not take a pay cut of the magnitude indicated, to which no response was made. Gailey stated at some point that it was a "hell of a cut" and that he was not sure whether he would vote for it himself. In response to Chavez' question of whether Respondent's employees would have to take the same pay cut if they voted the Union out, Gailey answered that the issue was not union or nonunion, but parity of wage costs among competing grocers. Gailey also stated that he would pay his employees $20 an hour if his competitors had the same wage costs.

Finally, Gailey told his employees that Respondent's North Kansas City store was losing money because of inadequate volume and that wage concessions might make that store profitable over the near term.[6] Gailey further stated that the North Kansas City store would have to be sold or closed without the wage concessions.[7]

Respondent did not implement the pay cuts discussed at this meeting, and Respondent's North Kansas City store had not been closed or sold at the time of the hearing.

C. *The March 17 Incident*

On March 17, a conversation took place at the front of Respondent's North Kansas City store between Stewart and Michael Gailey, the manager of that store. At the time of the conversation, Stewart and Gailey had maintained both a working and a social relationship for approximately 10 years. No one else was present during the conversation. Stewart and Gailey discussed the March 16 meeting and the Milgram concessions. This was not the first occasion on which they had discussed the concessions. Gailey told Stewart that Respondent would have to sell the North Kansas City store unless the wage concessions were accepted.[8] There is no evidence that Gailey talked to any other employee on this subject.

Discussion

The General Counsel contends that Alan Gailey's statements on March 16 constitute three separate violations of the Act: a threat to shut down an operation unless wage concessions were granted, a threat to unilaterally modify terms and conditions of employment, and a threat to refuse to bargain in good faith. Respondent argues that Gailey's statements were not threats when viewed in the context of everything which was said during the meeting and that his statements were part of an isolated incident and therefore de minimis.

It was established that Gailey stated that Respondent would sell or close one its stores unless wage concessions were granted, that it would make unilateral wage cuts, and that it would bargain from a fixed position on expi-

[4] The foregoing findings are based primarily on Gailey's admissions which were corroborated by the employees present at the meeting.

[5] Gailey's candid admission that he told his employees "this is the contract that we'll offer and that's all" was confirmed by Respondent's witness Weant who testified that Gailey stated that the Milgram concessions "would be the only contract that was offered" in September.

[6] Gailey so testified.

[7] The General Counsel's witnesses Stewart, Lybarger, and Chavez, as well as Respondent's witness Weant, so testified.

[8] Stewart so testified. Gailey conceded that he stated, in the conversational context of Respondent's competitors paying lower wages, that Respondent would have to sell the store before it lost too much money. To the extent that their versions of the conversation may be thought to be inconsistent, I credit Stewart who displayed the better memory of what occurred.

ration of the then current collective-bargaining agreement. By making these statements, Gailey threatened to inflict economic harm on his employees by engaging in conduct which was indisputably violative of the Act.[9] All three of these threats may reasonably be said to interfere with the free exercise of employee rights guaranteed by Section 7 of the Act, specifically of the right of Respondent's employees to bargain collectively concerning the terms and conditions of their employment. See *Admiral Merchants Motor Freight*, 265 NLRB 134 (1982). Given this finding, neither Gailey's intent in making the statements nor the ultimate coercive effect of those statements is material. *Fairleigh Dickinson University*, 264 NLRB 725 (1982); *National Apartment Leasing Co.*, 263 NLRB 15 (1982).

Because I found that Gailey's threats tended to interfere with the free exercise of employee rights, it is necessary to address Respondent's argument that those threats were merely an isolated incident which does not rise to the level of a violation of the Act. Gailey, acting pursuant to a union request to "condition" Respondent's work force to accept wage concessions, called together five admittedly "key" employees and threatened them. Those threats envisioned a serious economic impact on all of Respondent's employees and were made by an individual who had the power to carry them out. There is no evidence that Respondent ever attempted to retract or repudiate the threats. In this context, the presumption that such threats will be repeated to and discussed with other employees is clearly applicable. See *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977); *General Stencils*, 195 NLRB 1109, 1110 (1972). For the foregoing reasons, I find that all of Gailey's threats on March 16 were violative of Section 8(a)(1) of the Act.

[9] Gailey's statements therefore fall within one of the definitions of the term "threat" quoted by Respondent on brief: "an indication of something impending and usu. [sic] undesirable or unpleasant . . . as . . . expression of an intention to inflict loss or harm on another by illegal means . . . ."

The General Counsel contends that the conversation on March 17 at Respondent's North Kansas City store discloses a further violation of the Act. Respondent argues that the conversation was merely one "between individuals who had a working relationship for many years" and that it was an isolated incident. The existence of a long-standing social and working relationship between Stewart and Michael Gailey does not nullify the coercive effect of Gailey's statement. Indeed, a statement of serious economic consequences may have an even greater impact on an employee when it comes from a friend who is part of management. See *Coach & Equipment Sales Corp.*, supra; *Wichita Eagle & Beacon Publishing Co.*, 199 NLRB 360, 370 (1972) Contrary to Respondent's second argument, I do not believe that Michael Gailey's statement can be assessed standing alone. Rather, it must be considered in connection with and as corroborative of Alan Gailey's similar threat on March 16. Accordingly, I find that Michael Gailey's statement that the North Kansas City store would be have to be sold unless wage concessions were granted was a threat violative of Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening that (a) it would sell or close one of its stores unless its employees granted wage concessions, (b) it would unilaterally reduce employee wages, and (c) it would refuse to bargain in good faith by adopting a fixed and unalterable bargaining position, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices effect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Eli Gordon, Gerald Tillinger and Seymour Tillinger, a Copartnership, d/b/a Balsam Village Management Company *and* Local 32B-32J, Service Employees International Union, AFL-CIO. Case 27-CA-10276

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 17 October 1983 Administrative Law Judge Stanley N. Ohlbaum issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

For the reasons the judge stated, we agree that a *Gissel*[2] bargaining order is clearly warranted to remedy the Respondent's unfair labor practices, which the judge aptly described as the "unlawful discharge of an entire bargaining unit, lock, stock and barrel, for the express purpose of avoiding the statutory bargaining obligation."[3] We also agree with the judge's rejection of the Respondent's argument that a bargaining order should be denied because all three discriminatees declined reinstatement, and thus there has been substantial "employee turnover." As the judge pointed out, the Respondent's contention has "a hollow ring" because the "employee turnover" in this case was a direct and obvious product of the Respondent's own unlawful conduct.

Our dissenting colleague claims that a bargaining order is inconsistent with decisions of the Second Circuit. We disagree. In its *Jamaica Towing* opinion,[4] the court specifically cautioned against "rewarding an employer for his own misconduct," and limited consideration of the turnover factor to "cases where later relevant events are not of the employer's making." Here, the "employee turnover" was "of the employer's making," and withholding a bargaining order on that ground would be "rewarding an employer for his own misconduct." Accordingly, for all of the above reasons, we adopt the judge's recommendation that a *Gissel* bargaining order be issued.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eli Gordon, Gerald Tillinger and Seymour Tillinger, a Copartnership, d/b/a Balsam Village Management Company, New York, New York, its partners, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[3] We find it unnecessary to pass on the judge's alternative rationale for issuing a bargaining order.

[4] *NLRB v. Jamaica Towing*, 632 F.2d 208, 214 (2d Cir. 1980).

[5] Chairman Dotson finds the issuance of a bargaining order in this case arising in the Second Circuit to be contrary to the law of that circuit. See *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984); *NLRB v. Windsor Industries*, 730 F.2d 860 (2d Cir. 1984); *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984), and cases cited therein. While recognizing the severity of the Respondent's misconduct, Chairman Dotson finds that a bargaining order would impair the rights of the Respondent's current work force. In so finding he notes that the unlawfully discharged employees declined reinstatement to their former jobs. Thus, there is no continuity in the Company's work force before and after the unfair labor practices. Further, the record fails to show that the Respondent asked the replacement employees about their union sentiments, that the replacement employees exhibited any interest in the Union, or that the Union attempted to organize the new employees. No showing was made that the current employees discussed the Respondent's prior misconduct or that the Respondent has engaged in further antiunion activity. In view of the circumstances of this Second Circuit case, Chairman Dotson finds a bargaining order inappropriate.

DECISION

STATEMENT OF THE CASE

STANLEY N. OHLBAUM, Administrative Law Judge. This proceeding,[1] under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (Act), was litigated before me in Brooklyn, New York, on August 15 and 17, 1983, with all parties participating throughout by counsel afforded full opportunity to present evidence, arguments, and briefs (received on October 7, 1983). All have been carefully considered.

The basic issues presented are whether Respondent violated Section 8(a)(1), (3), and (5) of the Act by threatening employees with discharge and other reprisals for joining or supporting the Charging Party Union, by discharging (and, for a time, refusing to agree to reinstate) three employees for joining the Union and engaging in concerted activities protected under the Act, and by refusing to recognize and bargain with the Union as the authorized collective-bargaining representative of Respondent's employees. Respondent denies all of these allegations.

[1] Based on complaint issued April 5, 1983, by the Acting Regional Director for NLRB Region 29, growing out of charge filed on February 18, 1983, by the above Union.

On the entire record and my observation of the testimonial demeanor of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

I. PARTIES; JURISDICTION

At all material times, Respondent, a copartnership consisting of Eli Gordon, Gerald Tillinger, and Seymour Tillinger doing business under the firm name and style of Balsam Village Management Company, has continuously engaged and now engages in the management, operation, and rental of a garden apartment complex known as Balsam Village, at 88–15 133d Avenue, Borough and county of Queens, city and State of New York, at which address Respondent has also maintained and maintains its principal office and place of business. During the representative year immediately preceding issuance of the complaint, Respondent derived gross revenues exceeding $500,000 in and from those business operations; and, further therein, caused to be transported to and received at its said premises for its use in said business, goods and materials valued at over $5000, purchased from other enterprises in New York who in turn had purchased and received them directly in interstate commerce from and through other States.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all of those times Charging Party Union has been and is a labor organization as defined in Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

Respondent operates and manages an apartment house complex in Queens County, New York, covering some seven city blocks, consisting of 270 apartment units located in 45 six-family buildings. Prior to events to be described, upkeep, maintenance, and cleanup of the grounds, walks, and portions of the buildings used in common (hallways, stairs, doors, cellars, furnaces, etc.), as well as minor repairs (e.g., minor plumbing), were done by three employees who figure prominently in the events to be described. These were Carlos Casal, the "superintendent" (but not a supervisor within the Act's definition, since he lacked authority over and had no subordinates, and possessed no other characteristic of supervisorship listed in the Act) who tended some 118 boilers and water heaters and also made minor repairs within his capability; and Mario Aguila and Daniel Santos, who took care of the grounds (mowing lawns, keeping grass and walkways debris free, etc.) and general cleanup chores (hallways, stairways and rails, hall ceilings, windows, doors, mailboxes, vacuuming and waxing floors, laundry rooms, parking lots, project office, etc.). Major refurbishing was accomplished by outside contractors, including firms of the Tillinger brothers or Eli Gordon, the partners comprising Respondent partnership.[2] Until around the summer of 1982, Mattie Tillinger, wife of Respondent partner Seymour Tillinger, was in overall charge and management of the housing project. When she (Mrs. Seymour Tillinger) ceased functioning in that capacity, Respondent partner Eli Gordon commenced overseeing the project until Respondent partner Gerald (Jerry) Tillinger assumed that responsibility on a full-time basis in October 1982 (with Gordon continuing to participate on a part-time basis). The project office bookkeeping, correspondence, and related chores were handled by office manager/secretary Helen Lober in an office she shared with Jerry Tillinger (and Gordon). Respondent partner Seymour Tillinger has not taken an active part in Respondent's operations at the times here involved.

Because of dissatisfaction with the terms and conditions of their employment (including a cutback in medical insurance for dependents), in early December 1982 interest in the possibility of joining a union to bargain collectively, developed among these three employees, who (except for an occasional student here and there utilized occasionally and sporadically to assist with a chore, a part-time night watchman/guard, and the office manager/secretary), comprised the entire work force at the project. It was stipulated at the outset of the hearing that these three employees constituted the only employees in the bargaining unit alleged in the complaint, a conventional bargaining unit which I find appropriate for collective bargaining under the Act (and so admitted at the trial by amendment to the answer).

After meeting with a business agent (Anthony Poccio) of the Charging Party Union in January 1983 and, after discussions with him being satisfied to proceed along that line, Respondent's three employees joined the Union (paying the required initiation fees) and on January 20, 1983, signed cards (the meaning and significance of which they each clearly understood) authorizing the Union to represent them in collective bargaining. On January 25 or 26 the Union mailed receipts for these initiation fees to Casal *at the project* (in the mistaken belief that he lived there), although Casal lived off the project premises. That mail, in a window envelope showing the name and return address of the Union, and bearing the capitalized words "ENCLOSE YOUR UNION BOOK! DO NOT SEND CASH!," thus arrived at the *project office*, where it landed on the desk of Project Manager Jerry Tillinger, where it was observed by Casal on January 27 or 28 (Thursday or Friday). The envelope, perhaps opened,[3] was handed to Casal by Office Manager Lober on February 2 (Wednesday).

When the three employees discussed the *pros* and *cons* of union affiliation with Union Business Agent Poccio, the latter specifically warned them that "joining the Union could mean losing [your] jobs if the Employer [is] not in agreement with it." Unfortunately, this prediction of Poccio was precisely and rapidly fulfilled. On February 4 (Friday), payday, 2 days after the union envelope

[2] Some painting was occasionally done by one or the other of the foregoing three employees, on their own time, for extra or separate pay.

[3] Casal could not recollect one way or the other, since, as he testified, he was considerably unnerved by the incident—i.e., delivery of the envelope bearing the union name, addressed to him, at the project office, clearly disclosing connection with the Union.

with the union initiation fee receipts of Casal and his two fellow employees was handed to Casal by Lober, the three employees were summarily discharged.

Casal as well as Aguila had been in Respondent's employ uninterruptedly for some 6 years, since 1977; and Santos from 1980, with a hiatus from late 1980 to mid-1982 followed by rehire and continuous employment since then. As testified by these three individuals, whom I credit based on my close observation of their testimonial demeanor, no dissatisfaction had been expressed by management with the work of any of them.[4] At no time has Respondent furnished any of these employees with any writing stating any reason or basis for his discharge, and unemployment insurance benefits[5] to them were applied for and paid without objection or protest from Respondent.

The circumstances of the actual discharges were as follows. In the early afternoon of February 4 (Friday), Office Manager Lober summoned Casal to the project office, where he was met by Project Manager Jerry Tillinger and his partner, Gordon. Gordon opened up at Casal with, "This is not Manhattan. We cannot afford Unions here, and [you all] should have came and talked to me about this before you done anything about it. . . . We cannot afford Unions and you should talk the [other two] men out of getting into Union . . . . [We need your] cooperation for all of us to work together to try to bring the place back into shape and the Union will not let us do that. . . . [G]o and talk to them [i.e., his two fellow-employees] and talk them out of the Union. . . . if [you all] bring the Union [I'm] going to have to fire them and [I'm] going to have to accept your resignation. . . ." When Casal explained to Gordon and Tillinger that "it's too late, the men want the Union. We have talked about it," Gordon persisted, "Well, just go and talk to them, just tell them that they will lose their jobs. They have families to support and I'm sure they don't want to lose their jobs. Just go and talk to them and explain to them that there will be no job if they join the Union." Gordon also told Casal, "You have to decide whether you guys want to work here or you guys don't want to work here . . . unions are no good for the company . . . once you have a union you cannot work as a family any more . . . if the men don't want to give up the union, then they don't have a job. . . . [I]f [you don't] cooperate and get them out of the union, [we will] have to accept [your] resignation. . . . You have a family also . . . and [you have] to think about [your] family." Casal thereupon conveyed the foregoing to Aguila and Santos and told them that "you have to make a decision if you want the Union or not because he's firing you if you want the Union." Both Aguila and Santos indicated that they "wanted" and were "sticking with the Union." Casal returned to the project office and relayed this decision to Gordon and Tillinger, adding that "I'm sticking with the union with the men." Gordon then urged Casal to "come off the union [yourself] and [I'll] straighten it out with the men." When Casal reiterated, "No, I'm sticking with the union with the men," Gordon responded, "Well, if you're going to stick to the union, . . . then I accept your resignation also." At no time did Casal accept the invitation to "resign." Gordon proceeded to remonstrate with Casal again, urging anew that they give up the Union, this time adding, "You [Casal] know that you are the key for them to be in the Union. You know that if you don't join the Union they have no chance. They don't speak English. They will never be able to do anything, but you are the key." Gordon concluded by inviting Casal and his wife to join him for dinner that evening "and then we will all be a happy family again." As for Aguila and Santos, Gordon said, "they are finished. [I] cannot keep them any longer." And, when they came for their pay later in the afternoon, Gordon did indeed abruptly terminate them, stating that their jobs were "not going to be performed any longer . . . . [We] are not in the business to clean hallways. . . . [We are] doing a rental business and things [are] not doing well and besides . . . [you] don't speak English and we cannot use you for anything else. If you spoke English maybe we could try to put you doing something else."

Following the discharge of these three employees on February 4, the Union on February 7 formally requested to meet and bargain with Respondent (G.C. Exh. 2), a request received by Respondent on February 10 but to which Respondent has at no time responded. On February 8, continuing until mid-April, the three discharged employees picketed Respondent's premises. During the course of this picketing, replacement employees were observed to be doing the work they had formerly done.[6] Also during the course of this picketing, on February 25 Gordon approached the pickets and informed them that if they renounced the Union they could return to their jobs—a condition not accepted by the employees, who continued their picketing.

It was stipulated at the trial that on June 8, 1983, Respondent offered the three employees here reinstatement, which they declined.

It is evident from the foregoing facts as found that the General Counsel has established a clear prima facie case of inhibitory, restraining, coercive, discriminatory, and retaliatory discharge of the three employees in question, in violation of Section 8(a)(1) and (3) of the Act. The three had been satisfactory employees for a long time but were precipitately fired right after they joined the Union

[4] Some alleged correspondence from a very few alleged tenants out of the very large number of tenants, produced by Respondent, details certain alleged complaints to management. These, however (including nonreceipt of a copy of the lease, and various structural or outside repairs desired), from but few of the very large number of tenants in the project and constituting seemingly the usual kind of complaints from tenants, either obviously fall outside the scope of the duties or competence of the three employees or have not been shown to be ascribable in any way to any neglect, misfeasance, or nonfeasance on their part; nor is there any showing that any of these alleged conditions was ever reported or assigned to any of those employees for rectification, nor, if it was, that it was not taken care of.

[5] As is well known, such benefits are not payable in case of discharge for cause ascribable to the employee.

[6] Confirmed by Respondent's own personnel records, as testified to by Respondent's office manager Lober. Gordon also conceded that, after the discharge of Aguila and Santos, their work continued to be done by other employees hired to replace them; and that of the six hired, none was a union member.

and Respondent learned about it. Respondent's knowledge is clear not only from its receipt of the unfortunately misdirected union envelope containing the receipts for the three employees' initiation fees, but also, of course, from Gordon's remarks to Casal, detailed above, importuning Casal to persuade his fellows to drop out of the Union, on penalty of being discharged.

The General Counsel having established a prima facie case, the burden shifts to Respondent to establish by a preponderance of evidence that the discharges in question were not for reasons violative of the Act. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). It is accordingly necessary to address Respondent's defenses.

B. *Respondent's "Defenses"*

Respondent advances several contentions by way of defense. Each is readily and simply answered.

To begin with, Respondent contends that it no longer had need for the discharged employees' services. This is belied by the fact that no previous mention had been made to that effect, prior to their advent into unionism; by the nature of Respondent's business, which had not changed and which clearly continued to require such services; by Respondent's prompt hire of replacements for the discharged employees; and by Respondent's offer of reinstatement to the discharged employees.

Respondent next contends that it discharged Aguila and Santos because they could not speak English. The answers to this are that Respondent was aware of this when it hired them; that they remained in Respondent's employ for years without complaint or incident on that (or other) score; that knowledge of English was not required in the work they did, and ignorance of English in no way affected their job performance; and that they could and did carry on two-way conversations with Project Manager Tillinger in Spanish, which he spoke and understood.

Respondent further contends that Casal resigned his job voluntarily. This is simply untrue. Upon comparative testimonial demeanor evaluation, without more (as well as on the plain inherent probabilities of the situation under the circumstances described), I clearly prefer and accept the version of Casal (a most impressive witness) over that of Gordon (a poor quality witness, as the record also will disclose) as to the statements, circumstances, and events surrounding the employees' discharges on February 4.

Respondent also contends that the employees were discharged for inefficiency or inability to do the needed work. This also is belied by their long-term employments, during which Respondent had expressed no dissatisfaction with their work.[7]

As for other "defenses" darkly hinted at in Respondent's opening statement, suffice it to say that they did not emerge from that darkness at the trial, and that they therefore continue to be invisible and not deserving of mention, much less credit. Perhaps it is fair, however, to regard them as reflective of the fictive or pretextual nature of the other "reasons" contrived to attempt to justify the discharges under the circumstances shown.

Finally, it is to be observed that Jerry Tillinger, although deeply implicated in events that have been described, elected without explanation not to testify.

Under these circumstances, Respondent having failed by a preponderance of the evidence to overcome the General Counsel's prima facie case (*Transportation Management*, supra), it is found that Respondent threatened to and then discharged the three employees in question on February 4, 1983, because of their union membership and their desire to bargain collectively, rights guaranteed to them under Section 7 of the Act; that but for such union membership and their exercise of such rights they would not have been discharged, and that Respondent thereby violated and continues to violate Section 8(a)(1) and (3) of the Act; and, further, that by failing and refusing to bargain with Charging Party Union as the duly authorized collective-bargaining representative of an appropriate bargaining unit of Respondent's employees, Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act.

On the foregoing findings and the entire record, I state the following

Conclusions of Law

1. Jurisdiction is properly asserted here.

2. By threatening to discharge and by discharging its employees Carlos Casal, Mario Aguila, and Daniel Santos, at the times and under the circumstances described and found in section III, supra, Respondent has discriminated in regard to the hire, tenure, and terms and conditions of employment of its employees, and has further interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7, thereby violating Section 8(a)(3) and (1), of the Act.

3. By failing and refusing to recognize and bargain collectively with Local 32B–32J, Service Employees International Union, AFL–CIO as the duly designated bargaining representative of all of Respondent's employees in the following appropriate collective-bargaining unit, under the circumstances described and found in section II, supra, Respondent has violated Section 8(a)(5) and (1) of the Act:

> All building service employees, including porters, handymen and superintendents employed by Respondent at its Queens facility, exclusive of office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

4. The aforesaid unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

[7] I have already commented on the insignificant, irrelevant, or inconclusive nature of the few paltry "complaints" of a small number of tenants, many, if not most, which related to matters not within these employees' duties or competence, and as to which there was no proof that they were communicated to these employees for their action, nor that they were not attended to by them. Supra, fn. 4.

REMEDY

Respondent having been found to have discharged employees, after threatening to do so, and to have interfered with, restrained, and coerced them in the exercise of their Section 7 rights, in violation of Section 8(a)(3) and (1) of the Act, should, as is usual in cases of that variety, be ordered to cease and desist from continuing or other such violations and to make each of the employees whole through payment of backpay and interest computed as explicated by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977). In this connection it is to be noted that the parties have stipulated that the three discharged employees here were offered, but declined, reinstatement on June 8, 1983, and that with regard to the calculation of backpay, the General Counsel seeks no more for the three by way of recompense than the backpay due them until then. Respondent should also, as usual, be required to expunge any relevant deleterious references to these employees from its records; to preserve and open its books and records to the Board's agents for computation and compliance determination purposes; and to post the conventional informational notice to employees.

There arises the additional question of whether, as the General Counsel demands, a bargaining order should be issued in this case. In this connection it is to be noted that, at the time of their unlawful discharge as well as at the time of the Union's demand for recognition and collective bargaining, the three employees here constituted the entire (100 percent) bargaining unit. It is further to be noted that at no time was the status of the Union as such bargaining agent in any way challenged or questioned by Respondent—indeed, to the contrary, Respondent insisted that the three employees and Union members relinquish their union membership as a condition to being permitted to remain in Respondent's employ; and when they refused to do so they were for that reason promptly discharged. Employees who are discharged in violation of the Act remain employees within the Act's definition (Sec. 2(3)). Since the three unlawfully discharged employees were thus employees, as well as the only members of the bargaining unit, when Respondent received the Union's demand to bargain, the Union represented all of the employees in the bargaining unit at that time. In no way did Respondent challenge or raise any question concerning the union's authority as bargaining representative, and at no time did Respondent request an election. The Act does not *require* an election as a precondition to union recognition. An employer who doubts a union's representative status without an election should in some way so indicate. But here there was no doubt in Respondent's mind regarding the Union's status and authority. After a direct confrontation, the employees expressly refused to abandon the Union, when Respondent demanded that they do so as the cost of retaining their jobs. What better proof of their union desires (or of Respondent's knowledge thereof) was required? Thus, there was no question in Respondent's mind of the Union's status as the duly designated bargaining representative of *all* of the unit employees at the time the Union sought to bargain on their behalf. The fact that, on top of its discharge of these employees for joining the Union and seeking to bargaining collectively, Respondent later replaced them with a new and larger crew, does not change this. We have been long and consistently instructed by the Supreme Court that mere turnover—even, unlike here, where wholly legitimate—does not oust a union as bargaining representative. See *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 513 (1942); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *NLRB v. Katz*, 369 U.S. 736, 748 fn. 16 (1962); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969). And, of course, an employer cannot disestablish a bargaining unit or avoid his obligation to bargain by simply unlawfully discharging all of the unit members—this is so plain that it requires no citation of authority. Even if, after the bargaining obligation was perfected, the three employees here had left of their own accord and had been replaced by nonunion employees, the existing bargaining obligation would not thereby have been erased. *Gissel* and other cases cited supra. It is no different just because the three here subsequently declined reinstatement, for reasons good and sufficient to them, such as disinclination to give up other jobs they had since obtained. An employer cannot be permitted (as Respondent here attempted to do) to disestablish a bargaining unit through the simple expedient of discharging all of its members. Such a result would constitute an intolerable affront to the basic purposes of the Act. And since the effects of Respondent's actions remain coercive, they continue to require remediation so that deliberate flouting of core purposes of the Act not be encouraged by going unremedied.[8]

Respondent's refusal to recognize and bargain with the Union as the bargaining representative of all of its unit employees, without raising any question as to the Union's status or demanding an election, constituted a violation of Section 8(a)(5), as found above. In this situation, resort to *Gissel* to support an electionless bargaining order is unnecessary, for to withhold a bargaining order in this situation would leave the Section 8(a)(5) violation wholly unremedied.[9] However, even under *Gissel* a bargaining order would be appropriate under the circumstances shown—i.e., unlawful discharge of an entire bargaining unit, lock, stock, and barrel, for the express purpose of avoiding the statutory bargaining obligation. In *Gissel*, supra, the Supreme Court described the conditions where an electionless bargaining order is appropriate under the Act. The instant case fits comfortably within the Court's instructions there. I find that Respondent's described unlawful actions in discharging the three employees, comprising the entire bargaining unit, for attempting to exercise the statutorily guaranteed right to bargain collectively, was deliberate, egregious, and pervasive, thrusting at the heart of the Act's purposes

[8] For this reason (in addition to the 8(a)(5) violation described above), it matters not that the three unlawfully discharged employees do not desire reinstatement, since, if no effective remedy is provided, Respondent will have succeeded in its deliberate flouting of the Act.

[9] Neither a bargaining demand (or petition) nor an 8(a)(5) violation is a prerequisite for a *Gissel* electionless bargaining order. *Gissel*, supra at 610 and 614.

and guarantees; that it had and will "have the tendency to undermine majority strength and impede the election processes" (*Gissel*, supra at 614); that it was and continues to be of "'such a nature that [its] coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had'" (id. at 614); that, under the circumstances described and found, "the possibility of erasing the effects of [Respondent's] past practice and of ensuring a fair election . . . by the use of traditional remedies . . . is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" (id. at 614–615); and that there is "insufficient indication that an election . . . would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practice occurred" (id. at 616).[10]

An employer who discharges the entire bargaining unit because its members have designated a union to bargain collectively for them is hardly in a position to complain if required to bargain with the union without that fair election which it set out deliberately to abort by riding roughshod over its employees' rights and the law's requirements.[11] Respondent's current tongue-in-cheek protestation against an electionless *Gissel* bargaining order on the ground that it would deprive its present employees of the "free choice" of bargaining representative has a hollow ring, since it was Respondent itself who, by discharging all of its union employees, attempted to deprive them of that free choice through an uncoerced and fair election without unlawful interference on its part. Respondent's current argument, purportedly "seek[ing] to vindicate the rights of his employees" (*Brooks v. NLRB*, 348 U.S. 96, 103 (1954); see also *Ladies Garment Workers v. NLRB*, 374 F.2d 295, 308 (D.C. Cir. 1967), cert. denied 387 U.S. 942 (1967), who themselves seek no such "vindication," would be more appealing if Respondent had not deliberately terminated its union employees and replaced them with nonunion employees, thereby deranging the statutory election system by putting a heavy hand on the election scales. Respondent has changed the electorate to one of its own design. Its position is thus at odds with the principles enunciated by the Supreme Court 14 years ago in *Gissel*. Respondent's contention that it should no longer be required to bargain since, as a result of its unlawful discharge of the three employees here, it no longer employs any union personnel, smacks like that of the orphan who, convicted of murdering his parents, pleaded for mercy on the ground that he was a poor orphan. See *Franks Bros. Co.*, supra at 704.

Accordingly, on *Gissel* principles as well as because of Respondent's flat-out violation of Section 8(a)(5), a bargaining order is warranted and required here, and should be issued.

In view of the serious, egregious nature of Respondent's violation, thrusting at "the very heart of the Act,"[12] Respondent should also be required to cease and desist from any violation of the Act.[13]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondents, Eli Gordon, Gerald Tillinger and Seymour Tillinger, a Copartnership, d/b/a Balsam Village Management Company, New York, New York, their agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging or encouraging membership in any labor organization by discharging, terminating, laying off, furloughing, suspending, failing to recall or reinstate or rehire, threatening so to do, or otherwise discriminating in regard to the hire or tenure of employment or any term or condition of employment of any of its employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(c) In any other manner interfering with, restraining, or coercing any employee in the exercise of the right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of his or her own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Make the following employees whole for any loss of pay (including overtime, holiday, and vacation pay, and insurance benefits and reimbursements if any), together with interest, in the manner set forth in "The Remedy" portion of the decision of which this Order forms a part:

Carlos Casal
Mario Aguila
Daniel Santos

(b) Forthwith expunge from the personnel and employment records of each of said employees all statements or references that they (or any of them) were terminated or laid off by Respondent for any work related fault, deficiency, or reason; refrain from so reporting to any employer, prospective employer, employment

[10] See also *Amsterdam Wrecking & Salvage Co.*, 196 NLRB 113 (1972), enfd. 472 F.2d 153 (2d Cir. 1973); *Medley Distilling Co.*, 187 NLRB 84 (1970), enfd. 453 F.2d 374 (6th Cir. 1971); *Gibson Products Co.*, 185 NLRB 362 (1970).

[11] As has been pointed out, discriminatory discharge "goes to the very heart of the Act" (*A. J. Krajewski Mfg. Co.*, 180 NLRB 1071 (1970)) and is the "surest method of undermining a union's majority or impeding an election process" (*NLRB v. Sitton Tank Co.*, 467 F.2d 1371, 1372 (8th Cir. 1972)); and, accordingly, a bargaining order is on that basis alone warranted.

[12] *A. J. Krajewski Mfg. Co.*, 180 NLRB 1071 (1970).

[13] *NLRB v. Enwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941); *Hickmott Foods*, 242 NLRB 1357 (1979).

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

agency, reference seeker, or credit or character inquiry, or that such action by Respondent was in any way related to any union or other lawful activity by any of said employees under the Act; and notify said employees in writing that such entries in Respondent's records have been expunged and that evidence of said terminations or layoffs will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) On request, bargain collectively in good faith with Local 32B–32J, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of Respondent's employees in the following appropriate collective-bargaining unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached:

> All building service employees, including porters, handymen and superintendents employed by Respondent at its Queens facility, exclusive of office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

(e) Post at its premises at 88-15 133d Avenue, Borough and county of Queens, city and State of New York, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[15] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had the opportunity to present evidence and arguments, the National Labor Relations Board has decided that we have violated the National Labor Relations Act. We have therefore been ordered to post this notice and do what it says.

The National Labor Relations Act gives all employees these rights.

> To engage in self-organizaton
> To form, join, or help unions
> To bargain collectively through representatives of their own choosing
> To act together for collective bargaining or other mutual aid or protection
> To refrain from any or all of these things.

WE WILL NOT violate these rights of yours.

WE WILL NOT terminate the employment of, discharge, lay off, suspend, or refuse to reinstate you, or threaten to do so, because you seek to bargain collectively with us, or because you join or apply for membership in, affiliate with, designate as bargaining representative, or act on behalf of or in sympathy with, any labor organization, or because you exercise or seek to exercise any right under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to self-organization; to form, join, or assist any labor organization; to bargain collectively through representatives of your own choosing; to engage in concerted protected activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

WE WILL make whole the following employees for any wages and benefits lost by them because of their discharge by us on February 4, 1983, plus interest:

> Carlos Casal
> Mario Aguila
> Daniel Santos

WE WILL at once eliminate from our records all indications that any of the above employees was discharged or laid off for any deficiency in work performance, or for union membership or activity; WE WILL NOT so report to any employer, prospective employer, employment agency, or credit or character inquiry; WE WILL NOT use such terminations or layoffs as a basis for future personnel actions against said employees; and WE WILL so notify those employees in writing.

WE WILL, on request, recognize and bargain collectively with Local 32B–32J, Service Employees International Union, AFL–CIO, as the exclusive bargaining representative of our employees in the following appropriate unit, and embody in a signed agreement any understanding reached:

> All building service employees, including porters, handymen and superintendents employed by us at our Queens facility (Balsam Village), exclusive of

office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act.

ELI GORDON, GERALD TILLINGER AND SEYMOUR TILLINGER, A COPARTNERSHIP, D/B/A BALSAM VILLAGE MANAGEMENT COMPANY

International Brotherhood of Electrical Workers, Local Union 340, AFL–CIO *and* Hulse Electric *and* May-Han Electric, d/b/a M & M Electric *and* Clint McCubbin, Inc. *and* Rex Moore Electrical Company *and* Amos J. Walker, Inc. *and* Peters Electric Co. Cases 20–CB–5397, 20–CB–5441, 20–CB–5459, 20–CB–5490, 20–CB–5502, 20–CB–5504, 20–CB–5593, 20–CB–5651, 20–CB–5509, and 20–CB–5541

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 28 March 1983 Administrative Law Judge Jay R. Pollack issued the attached decision. The Charging Parties and the Respondent filed exceptions and supporting briefs, and the Charging Parties filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Electrical Workers, Local Union 340, AFL–CIO, Sacramento, California, its officers, agents, and representatives, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these consolidated cases in trial at Sacramento, California, on June 29 through July 12, 1982, and at San Francisco, California, on August 20, 1982. Thereafter, the record was reopened for one further day of trial on January 10, 1983. The cases arose as follows: Hulse Electric (Hulse) filed charges in Case 20–CB–5397 on August 17, 1981, against International Brotherhood of Electrical Workers, Local Union 340, AFL–CIO (Respondent or the Union). On October 15, May-Han Electric, d/b/a M & M Electric (M & M) filed charges in Case 20–CB–5441 against the Union. On October 30, the Acting Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent in Case 20–CB–5397 (the Hulse case). Clint McCubbin, Inc. (McCubbin) filed a charge against the Union in Case 20–CB–5459 on November 13. On November 30, the Acting Regional Director issued a complaint and notice of hearing against Respondent in Case 20–CB–5441 (the M & M case). On December 1, the Acting Regional Director issued an order consolidating Cases 20–CB–5397 and 20–CB–5441 for purposes of hearing. On December 16, the Acting Regional Director issued a complaint against Respondent in Case 20–CB–5459 (the McCubbin case) and that same date ordered the McCubbin case to be consolidated for purposes of hearing with the Hulse and M & M cases. On December 17, Rex Moore Electrical Company (Rex Moore) filed a charge against the Union in Case 20–CB–5490 and thereafter Rex Moore filed the charges in Cases 20–CB–5502 and 20–CB–5504 on January 12 and 14, 1982, respectively. Amos J. Walker, Inc. (Walker) filed the charge in Case 20–CB–5509 against the Union on January 21, 1982. On January 29, the Acting Regional Director issued a consolidated complaint in Cases 20–CB–5490 and 20–CB–5502 (the first two Rex Moore cases) and that same date issued an order consolidating those two cases for trial with the three outstanding complaints. On February 22, the Regional Director issued a complaint in Case 20–CB–5504 (the third Rex Moore case) and that same date issued an order consolidating that case for trial with the outstanding complaints in the five prior cases. On February 26, the Regional Director issued a complaint in Case 20–CB–5509 (the Amos Walker case) and that same date issued an order consolidating that case for trial with the preceding six cases. Peters Electric Co. (Peters) filed a charge in Case 20–CB–5541 against the Union on March 2. Thereafter, on April 29, the Regional Director issued a complaint against the Union and an order consolidating that case with the preceding seven cases. On May 21, Rex Moore filed the charge in Case 20–CB–5593. On June 11, 1982,

---

[1] The Charging Parties excepted to the judge's alleged failure to find that the charges in Cases 20–CB–5459 and 20–CB–5502 were filed by the National Electrical Contractors Association (NECA) on behalf of the named employers. The formal documents reveal that NECA filed the charges. The complaints in those cases, however, state that Clint McCubbin, Inc. and Rex Moore Electrical Company were the Charging Parties. At the hearing the discrepancy was addressed, but no motion was made to amend the pertinent complaints. At this stage in the proceeding, we find it unnecessary to amend the complaints because the charges were filed on behalf of the named employers, and the interests of NECA were fully represented by counsel for the Charging Parties.

[2] In affirming the judge's conclusion that the Respondent's action had a representational purpose, we find it unnecessary to rely on his finding that the Respondent was bound by statements of various pickets. See fn. 27 of the judge's decision.

[3] Chairman Dotson and Member Dennis agree with the judge that the fines imposed against Dale Pettit, Don Verga, and Doyle McDaniel violated Sec. 8(b)(1)(A). See *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984). In agreeing with his colleagues that these fines violated Sec. 8(b)(1)(A), Member Zimmerman relies on the fact that the fines were for conduct which occurred after the employees had effectively resigned their membership.

We find no merit in the Respondent's contention that the principles of *Typographical Union 101 (Washington Post)*, 242 NLRB 1079 (1979), are applicable in the circumstances of this case. See *Electrical Workers IBEW Local 340 (Royal Electric)*, 271 NLRB 995 fn. 5 (1984). In agreeing with his colleagues that the Respondent's fines against the union members who were supervisors of employees with whom the Respondent had an ongoing labor dispute violated Sec. 8(b)(1)(B), Member Zimmerman relies solely on the adoption of the judge's conclusion that the fines were designed to deprive the employees of their supervisors.

the Acting Regional Director issued amendments to the outstanding complaints in Cases 20–CB–5502 and 20–CB–5504 (the second and third Rex Moore cases) and issued a complaint in Case 20–CB–5593 (the fourth Rex Moore case). That same date the Acting Regional Director issued an order consolidating all nine cases for trial. On June 17, the Regional Director issued a consolidated complaint against the Union in Cases 20–CC–2499 and 20–CC–2504 and an order consolidating those cases with the preceding nine cases for purposes of trial.[1] As mentioned earlier, the consolidated trial closed on August 20, 1982. Thereafter, on September 1, Rex Moore filed a charge in Case 20–CB–5651 and pursuant thereto on October 21 the Regional Director issued a complaint and notice of hearing. That same date, the General Counsel filed a motion to reopen the record and to consolidate Case 20–CB–5651 with the previously litigated nine cases. On November 15, having received no opposition to the General Counsel's motion, I issued an order granting the motion.[2] As mentioned earlier, the record was reopened on January 10, 1983, for the purpose of taking evidence in Case 20–CB–5651.[3]

The Issues

The principal questions presented for decision are:

1. Whether Respondent violated Section 8(b)(1)(A) of the Act when it levied fines against employees Dale Pettit (Hulse), Don Verga (Peters), and Doyle McDaniel (Peters) for having worked for nonsignatory employers.

2. Whether Robert Hogan (McCubbin), Curtis Watson (M & M), John Reese (Amos Walker), Gary Wheeler (Rex Moore), Ted Barlow (Rex Moore), Don Sutton (Rex Moore), Robert Slack (Rex Moore), and Francisco Orden (Rex Moore) were supervisors within the meaning of Section 2(11) of the Act and representatives of their employers for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B).

3. Whether Respondent violated Section 8(b)(1)(B) of the Act by fining Hogan, Watson, Reese, Wheeler, Barlow, Sutton, Bailey, Zicarelli, Slack, and Orden.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the entire record, and from my observation of the demeanor of the witnesses and after due consideration of the briefs filed on behalf of the parties, I make the following

Findings of Fact and Conclusions

I. Jurisdiction

The parties stipulated that during 1981 Hulse, Peters, Rex Moore, McCubbin, Amos Walker, and M & M, all electrical contractors doing business in the greater Sacramento, California area, have each purchased and received goods and materials valued in excess of $50,000 directly from companies located outside the State of California. Accordingly, I find Hulse, Peters, Rex Moore, McCubbin, Amos Walker, and M & M, at all times material herein, have each been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Respondent has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

National Electrical Contractors Association, Inc., Sacramento Valley Chapter (NECA) is an association of employers engaged in electrical contracting which has as one of its purposes the representation of its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations. Respondent and NECA had a collective-bargaining relationship for approximately 40 years. The last collective-bargaining agreement between Respondent and NECA expired May 31, 1981. On June 11, 1981, Respondent commenced a strike against the employers in the NECA multiemployer bargaining group, including Rex Moore, McCubbin, Peters, Amos Walker, and M & M.[4] On September 15, the Union sent NECA a disclaimer of interest which provided:

> On behalf of Local Union 340, IBEW, this letter shall serve as, and constitute a disclaimer of interest by IBEW Local Union 340 in representing, for purposes of collective bargaining or any other purpose, the employees of the multi-bargaining unit previously established and consisting of the employees of the employer-members of the Sacramento Valley Chapter, of the National Electrical Contractors Association, Inc., and other employers who have, from time to time, agreed to become part of the multi-employer bargaining unit. This disclaimer covers the employees covered by the Inside Wireman's Agreement, the Line Agreement, and the Material Handler's Agreement, and is intended to disclaim interest as to the multi-employer bargaining units or unit previously created by these three separate labor contracts.

[1] On August 20, 1982, at hearing, Respondent and the General Counsel reached agreement on a formal settlement disposing of all the allegations in Cases 20–CC–2499 and 20–CC–2504. On September 17, 1982, I issued an order approving the settlement stipulation over the objections of the Charging Party, Rex Moore. On October 20, the Board issued a Decision and Order approving the settlement stipulation and providing for an order consistent with the settlement.

[2] On January 5, 1983, I issued an order denying the General Counsel's motion to consolidate the complaint against Respondent in Case 20–CB–5717 with the instant consolidated cases. Case 20–CB–5717 was filed by an employer that was not involved in the instant hearing.

[3] References hereinafter to the complaint refer to all nine complaints viewed as a whole.

[4] At the time the strike commenced, there were approximately 55 employers in the NECA bargaining unit.

On September 25, the Union filed 17 representation petitions in individual employer units for 17 employers, formerly in the NECA bargaining unit, including Peters and M & M. The Regional Director administratively dismissed the 17 petitions on the basis that the appropriate bargaining unit was the multiemployer unit.[5] On August 12, 1982, the Board directed a hearing on the issue of the continued existence or viability of the multiemployer unit. The Board Order is reported as *Arden Electric*, 263 NLRB 318 (1982). The hearing in the representation cases closed on February 28, 1983, and the decision in that case is now pending before the Board.

During the strike, employee Dale Pettit was fined for working for Hulse on June 18, 1981. All the other fines occurred after the Union's disclaimer of September 15. The complaint alleges that Pettit, Don Verga, and Doyle McDaniel were fined in violation of Section 8(b)(1)(A) on the ground that they had effectively resigned their union membership prior to the conduct for which they were fined. The complaint alleges that the fines of Ted Barlow, Gary Wheeler, Don Sutton, Tim Bailey, Robert Slack, Dale Zicarelli, Francisco Orden, Curtis Watson, Rober Hogan, and John Reese violated Section 8(b)(1)(B) on the theory that all were natural and potential representatives of their employers for the purposes of collective bargaining and the adjustment of grievances.

With respect to the 8(b)(1)(A) allegations, Respondent contends that the employees had not effectively resigned from union membership prior to engaging in the conduct for which they were fined. With respect to the 8(b)(1)(B) allegations, Respondent contends that the alleged supervisors did not possess the authority to bargain collectively or to adjust grievances and further that no violation could be found because the Union had previously disclaimed interest in representing the employees in the NECA multiemployer bargaining unit.

B. *Employee Dale Pettit*

Dale Pettit had been a member of IBEW Local Union 180 (a sister local of Respondent) in Vallejo, California, since approximately 1966. On June 16, 1981, Pettit had his wife, Valerie, type a letter to Local 180 stating that Pettit wished to resign his membership effective that same date. Valerie Pettit sent the letter by certified mail to Local 180 on June 16. On June 17, the Postal Service attempted to deliver the letter but was unable to do so. That same date a notice was left at Local 180's offices and on June 19 an official of Local 180 picked up Pettit's letter at the post office.

On June 18, Pettit was working for Hulse, a company against which the Union was on strike.[6] On that date, Al Romitti, a business representative for Respondent, visited the Hulse jobsite. Pettit told Romitti that he no longer belonged to the IBEW. Romitti answered that he was "sorry to hear it." Shortly thereafter, Romitti filed intraunion charges against Pettit, the substance of which provides:

> The alleged violation occurred on 6–18–81 at approximately 11:30 a.m., at Sycamore West Apartments, Covell and Sycamore and Alvarado Ave., Davis, California.
>
> The alleged violation occurred as follows: On entering the second cluster of apartments fronting Alvarado Ave. I observed Brother Petit [sic] installing electrical wall boxes. Upon further conversation I requested seeing his Union receipt and he stated he was not a member of the IBEW anymore. Upon returning to Local Union 340's office I received information to the contrary in that he is still a member of Local 180, IBEW. I also stated to Brother Petit that at this time Hulse Electric is not signatory to Local Union 340's agreement. Because of these violations, I feel Brother Petit has wronged the members of Local Union 340, IBEW.

On July 27, the Union's trial board conducted a meeting on the charges brought against Pettit by Romitti. Pettit did not attend the trial board meeting and was found in violation of the Union's bylaws and the IBEW's constitution. Pettit was fined a total of $12,020. The Union sent Pettit a letter on October 7 notifying him of the trial board's decision and fine.

C. *Employees Don Verga and Doyle McDaniel*

Don Verga had been a member of IBEW Local Union 234 in Castroville, California, since 1976. In November 1981, Verga called Ralph Gaines, a business agent for Local 234, and told Gaines that he had a job offer from Peters in Sacramento. Gaines invited Verga to talk about the matter that evening. Verga went to Gaines' home to talk about the job offer from Peters. Verga mentioned that the shop had a new union.[7] Gaines said that he had heard about the situation and suggested that Verga reconsider accepting the offer. Verga answered that he had been trying to get to the Sacramento area and that this job was a chance to do so. Verga then asked Gaines about obtaining a withdrawal from Local 234. Gaines said that Verga was not eligible for a withdrawal because Verga was still working in the trade. Verga then asked about quitting and Gaines said that Verga could not just quit. Finally, Gaines said that the only way Verga could get out of the Union was to quit paying dues. Verga then asked if his dues payments for November and December could be returned and Gaines answered no. Verga did not pay any further dues to Local 234 or to the IBEW.

Verga did not send a letter of resignation to Local 234. However, he sent a letter in November and again in

[5] On October 1, NECA signed a collective-bargaining agreement with the National Association of Independent Unions (NAIU), which agreement purported to cover the electrician employees of the employers previously involved in the negotiations between NECA and Respondent.

[6] Hulse was not a member of the NECA multiemployer bargaining unit but had signed a "me-too" agreement binding it to the terms and conditions of the NECA-Union 1978–81 bargaining agreement. While some "me-too" employers signed interim agreements with the Union, Hulse signed no agreement after the expiration of the 1978–1981 contract.

[7] The new union was the NAIU which had signed a collective-bargaining agreement with NECA about October 1.

January 1982 resigning from his position as vice president of Local 234. Verga testified that he resigned as vice president in writing because the "book" (the constitution and bylaws) required him to do so. He further testified that, when he heard that his November resignation was not mentioned at the union meeting or to his employer, he sent another resignation in January.

Doyle McDaniel had been a member of Respondent since approximately 1951. In December 1981, McDaniel called Lee Frith, Respondent's business manager, and told Frith that he had to return to work after the first of the year. McDaniel asked what he had to do "in case I wanted to go to work as a plumber, electrician, a carpenter or ditchdigger, whatever I had to find a job—that I had to do so that I wouldn't cause any problems with the Union or anyone else." Frith told McDaniel to send in a letter of withdrawal. McDaniel then wrote Frith seeking to withdraw his union card effective January 6, 1982. On January 12, Frith wrote McDaniel acknowledging receipt of McDaniel's withdrawal letter. Frith sent two withdrawal forms to McDaniel: (1) a form entitled "honorary withdrawal" which provided, inter alia, that McDaniel forfeit 30 years of pension credits and his life insurance policy; and (2) a form entitled "participatory withdrawal" which provided, inter alia, that the employee was no longer working in the electrical trade and would reactivate his membership in the Union if he returned to the electrical trade.[8] McDaniel did not fill out either form or respond to Frith's letter in any other manner. McDaniel testified that he did not sign the honorary withdrawal because he did not wish to forfeit his pension and did not sign the participatory withdrawal because, as he was still working in the electrical trade, the form did not apply to him.

On January 19, 1982, Chuck Cake, a business agent for Respondent, visited the Peters jobsite where Verga and McDaniel were working. Cake first spotted Verga on the job and said, "I can't believe that you're up here." Verga and McDaniel then spoke with Cake. McDaniel asked Cake why the Union was bothering them when employees for other contractors, such as Foss Electric,[9] were working without interference from the Union. Cake said that the Foss situation was different and that Frith was working with Foss Electric. Cake said that he would have to cite both Verga and McDaniel. Cake said that, if the employees could get their boss, Dave Rubins, to sign an agreement, the intraunion charges would be dropped. Verga said that he would see what he could do. Later that same day, Cake again asked McDaniel to talk to Rubins about signing a contract. Cake said he would drop the charges if Rubins signed a contract.

Cake filed intraunion charges against both Verga and McDaniel for working for Peters on January 19. A trial board meeting on the charges against McDaniel was held on April 2, 1982. Before the trial, McDaniel spoke with Cake. Cake had been unsuccessful in attempting to get Rubins to sign a contract[10] and told McDaniel that the Union would continue to process the charges. At the trial board meeting, McDaniel pleaded not guilty to all the charges on the ground that he was no longer a union member. A trial board member said that McDaniel could not withdraw but had to resign. McDaniel argued that Frith had never mentioned resignation and that he thought he had done everything necessary to free himself from the Union.

The trial board meeting on the charges against Verga was held on April 5. Just prior to seeing the trial board, Verga told Cake that Rubins would not talk about a contract until the charges against Verga and McDaniel were dropped. Cake again said that, if Rubins would sign a contract, the charges against Verga and McDaniel would be dropped. At the trial board meeting, Verga told the board members about his conversation with Gaines and that it was his belief that he had resigned from union membership.

On April 12, the Union's trial board found both Verga and McDaniel guilty of performing bargaining unit work for Peters. McDaniel was fined $11,604 and Verga was fined $19,287.20. However, on June 15, the fines against both McDaniel and Verga were rescinded by the trial board on the ground that the trial board hearings were untimely.

The Union concedes that its constitution places no restrictions on a member's ability to resign. However, Frith testified that it is the Union's policy that a written resignation is read at the next regular union meeting and that the resignation becomes effective the last day of the month in which the meeting was held, provided that the member's dues are paid through the month the resignation is submitted, the member is not indebted to the Union, and there are no pending charges in the Union against the member. According to Frith, the Union enforces this policy by letter to each individual who wants to resign. However, McDaniel, the only member of Respondent involved in this aspect of the case, did not receive such a letter. Verga and Pettit were members of other locals and there is no evidence of any restrictions on their ability to resign.

D. *Conclusions Regarding 8(b)(1)(A) Issues*

It is well settled that Section 7 of the Act guarantees to employees the right to resign from a labor organization. *Marlin Rockwell Corp.*, 114 NLRB 553, 561–562 (1955). Section 8(b)(1)(A) protects such rights by making it an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7."

The right of a union to fine an employee for violating a union rule and, therefore, escape the prohibition of Section 8(b)(1)(A) is dependent upon whether the em-

[8] Both the honorary and participatory withdrawals were not available to an employee who wished to continue working in the trade.

[9] The Union had agreed with Foss Electric that Foss employees, represented by the Union, could return to work about September 28, 1981. About February 12, 1982, Foss Electric signed a collective-bargaining agreement with the Union. Prior to October 1981, Foss Electric had been party to the NECA-Union negotiations.

[10] Rubins, the owner of Peters, testified that, in late January or early February, Cake attempted to have him sign a contract with the Union. Rubins told Cake that Peters was a member of NECA and was not free to sign with the Union. Cake insisted that Rubins could sign but Rubins refused to do so.

ployee has lawfully resigned his union membership. As the Supreme Court stated in *Granite State*:[11]

> Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.

See also *Machinists Local 405 v. NLRB*, 412 U.S. 84 (1973).

Where a union's constitution and bylaws are silent as to resignation, a member is free to resign at will. *Granite State*, supra; *Scofield v. NLRB*, 394 U.S. 423 (1969); *Electrical Workers IBEW Local 66 (Houston Lighting)*, 262 NLRB 483 (1982). Inherent in the union-member relationship is a duty on the part of the union to inform its members of any constitutional limitations placed on their statutory right to resign union membership. *Teamsters Local 439 (Loomis Courier)*, 237 NLRB 220, 223 (1978).

The legality of the instant fines depends primarily upon two issues: (1) whether the individuals effectively resigned their memberships in the Union, and (2) whether they were fined for postresignation conduct.

1. The fine of Dale Pettit

It is undisputed that Pettit sent a letter of resignation on June 16 to Respondent's sister local in Vallejo. On June 17, unable to deliver the letter, the Postal Service left a notice of attempted delivery. On June 19, an official of Local 180 picked up the letter. Pettit was fined for conduct which occurred on June 18. Thus, the issue is when did Pettit's resignation become effective.

The Board has held that, when a letter of resignation is mailed to a union, the resignation is not effective until it is received by the union. *Communications Workers Local 6135 (Southwestern Bell)*, 188 NLRB 971 (1971); *Broadcast Employees NABET Local 531 (Skateboard Products)*, 245 NLRB 638, 645 (1979).[12] There is no case dealing directly with the question of whether actual receipt is required. However, the Board has applied a presumption of receipt in cases where there was no evidence of actual receipt. See, e.g., *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1098 (1979); *Auto Workers Local 1384 (Ex-Cell-O Corp.)*, 219 NLRB 729 (1975); *Machinists District 99 (General Electric)*, 194 NLRB 938, 944–945 (1972). In *Hendricks-Miller*, supra, the Board held that the resignation letter was effective upon receipt notwithstanding that the union agent never saw the letter and was unable to locate it for the unfair labor practice hearing. In the present case, no presumption of delivery is required as the record reveals delivery on June 17. The fact that Local 180 did not pick up the letter until June 19 should not affect Pettit's rights. It appears no different than if Local 180 chose not to read the letter until June 19. Moreover, there is no evidence as to what date Local 180 considered the effective date of Pettit's resignation.[13] Under these circumstances, I find that Pettit's resignation was effective as of the close of business on June 17. Since Pettit was fined for conduct which took place on June 18, it appears that the entire fine levied against him was based on postresignation conduct. Accordingly, I find that by such conduct Respondent violated Section 8(b)(1)(A).

2. The fine of Don Verga

It is undisputed that Verga told Ralph Gaines of Local 234 that he wished to quit that union. Gaines said Verga could quit by simply not paying dues. Verga paid no further dues. Verga's letters of November 1981 and January 1982 stated that he wished to resign as union vice president. Those letters made no mention of resigning from union membership.

Absent lawful restrictions to the contrary, in order for an employee to effectively resign from membership, it is only necessary that he "clearly indicate that he no longer wishes to be bound by the union." *Houston Lighting*, supra; *Distillery Workers Local 80 (Capitol-Husting)*, 235 NLRB 1264 (1978). Thus, the Board has held oral resignations to be effective. See, e.g., *Carpenters Local 1233 (Polk Construction)*, 231 NLRB 756, 761 (1977); *Communications Workers Local 1127 (New York Telephone)*, 208 NLRB 258, 262–263 (1974). Further, inartful demands to "withdraw" from the union have been found by the Board to be sufficient on the ground that they clearly conveyed the intent to resign. *Capitol-Husting*, supra. See also *Polk Construction*, supra at 758–761.

In this case, Verga clearly indicated his intent to quit and acted consistently with Gaines' instruction that the only way to quit was to stop paying dues. While Verga's resignation from union office is misleading, there is no evidence to contradict Verga's testimony that the book required a written resignation of union office. There is no contention that a written resignation from membership was required. Further, neither Gaines nor any other official of Local 234 testified that Verga did not resign membership in Local 234 prior to January 19, 1982. Accordingly, I find that Verga effectively resigned from Local 234 in November 1981, and in any event no later than December 1981, the last month for which he had paid dues. Accordingly, Respondent's fine of Verga for his postresignation conduct of January 1982 violates Section 8(b)(1)(A) of the Act.

3. The fine of Doyle McDaniel

In December 1981, McDaniel called Frith and asked what he had to do to go back to work without having

[11] *NLRB v. Textile Workers Local 1029, Granite State Joint Board*, 409 U.S. 213, 217 (1972).

[12] In cases where the resignation is mailed to the union, the resignation is effective at the close of business on the date of receipt. *American Nurses' Assn.*, 250 NLRB 1324, 1329 (1980). However, where personal delivery was made, the Board found the resignation to be effective immediately. *Skateboard Products*, supra.

[13] The General Counsel apparently concedes Respondent's authority to fine members of sister locals. The General Counsel's allegations are based on the contention that the members had effectively resigned their union membership prior to engaging in the conduct for which they were fined.

any problems with the Union. Frith told McDaniel to send in a letter of withdrawal. About January 6, 1982, McDaniel followed Frith's instructions. However, on January 12, Frith wrote McDaniel acknowledging receipt of the withdrawal letter but enclosing two different withdrawal forms, neither of which satisfied McDaniel's needs. McDaniel took no further action to resign or withdraw from the Union and was fined for work on January 17 for Peters.

As mentioned earlier, a union has a duty to inform its members of any constitutional limitations placed upon their statutory right to resign union membership. McDaniel asked Frith what he had to do so that he could work without any union problems. Frith told McDaniel that he only had to withdraw and McDaniel followed those instructions. Frith made no mention of resignation and, accordingly, McDaniel did not use the word resignation. However, McDaniel clearly indicated to Frith his intention to be free of the Union's restrictions. There was no need for McDaniel to fill out any further form.

Respondent's defense appears to be that McDaniel mentioned withdrawal but not resignation. However, McDaniel clearly indicated his intention to be free of union discipline. Frith had a duty to notify McDaniel of the restrictions on withdrawals. Instead, Frith contributed to McDaniel's inartful attempt at resignation.[14] Frith never denied McDaniel's testimony that McDaniel indicated a desire to go back to work without union restriction. Under the authorities cited above, McDaniel's conversation with Frith would constitute a sufficient oral resignation. In any event, McDaniel's letter of withdrawal complied with Frith's instructions as to what McDaniel had to do to free himself from the Union's rules. Frith and Respondent cannot now contend otherwise. Thus, I find that McDaniel had effectively resigned from the Union prior to the conduct on January 19 for which he as fined. Accordingly, I find that Respondent violated Section 8(b)(1)(A) by fining McDaniel for postresignation conduct.

Although the fines of Verga and McDaniel were rescinded in June 1982, I find that the violation of the Act has not been repudiated. The fines were rescinded on the ground that the trial board's action was untimely. However, the Union took no action which would minimize the threat to the employees that the Union sought to restrict their postresignation conduct. It is the threat that is the core of cases involving postresignation discipline. See *Electrical Workers IBEW Local 2131 (Rucker Co.)*, 217 NLRB 46, 47 (1975); *Typographical Union 18 (Northwest Publications)*, 172 NLRB 2173 (1968).

E. *Curtis Watson, Superintendent for M & M*

1. Supervisory status

Curtis Watson has been employed by M & M since May 1979. In the fall of 1981, Watson was employed by M & M as a superintendent. M & M specializes in underground electrical work, i.e., traffic signals, street lighting, tennis courts, and ball parks. Approximately 65 percent of M & M's electrical work is traffic light work. Watson is the superintendent responsible for all of M & M's traffic light jobsites. Each project has a foreman who reports to Watson. Watson determines the foreman for each job and the size of the work crew. His duties include transferring men from site to site, including non-traffic light jobs. Watson transfers employees due to changes in the workload and has also transferred employees due to personality problems between workmen and the foremen on jobsites. On at least one occasion Watson fired an employee. Watson's recommendations for promotions of journeymen electricians to foremen are followed by Ross Price, general superintendent in charge of field operations, as a matter of course. Finally, Watson testified that he resolved at least two complaints by union business agents: one involving work jurisdiction and the other involving hiring procedures.

Based on the foregoing facts, I find that Curtis Watson is now, and has been at all times material herein, a supervisor of M & M within the meaning of Section 2(11) of the Act. I further find that Watson was a representative of M & M for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. See *Painters District Council 36 (Brown & Co.)*, 259 NLRB 808, 810 (1981).

2. The union discipline

Watson has been a member of a sister local of Respondent for approximately 30 years. Watson did not work for M & M during the strike but returned to M & M on September 21, after the Union's disclaimer letter.[15] On September 24, two union members observed Watson on an M & M jobsite helping some laborers with certain work which the laborers were having trouble performing. That same date the two members filed an intraunion charge with Respondent alleging that Watson was "working for an employer who has been on strike for 15 Weeks. [Watson] was working with five (5) laborers." Approximately 1 week later, M & M and the Union agreed that M & M's union workers could return to work.[16]

On November 2, Respondent's trial board conducted a trial on the charge brought against Watson. Watson explained that on the date in question he was acting in a supervisory capacity. He further argued that he was helping the Union by showing the futility of having laborers do the electrical work and that he was attempting to convince M & M to sign an agreement. At least one of the board members argued that M & M would not have held out so long without Watson's help. In addition, Watson presented a letter from M & M contending

[14] There is no contention that Frith explained Respondent's restriction on resignation, i.e., that resignations were effective on the last day of the month of the union meeting at which the resignation was read.

[15] Prior to the disclaimer letter, M & M had been party to the NECA-Union multiemployer bargaining.

[16] On September 25, the Union filed a representation petition seeking to represent M & M's employees in a single employer unit. As mentioned earlier, the Union filed 16 other representation petitions on that date. About September 28, the Union agreed that M & M's electrician employees could return to work. About February 12, 1982, Respondent and M & M signed a collective-bargaining agreement.

that the fine was invalid and stating that Watson "works in a supervisory position with authority to hire and fire, promote and discipline employees." There was no mention at the trial of the Union's September 15 disclaimer. By letter dated November 4, Watson was notified that he had been found guilty of the charges against him and was fined $3,921.60 ($2000 of which was suspended on condition that no similar violations occur for a period of 5 years).

F. *Robert Hogan, Estimator for McCubbin*

1. Supervisory status

Robert Hogan has been employed as an estimator by McCubbin for approximately 7 years. Hogan does approximately 99 percent of all the estimating for McCubbin's construction contracting. As estimator, Hogan has full responsibility for doing a complete "take-off" on a proposed job, i.e., estimating how much material, labor, and time would be needed to accomplish the proposed job. Once McCubbin is awarded a job, Hogan is responsible for ordering material, scheduling the job, coordinating with the general contractor, and going over the plans for the electrical work with the general contractor, owner, and/or government agency. Once a job is begun, Hogan is responsible for overseeing the progress of the job, ordering materials, scheduling, and billing. Hogan usually spends 1 day a week visiting jobsites and the other 4 days working in the office.

Hogan and Clint McCubbin, president of the Company, jointly determine who will be foreman for a job. The foreman has the authority to adjust minor disputes on the job, deal with safety problems, and send employees home due to inclement weather. However, if the foremen have any problems in these areas, they call Hogan or Clint McCubbin. The foremen determine how many men are needed for their crew and relay this information to Hogan. Hogan and Clint McCubbin then fill the foremen's needs. Hogan approves foremen's requests to lay off and/or transfer employees to other jobsites. Hogan hires employees, usually in consultation with McCubbin, and fires employees. Finally, Hogan has dealt with union officials concerning working conditions on McCubbin jobsites and on at least one occasion, after consultation with Clint McCubbin, resolved a union grievance by agreeing to pay certain moneys claimed by a sister local of Respondent.

Based on the foregoing facts, I find that Robert Hogan is now, and has been at all times material herein, a supervisor of McCubbin within the meaning of Section 2(11) of the Act. I further find that Hogan was a natural and potential representative of McCubbin for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.[17]

2. The union discipline

Hogan joined Respondent in March 1951. In approximately 1976, the Union notified Hogan that he was a member of management and could no longer participate in the Union's health and welfare, pension, and vacation programs. Thereafter, Hogan was covered by McCubbin's health and retirement plans for its nonunion personnel. However, in order to continue teaching for the Joint Apprentice Training Committee, he continued to pay dues to the Union. Hogan paid dues but not working assessments paid by full members. Thus, Hogan remained an "inactive" member of the Union.

On September 25, 1981, Robert Gately, a member of the Union, observed Hogan working with prints and a ruler on one of McCubbin's jobsites and filed charges with the Union against Hogan. Hogan had been measuring the wiring on that jobsite because it was a state job and McCubbin was paid by the linear foot for work completed. Hogan has not worked with the tools of the trade for over 20 years. On one occasion in October, he was spotted by a union member showing nonunion employees how to properly bend pipes. On November 2, the Union held a trial board meeting on the charges against Hogan.

Hogan attended the trial board meeting and pleaded not guilty to the charges against him. Hogan explained to the trial board that in 1976 the Union had notified him that he was part of management and could not participate in the Union's benefit plans. He said that he had been an inactive member since 1976. Hogan explained that he was not doing electrical work but was measuring for billing purposes on the date that he was cited. He further explained that he was not bending pipe as a workman but was teaching employees of McCubbin how to bend pipe. One of the trial board members, Gary Peterson, suggested that McCubbin could hire back Respondent's members. Hogan said he did not know how that could be done and Peterson said that the Union could file a petition as it did with Collins Electric and that McCubbin could have the same deal as Collins Electric.[18] Notwithstanding the Union's disclaimer of September 15, the trial board asserted that the Union was on strike against McCubbin. By letter dated November 5, Hogan was informed that he was found guilty and fined $2000 ($1000 of which was suspended on the condition that no similar violations occur for a period of 5 years).

G. *John Reese, Project Superintendent for Walker*

1. Supervisory status

John Reese has been employed by Walker for approximately 14 years. Reese has been project superintendent since October 1981. Prior to that time, Reese was a foreman. As project superintendent, Reese reports to either

[17] The fact that Clint McCubbin has final authority on matters involving collective bargaining and the adjustment of grievances does not change the result herein. Ultimate authority cannot be a prerequisite to supervisory or representative status, since in every corporation ultimate authority is vested in the board of directors. Cf. *Bentley Hedges Travel Service*, 263 NLRB 1408, 1412 (1982) (a case involving managerial status).

[18] The Union filed a petition seeking to represent Collins Electric's employees on September 25. Shortly thereafter, Collins Electric's union employees returned to work. Collins Electric signed an agreement with the Union in February 1982. However, no petition was filed for McCubbin's employees and McCubbin honored the October 1, NECA-NAIU multiemployer bargaining agreement.

Amos Walker, president, or Ray Roberts, estimator and designer.

Reese did not work for Walker during the Union's strike from June until September 1981. In October, he was hired by Amos Walker as a project superintendent.[19] Amos Walker gave Reese the authority to hire and fire employees and the overall responsibility for jobs under his supervision. In October, Reese was given the responsibility for approximately five jobs then in progress. Each job had its own foreman.

Once Walker is awarded a job, Reese has the responsibility of determining the material, equipment, and labor requirements of the job. He decides how many employees will be needed and chooses the job foreman. Once the job is begun, Reese continues to work with the general contractor and the foreman to monitor material, equipment, and labor requirements. Reese, rather than the foremen, authorizes overtime and transfers and/or lays off workers. The foremen notify Reese of changes in labor requirements and Reese hires, transfers, or lays off employees to meet those requirements. Reese has the authority to discipline and to discharge employees, which authority he has exercised on several occasions. Personnel and safety problems on the jobsites are usually handled by the foremen. However, if the foremen cannot resolve the problems, Reese is called in "like a fireman" to "put out the fires." Reese was involved in one grievance by the NAIU concerning an employee who had been fired by Reese. Reese met with an NAIU official to give his side of the story. That dispute has not been resolved at the time of the instant hearing.

Reese testified that he performs journeyman's work approximately 20 percent of the time. Richard Earl, a member of Respondent who filed the intraunion charges against Reese, testified that Reese spent 50 percent of his time performing journeyman electrician's work on a certain job in Sacramento. However, Earl admitted that he only observed Reese for brief periods and that the two men rarely worked in the same area.[20] Accordingly, I credit Reese's testimony that he performed such work only 20 percent of the time.

Based on the foregoing facts, I find that John Reese is now, and has been at all times material herein, a supervisor of Walker within the meaning of Section 2(11) of the Act. I further find that since October 1 Reese has been a natural and potential representative of Walker for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. The fact that Reese performs journeyman electrician's work approximately 20 percent of the time does not detract from his representative status. See *Carpenters (Skippy Enterprises)*, 211 NLRB 222, 225–226 (1974), enfd. 532 F.2d 47, 53 (7th Cir. 1976).

[19] Reese did not return to work for Walker until after the Union's disclaimer. Walker had been party to the NECA-Union negotiations and after the disclaimer Walker became party to the NECA-NAIU agreement of October 1.

[20] Earl was employed by another contractor on the same jobsite.

2. The union discipline

As mentioned earlier, Richard Earl filed charges against Reese which provided, inter alia:

> During the morning of 10/23/81 I observed John Reese installing and performing electrical work for Amos Walker Electric. With these actions I feel he has violated his contract and oath to the IBEW and has wronged other members.

The trial board meeting was held on December 7, 1981, but Reese did not attend. Business Agent Cake stated at the trial board meeting that Reese had told Cake that Reese was a journeyman and not a foreman. At the instant hearing, Cake testified that, as far as Cake and the Union were concerned, all foremen and superintendents continued to be journeymen. By letter dated December 9, Reese was notified that he had been found guilty of all charges and fined $5000.

H. *The Superintendents and Foremen of Rex Moore*

1. The supervisory hierarchy

Rex Moore had been party to the NECA-Union collective-bargaining agreement. In June 1981, when the Union commenced its strike, Rex Moore continued its Sacramento operations with replacement employees.[21] After the strike, Rex Moore's business increased. The combination of the hiring of strike replacements and the increased number of worksites caused Rex Moore to establish a new chain of command for the supervision of its construction projects.

The president and general manager of Rex Moore is Steven Moore. Under Steven Moore's supervision are Rodney Weckworth, vice president for construction and engineering, and two superintendents, Gary Wheeler and Ted Barlow. After the strike, Wheeler and Barlow were each promoted from foreman to superintendent. Wheeler and Barlow have responsibility for all the Company's construction jobs and maintenance jobs, including authority over the job foremen and electrical workers. Generally, Wheeler has authority over in-town projects and maintenance contracts and Barlow has authority on out-of-town projects. However, to even out the workload, Barlow has some in-town projects. Combined, Barlow and Wheeler have the responsibility of 50–60 jobs.

In November 1981, Rex Moore set up a new organizational structure to deal with the supervision problems created by the increase in its business and the change in its employee complement.[22] On December 2, Steven Moore held a meeting of the Company's managerial and supervisorial personnel, including Barlow and Wheeler and all its current and "potential" foremen. The two superintendents and all of the foremen and potential foremen were given written job descriptions. Steven Moore

[21] Rex Moore's out-of-town jobs continued under IBEW agreements with various sister locals of Respondent.

[22] In October, after the signing of the NECA-NAIU agreement, Rex Moore adopted that agreement and its strike replacements became NAIU members.

informed the foremen that problems and grievances should be funneled through the superintendents. Wheeler and Barlow told the foremen that foremen were to handle as many problems as possible on the job and only bring the larger, more difficult problems to the superintendents. Don Sutton, Tim Bailey, and Dale Zicarelli, foremen at issue in this case, were present at the meeting. Francisco Orden and Robert Slack were not hired until February and March 1982, respectively.

Wheeler and Barlow are responsible for every aspect of every Rex Moore project, including both construction and maintenance jobs. Wheeler and Barlow decide which one of them will be superintendent for the job and they jointly choose the foreman. When a project is first begun, Wheeler, Barlow, Moore, Weckworth, the estimator, and the foreman meet for a prejob conference. At the conference, a prejob agenda is developed, a copy of which is given to the foreman and the superintendent. Next the superintendent and foreman will go to the jobsite and discuss the plans and the material, equipment, and manpower needs. They will also discuss scheduling with the general contractor's representatives.

Wheeler and Barlow visit jobsites approximately once a week. On such occasions, the superintendent takes a "job walk" with the foreman to check on the progress of the job, including the quality of work, amount of work, materials, and any deviations from the plans. The superintendent and foreman fill out a project inspection checklist for each visit which covers, in detail, every aspect of the project, including labor costs and personnel problems. Every other Friday, the checklist for each job is reviewed by Barlow, Wheeler, Weckworth, and Steven Moore at their production meeting.

Wheeler has similar duties with regard to the Company's three large maintenance contracts. However, less supervision of the foreman is required on maintenance jobs because of the direct day-to-day contact between the foreman and the management of the facility.

As indicated earlier, if personnel problems arise on the job, the responsibility falls to the foreman. If the foreman cannot resolve the dispute then he will go to the superintendent for a resolution. Wheeler and Barlow have the authority to discharge, lay off, and transfer employees. Wheeler and Barlow have the responsibility of dealing with unions on the job about contract disputes or other grievances. On Barlow's out-of-town jobs, he has been involved in several disputes with sister locals of Respondent.

In general, all of Rex Moore's supervisors have the same authority. However, certain foremen are permitted more discretion based on the superintendent's confidence in that foreman. On the Company's construction jobs, the foremen have the day-to-day responsibility of running the jobs. The foremen request the number of men needed on the job. The superintendents then transfer men from other jobs or hire new employees. The superintendents attempt to transfer men to other jobs and, if there is no place for transfer, they have employees laid off. However, it is the foremen who choose which employees to transfer or lay off. The foremen can also request employees by name or by skill. The foremen have the authority to fire employees on the spot for misconduct. Moreover, the foremen have responsibility for the safety on their jobs and conduct safety meetings with their crews. The foremen have the authority to grant time off and recommend employees for promotions or raises. Finally, the foremen have the authority to deal with union representatives concerning problems on the job; however, if the resolution of the problem involves a lot of money, the problem is referred to the superintendent.

2. Gary Wheeler and Ted Barlow

As mentioned earlier, Wheeler and Barlow are superintendents who, combined, have 50–60 jobs under their supervision. Their duties include the supervision of foremen. They are involved in the resolution of job problems which cannot be resolved by their foremen, including labor-management disputes. There can be no doubt that Wheeler and Barlow are supervisors within the meaning of Section 2(11) of the Act and employer representatives for purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B).

Barlow has been employed by Rex Moore for approximately 13 years. At the time of the strike, he was employed as a foreman. In October, Barlow was rehired as a superintendent. Charges were filed against Barlow for working on December 10, 1981, for Rex Moore. The charge alleged:

> Theodore Barlow has been a member of the IBEW for 23 years and has not terminated his contract with the IBEW. He has not furthered the purposes of the IBEW and has sacrificed its interest in the following manner—working for a contractor who is not signatory to an IBEW agreement with Local Union 340. Barlow has wronged the other members of the IBEW by causing economic harm.

On February 1, 1982, the Union's trial board held a meeting on the charge against Barlow but Barlow did not attend. At the trial board meeting it was mentioned that Barlow was not the foreman on the job but was overseeing the foreman. There was no discussion of the Union's disclaimer of September 15. By letter dated February 9, Barlow was notified that he had been found guilty and fined $2978.

Respondent's business agent Romitti filed the charges against Wheeler for working for an employer "who is no longer signatory to an IBEW agreement with Local 340." On January 18, 1982, the Union's trial board met to consider the charges against Wheeler but Wheeler did not attend the meeting. The trial board discussion revealed that on that date Wheeler crossed a union picket line to visit the job.[23] It was further discussed that prior to the strike Wheeler had been a foreman. By letter dated February 4, Wheeler was notified that he had been found guilty and fined $6500.

[23] The Union was picketing Rex Moore with picket signs alleging that Rex Moore did not pay prevailing wages.

3. Francisco Orden

Francisco Orden first went to work for Rex Moore in 1971. In 1974, he became a foreman and continued to work as a foreman until the strike in June 1981. In February 1982, Orden was rehired by Steven Moore, Weckworth, Wheeler, and Barlow as a foreman. Orden accepted the job on condition that he would not be required to work with the tools of the trade.

On his return to Rex Moore, Orden first became foreman for a job under the supervision of Barlow. Orden had from five to seven men working under his supervision. Because Orden was not familiar with the men then working for Rex Moore, Barlow helped Orden choose the men to be hired for this job. Orden determined the number of men needed and ordered the materials for the job. Orden did not fire any employees on this job but did lay off one employee due to a lack of work.

In March 1982, Orden became foreman of a warehouse job at which he supervised a crew of five or six employees. Three employees were transferred to this job from Orden's former job and Orden hired an additional two or three employees. Four weeks later, Orden was transferred to another jobsite for Rex Moore. In May 1982, Orden became a project manager. Orden hired Tim Bailey to be foreman over a crew of 7 to 10 men on one aspect of the job. Orden requested a crew of employees that had previously worked with Bailey on another jobsite. This crew was transferred over a period of time from other Rex Moore jobsites. Thereafter, Orden hired an additional foreman. Initially, Orden reported directly to Wheeler for this job. However, due to the press of work, after a period of approximately 1 month, Orden began to skip Wheeler and report directly to Steven Moore. Orden would show the foremen in detail what work he wanted done and the priority of work. The foremen would then lay out the work for their crews. The direct supervision of the workmen was left to the foremen. The foremen had the responsibility of adjusting minor problems on the job, such as personality conflicts. If the foremen could not resolve such problems, they would be brought to Orden. On one occasion, after an employee had a personality conflict with two different foremen, Orden fired the employee. On another occasion, Orden fired an employee who had been given two warnings by Bailey. Orden testified that neither he nor his foremen had any responsibility regarding Rex Moore's collective-bargaining agreement.

About June 4, 1982, Charles Lux, a member of Respondent, filed a charge against Orden for "working for an employer who is no longer signatory to an IBEW agreement with Local Union 340." On July 19, a trial board meeting was held on these charges, but Orden did not attend. By letter dated July 26, Orden was notified that he had been fined $10,108.

4. Tim Bailey, Don Sutton, Robert Slack, and Dale Zicarelli

Tim Bailey was hired by Rex Moore in August 1981 as a general foreman. As general foreman, Bailey instructed his crew on what was expected of them on a daily basis. Bailey kept a record of each workman's time and a job journal. Bailey was also responsible for ordering the materials on the job. Bailey worked closely with the engineers on the jobsite. Based on the workload, Bailey would call Wheeler for additional workmen. When the workload eased, Bailey would call Wheeler to find out whether men should be transferred to other jobs or laid off. On at least one occasion, Bailey resolved a complaint from two employees by assigning the employees to a different area of the jobsite. Bailey recommended employees for raises. Bailey had two employees transferred to another jobsite because they were not capable of performing certain work. Bailey authorized overtime and also sent men home early because of inclement weather.

On February 24, 1982, Cake filed charges against Bailey for working on February 24 "for an employer who is no longer signatory to an IBEW agreement with Local Union 340." Bailey did not attend the Union's trial board meeting of April 26. By letter dated May 4, Bailey was notified that he had been fined $9604 for "performing bargaining unit work while employed by Rex Moore Electric."

Don Sutton was hired by Weckworth in October 1981 as a foreman for an office building jobsite. Although Sutton had a smaller crew than most foremen, there was testimony that Sutton had the same authority as the other foremen. In addition, there was testimony that Sutton made various changes in the plans for his jobs. On several occasions, Sutton called Wheeler to have particular employees transferred or laid off. Sutton terminated one employee. On one occasion, employees under Sutton's supervision complained about a safety problem. Sutton went to the general contractor's superintendent and had the problem taken care of.

About April 8, 1982, Cake filed charges against Sutton for "working for an employer who is no longer signatory to an IBEW agreement with Local Union 340." On May 17, the trial board held a meeting on these charges but Sutton did not attend. On May 26, Sutton was notified that he was fined $10,640 for "performing bargaining unit work while employed by Rex Moore Electric."

Robert Slack began working for Rex Moore in March 1982 as a foreman. Slack was hired by Wheeler to be a foreman on a job in downtown Sacramento. Wheeler hired the crew for the job. Slack's crew varied in size from 5 to 11 workmen. Slack had the authority to assign work and transfer and discipline workmen, including discharge. On this particular job, Dan Strain was also a foreman for a separate work crew. Slack and Strain transferred men between their crews depending on the press of work. The job walks were done by Wheeler with the two foremen, Slack and Strain.

On April 8, Cake filed intraunion charges against Slack for "working for an employer who is no longer signatory to an IBEW agreement with Local Union 340." On May 17, the Union's trial board held a meeting on these charges. Slack attended the meeting and was questioned about his work for Rex Moore. Slack denied that he was a foreman and told the trial board members

that he was not training other employees.[24] During the meeting Cake said "if Rex Moore couldn't get qualified people maybe Rex Moore wouldn't be in the position that he's in right now and maybe he could be coming back knocking at our door." On May 26, Slack was notified that he was found guilty of "performing bargaining unit work while employed by Rex Moore Electric" and fined $10,640.

Dale Zicarelli did not testify at the instant hearing. Zicarelli was a foreman for Rex Moore at a maintenance jobsite known as the Almond Growers' facility. The evidence indicates that Zicarelli had the same authority as the other Rex Moore foremen. Zicarelli reported to Wheeler on that job but worked closely with the facility's engineers. Zicarelli had the authority to determine the number of men needed and to direct the crew in its work. Zicarelli laid off and transferred employees. Further, Zicarelli recommended employees for promotion and raises.

On December 22, Cake filed an intraunion charge against Zicarelli for working at the Almond Growers' facility for Rex Moore. The trial board meeting was held on February 1, 1982, but Zicarelli did not attend. The trial board members noted that Zicarelli had an honorary withdrawal from another IBEW local. On February 9, the Union notified Zicarelli that he had been found guilty of "performing bargaining unit work while employed by Rex Moore Electric Company" and fined $3000.

I. *Conclusions Regarding the Foremen of Rex Moore*

As mentioned earlier, Wheeler and Barlow, the superintendents, are supervisors within the meaning of Section 2(11) of the Act and employer representatives for purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. The issue is closer with regard to the foremen.

Section 2(11) of the Act states:

> The term "supervisor" means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The possession of any one of the authorities specified in Section 2(11) is sufficient to place an employee in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Fair Lady, Inc.*, 211 NLRB 189 (1974).

On the other hand, the legislative history of Section 2(11) indicates that Congress intentionally distinguished between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. Thus, a leadman or straw boss may give minor orders or directives or supervise the work of others, but he is *not necessarily* a part of management and a 'supervisor' within the Act." 263 NLRB 380, 385 (1982), citing *NLRB v. Doctor's Hospital of Modesto*, 489 F.2d 772, 776 (9th Cir. 1973). The critical issue herein is whether the foremen exercised independent judgment in performing supervisory duties in the interest of their employer.

The Rex Moore foremen physically lay out the work for their crews and assign employees to various tasks. The foremen transfer or lay off employees when the workload requires such action. While the superintendent determines whether transfer or layoff is required, it is the foreman who determines which employees will remain with the job and which will be transferred or laid off. The foremen have the authority to discipline employees, including transfer, layoff, and discharge. The foremen effectively recommend pay increases and promotion. The foremen resolve such employee problems as safety, personality conflicts, requests for different assignments, and requests for time off. Superintendents Wheeler and Barlow have approximately 30 jobs each and, therefore, visit the jobs only once a week. At all other times, the foreman is the responsible Rex Moore official on the jobsite. Thus, the foreman represents Rex Moore in dealing with the general contractor on the jobsite and in dealing with the employees. Only if the foreman cannot resolve problems on the job are the matters brought to the attention of the superintendent. Thus, the record reveals that Foremen Bailey, Sutton, Slack, and Zicarelli possessed and exercised authority sufficient to find them to be supervisors within the meaning of the Act. Further, I find that the exercise of such authority required independent judgment and was not merely routine or clerical.[25]

Orden, as project manager, had two foremen working under him, each supervising a crew of electricians. As I have found the foremen to be supervisors, it follows that their supervisor, Orden, must have possessed supervisory authority. The facts bear this out; Orden hired a foreman and transferred another foreman. Moreover, Orden fired two employees after the foreman's warnings went un-

[24] Slack testified that he lied about being a foreman in the hope that the trial board would lessen his fine. The fact that Respondent did not know that Slack was a foreman appears irrelevant in view of the Board cases holding that such lack of knowledge is not a defense to an 8(b)(1)(B) violation. See e.g., *Skippy Enterprises*, 211 NLRB at 227. See also *Brown & Co.*, supra at 811. Moreover, the evidence shows that in this case the Union considered all superintendents and foremen to be journeymen electricians and that the Union was not concerned with the representatitive status of any of the individuals. See *American Broadcasting Co. v. Writers Guild*, 473 U.S. 411, 420–421 (1978).

[25] While there is some evidentiary conflict as to the amount of manual work performed by certain of the foremen, I find it unnecessary to resolve this conflict. The fact that working foremen perform manual work as well as direct others does not detract from their statutory supervisory status. *E.E.E. Co.*, 171 NLRB 982 (1968); *Penco Enterprises*, 201 NLRB 29, 31 (1973).

This is not a case where the normal amount of manual work performed by the supervisors increased during the course of a strike. See *Polk Construction*, supra at 761–762. Here, by sending its disclaimer letter of September 15, the Union ended its strike against the employers. The job duties of the foremen at issue were established after the strike had ended.

heeded. Accordingly, I find Orden to be a supervisor within the meaning of the Act.

Respondent contends that none of the supervisors herein engaged in collective bargaining or the adjustment of grievances and, therefore, are not covered by Section 8(b)(1)(B). However, under the Board's "reservoir doctrine," the Board interprets the term "representative for the purpose of collective bargaining or the adjustment of grievance" broadly so as to include all individuals who are supervisors within the meaning of Section 2(11) on the ground that such individuals from the logical "reservoir" from which the employer is likely to select his representatives for collective bargaining or grievance adjustment. See, e.g., *Lithographers & Photo-Engravers Local 15-P (Toledo Blade)*, 175 NLRB 1072 (1969), enfd. 437 F.2d 55 (6th Cir. 1971). Recently, in *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn. 6 (1982), the Board reaffirmed its adherence to the reservoir doctrine and its position that all supervisors within the meaning of Section 2(11) are representatives within the intent of Section 8(b)(1)(B).

Even without resort to the reservior doctrine, the evidence establishes that the foremen herein adjusted grievances. The foremen granted employees time off to attend to personal business, resolved personality conflicts, resolved personal complaints concerning job assignments, and resolved complaints concerning job safety. The Board has broadly interpreted the term grievances as used in both Section 2(11) and Section 8(b)(1)(B) so as to include not only contractual grievances but also personal grievances. *Typographical Union 529 (Hour Publishing)*, 241 NLRB 310, 315 (1979); *Toledo Blade*, supra.

J. *The Bargaining Relationship*

As mentioned earlier, the Union had a longstanding collective-bargaining relationship with NECA. Except for Hulse, which had signed a "me-too" agreement, all the companies involved herein were party to the NECA-Union negotiations of 1981. The 1978–1981 agreement expired on May 31, 1981. On June 10, the Union commenced a strike against NECA and its employer-members and some of the "me-too" contractors, including Hulse.

The strike was in progress on September 15 when the Union sent its disclaimer letter. On September 16, NECA sent a telegram accepting the disclaimer. On September 25, the Union filed 17 representation petitions seeking to represent the employees of 17 NECA employer-members, including M & M and Peters. On October 1, NECA signed a collective-bargaining agreement with the NAIU. Seven of the employers involved in the representation cases reached agreement with the Union permitting the employees to return to work about October 1. Thereafter, these seven employers signed separate collective-bargaining agreements with the Union in February 1982. M & M is the only employer involved herein that reached agreement with the Union. Peters, Rex Moore, McCubbin, and Amos Walker have adopted the NECA-NAIU collective-bargaining agreement.

Between the Union's disclaimer of September 15 and NECA's execution of a collective-bargaining agreement with the NAIU on October 1, the IBEW, the Union's parent organization, attempting to bring NECA and the Union back together again. On September 24, the Union's attorney wrote the IBEW's vice president for the geographic area which includes Sacramento concerning the disclaimer. The attorney's letter contains, inter alia, the following passage which sheds light on the Union's disclaimer:

> In late August and early September, Business Manager Frith asked me for advice concerning the legality of and procedures for disclaiming interest in the multi-employer bargaining unit represented by NECA. He asked me what impact a disclaimer would have on the NECA members and whether a disclaimer would free those NECA members who Frith felt wanted to bargain in good faith with Local 340. I understood then and now understand that the NECA negotiation committee and Board of Directors was and is dominated by employers who want to go non-union. Those NECA members who really wanted a fair contract and wanted to bargain in good faith had been kept out of the negotiations and [were] ignorant of the progress of negotiations. However, these same employers had signed a Power of Attorney with NECA to represent them and up to this point had not chosen to attempt to break away from the multi-employer unit and request individual bargaining.
>
> Brother Frith also inquired whether NECA could foster an RD election petition or file an RM election petition in an attempt to oust Local 340 from its position as bargaining representative. As you know, those NECA contractors who had shown their true colors at the bargaining table had hired scab replacements during the strike. In fact, NECA had already placed the newspaper ad for strike replacements *before* the strike was called and *before* impasse had been reached in negotiations.
>
> I advised Brother Frith that a disclaimer of interest was legally possible, but would have to extend to the whole multi-employer bargaining unit. I advised him that a disclaimer would cause a halt to his strike and prohibit him from demanding further bargaining with NECA on a multi-employer basis.
>
> Therefore, with this history of bad faith bargaining, lawsuits and NLRB charges, Brother Frith presented the matter of a disclaimer to the membership for its consideration. Although I was not asked to express an opinion as to the wisdom of disclaiming interest, it is my opinion that it was a realistic move to make considering the tactics employed by NECA and the possibility that the disclaimer would prompt the good contractors into action.
>
> I further advised Brother Frith that the disclaimer would permit the individual employers to grant recognition to Local 340 on an individual basis and to bargain on a single employer basis. However, I explained that the disclaimer would not have the effect of voiding the Power of Attorney. Should any employer wish to bargain individually with Local 340, it would still have to use NECA as its

bargaining agent. Whether NECA would refuse to act on behalf of any employer on this basis (and whether the employer itself would seize this refusal as an opportunity to break the Power of Attorney) were matters for speculation.

On December 29, the Regional Director administratively dismissed the Union's 17 representation petitions. On September 12, 1982, the Board reversed the Regional Director and ordered that a hearing be held limited to the issue of the continuing existence or viability of the NECA multiemployer bargaining unit which the Regional Director had administratively found to be a bar to the 17 petitions. The consolidated representation hearing was consolidated with an unfair labor practice case, *Grason Electric*, Case 20–CA–16872. That consolidated hearing closed on February 28, 1983, and the unfair labor practice case is now pending before me for decision.[26] In *Grason Electric*, the Union charged, inter alia, that the collective-bargaining agreement between NECA and NAIU violated Section 8(a)(2) of the Act.

The General Counsel and the Charging Parties introduced evidence showing that notwithstanding its disclaimer the Union picketed Rex Moore allegedly for representational purposes. As no case alleging a violation of Section 8(b)(7) of the Act is before me, I make no findings regarding the Union's purpose in picketing Rex Moore. However, I note that certain statements made by union pickets are relevant to the instant case.[27] In June 1982, a union picket, at a picket line established by the Union on a Rex Moore jobsite, told Wheeler that the Union hoped that "everything would get back together, all the small contractors and stuff would try to go back to the IBEW and eventually Rex Moore and the bigger contractors would try to come back." In July, a picket, on a union picket line at a Rex Moore jobsite, told Moore that he "hoped it [the picketing] would be over as soon as things got all back together."

K. *Conclusions Regarding 8(b)(1)(B) Violations*

Section 8(b)(1)(B) of the Act provides that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The applicable principles of law are set forth in *Plumbers Local 364 (West Coast Contractors)*, 254 NLRB 1123, 1125 (1981):[28]

> Section 8(b)(1)(B) prohibits both direct union pressure—for example, strikes—to force replacement of grievance representatives and indirect union pressure—for example, union discipline of supervisor-members—which may adversely affect the chosen supervisors' performance of their representative functions. *American Broadcasting Companies v. Writers Guild of America, West, Inc.*, 437 U.S. 411 (1978); *New Mexico District of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500, 502 (1969), enfd. 454 F.2d 1116 (10th Cir. 1972); and *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Skippy Enterprises, Inc.)*, 218 NLRB 1063, 1064 (1975), enfd. 532 F.2d 47 (7th Cir. 1976).
>
> It is also well settled that union discipline of supervisor-members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B). In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance adjustment services of his chosen representative. *American Broadcasting Companies, supra* at 433–437, fn. 36; *N.L.R.B. v. International Union of Operating Engineers, Local Union No. 501, AFL–CIO*, 580 F.2d 359, 360 (9th Cir. 1978); *A. S. Horner, supra* at 502; and [*Skippy Enterprises*, 532 F.2d at 52–53.] Such discipline is unlawful even where, as here, the supervisor defies the union and continues to work for the employer during the dispute; the discipline is unlawful because the supervisor, having been disciplined for working during a labor dispute, may reasonably fear further discipline and, hence, will be deterred from working during any future disputes. The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance adjustment representative. *American Broadcasting Companies*, supra at 433–437.

In light of the foregoing principles Respondent's discipline of the instant 10 supervisors because they worked for nonsignatory employers would appear to restrain and coerce the instant four employers in the selection and retention of their grievance adjustment representatives.

Respondent, relying on the decision of the United States Court of Appeals for the Ninth Circuit in the *Chewelah Contractors* case,[29] argues that no violation of

---

[26] The representation cases were transferred to the Board in Washington, D.C., on February 28, 1983, and are now pending before the Board for decision.

[27] Respondent contends that it is not bound by statements of pickets on the ground that pickets are not officers or agents of the Union. However, common law principles of agency govern the question of whether a picket was acting as an agent of a union. A finding of agency may be based on evidence that the individual "was acting with the knowledge and acquiescence of the union and that he had implied authority to do what he did." *NLRB v. Teamsters Local 135*, 267 F.2d 870, 873 (7th Cir. 1959); *NLRB v. Teamsters Local 182*, 228 F.2d 83, 84 (2d Cir. 1955). Thus, I find that the statements of the pickets within the authorized time and space of the picket line in furtherance of the Union's objectives are within the implied scope of their authority and imputable to the Union. Similarly, I find that the statements of a picket during a telephone conversation to the home of Steven Moore are not, absent other evidence, within the scope of the picket's agency, and therefore not imputable to the Union.

[28] See also *Painters District Council 36 (Brown & Co.)*, 259 NLRB 808, 810–811 (1981).

[29] *NLRB v. Electrical Workers IBEW Local 73*, 621 F.2d 1035 (9th Cir. 1980), denying enf. of 231 NLRB 809 (1977).

Section 8(b)(1)(B) can be found because the Union did not have a collective-bargaining agreement or a collective-bargaining relationship with any of the employers at the time the supervisors engaged in the conduct for which they were fined.

In *Chewelah Contractors*, the court, in refusing to enforce the Board's finding of a violation of Section 8(b)(1)(B), stated that the purposes of the section were to prevent unions from forcing employers into or out of multiemployer bargaining units and to guarantee that an employer's bargaining representative would be completely faithful to the employer's desires. The court noted that, in any decision involving Section 8(b)(1)(B) that had come to its attention, the charged union had been the bargaining representative of the complaining company's employees. However, the charged union in *Chewelah Contractors* neither represented the company's employees nor demonstrated a desire to represent the employees. The court reasoned that the union had no incentive to influence the company's choice of representative or affect the member's loyalty to the company. Thus, the court held that a union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer, if the union neither represents nor shows an intent to represent the employer's employees.

In *Plumbers Local 364 (West Coast Contractors)*, supra at 1126–27, the Board concluded that the Ninth Circuit's decision in *Chewelah* was in conflict with a long line of Board cases, and that the Board's position appeared to have the support of the United States Supreme Court and the opinions of other circuit courts:

> [In *American Broadcasting Companies, Inc. v. Writers Guild of America, West, Inc., supra*, the Supreme Court affirmed the Board's finding that the union (which represented writers in the film industry) violated Section 8(b)(1)(B) by threatening to discipline and by disciplining various supervisors—including directors—who worked during the writers' strike. It was undisputed that the directors—who supervised other employees and adjusted other employees' grievances—never dealt with writers and did not adjust writers' grievances. In the Supreme Court, the union argued that the threats and discipline directed toward the directors could not possibly affect their adjustment of writers' grievances and that therefore the union's actions regarding the directors had not violated Section 8(b)(1)(B). 437 U.S. at 437, fn. 37. The Supreme Court explicitly rejected the union's contention, noting that "directors . . . had [grievance] adjustment duties with respect to other employees" and finding that the union's sanctions made the directors "less than completely reliable and effective employer representatives for the duration of the strike, and less likely to perform any supervisory task during future strikes." *Id.* The Court then concluded: "A union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." 437 U.S. at 438, fn. 37.

The Union involved in *Writers Guild* did, of course, represent the employer's writing employees and, thus, had a bargaining relationship with the coerced employer. However, the Supreme Court also made clear that its rationale applied equally in circumstances where the union did not represent the employees of the coerced employer. Thus, the Supreme Court endorsed the Board's decision in *A. S. Horner, Inc.*,[7] finding an 8(b)(1)(B) violation where the respondent union did not represent the employees of the coerced employer. Referring with approval to a D.C. Circuit opinion[8] discussing Horner, the Supreme Court stated (437 U.S. at 436, fn. 36):

> The [D.C. Circuit] noted its agreement with [Horner] where a union member worked as a supervisor for a company which had no contract with the union. . . . A fine imposed in these circumstances violated [Section 8(b)(1)(B)] because compliance by the supervisor with the union's demands would have required his leaving his job and thus have the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances. . . . The [D.C. Circuit] said that *Horner* thus "falls close to the original rationale of § 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing." 159 U.S. App. D.C., at 284, fn. 19, 487 F.2d at 1155, fn. 19.

Furthermore, in addition to the Supreme Court's decision in *Writers Guild* and the Tenth Circuit's decision enforcing the Board's order in *A. S. Horner*, at least two other courts of appeals have approved Board findings of 8(b)(1)(B) violations where the respondent union had no bargaining relationship with the employer involved. See *International Organization of Masters, Mates and Pilots International Marine Division, ILA, AFL–CIO; and Union De Trabajadores De Muelles Y Ramas Anexas, Local 140 [Marine & Marketing International Corp.] v. N.L.R.B.*, 486 F.2d 1271, 1274 (D.C. Cir. 1973), cert. denied 416 U.S. 956 (1974); *International Organization of Masters, Mates and Pilots Marine Division, International Longshoremen's Association, AFL–CIO v. N.L.R.B.*, 539 F.2d 554, 559–560 (5th Cir. 1976), cert. denied 434 U.S. 828 (1977). Both the D.C. Circuit and the Fifth Circuit decisions were cited with approval by the Supreme Court in *Writers Guild*, 437 U.S. at 438, fn. 37.

---

[7] *New Mexico District Council of Carpenters (A. S. Horner, Inc)*, 177 NLRB 500 (1969), enfd. 454 F.2d 1116, 1118 (10th Cir. 1972).

[8] *International Brotherhood of Electrical Workers, Local 134, International Brotherhood of Electrical Workers, AFL–CIO [Florida Power & Light Co.] v. N.L.R.B.*, 487 F.2d 1143, 1155, fn. 19 (1973) affd. 417 U.S. 790 (1974).

Even assuming that the rationale of *Chewelah* should be applied to the present case, a violation of the Act would still be found. In *Chewelah* the court found that, since the union did not represent Chewelah's employees nor demonstrate a desire to represent the employees, the union had no incentive to either influence Chewelah's choice of bargaining representative or affect the supervisors' loyalty to Chewelah. In this case the union evidenced reasons to influence the employers' choice of bargaining representative and to affect the supervisors' loyalty to their employers.

While the Union disclaimed interest in representing employees in the NECA bargaining unit, it sought representation in single employer units of 17 NECA-represented employers. Statements at the trial board meetings and on the picket line reveal an intention to have the employers come back to Respondent.

At the trial board meetings conducted on the charges against Verga, McDaniel, Slack, Watson, and Hogan the board members spoke as if the Union were still on strike against the employers. There were requests that Peters, M & M, and McCubbin sign agreements with the Union. There was a discussion that Rex Moore would have to come back to the Union if it could not get trained electricians. Further, union pickets, at picket lines established at Rex Moore jobsites, made statements indicating that the Union was attempting to get the contractors, including Rex Moore, back together with the Union. Finally, the letter of the Union's attorney, quoted above, indicated that the Union's disclaimer was a tactic designed to "prompt the good contractors into action" and "permit the individual employers to grant recognition to Local 340 on an individual basis and to bargain on a single employer basis."

It appears that the Union and the Employers assumed that the replacements needed more training and supervision than the members of Respondent whom they replaced. Thus, the Union intended to withhold supervision from the Employers in order to force the Employers to come back to the Union. The Union would then be in a position to bargain with the Employers on an individual basis rather than on a NECA multiemployer basis. Thus *Chewelah* is distinguishable because the Union continued to desire to represent the employees of the Employers albeit not in the multiemployer unit. More importantly, one of the Union's purposes was to force the Employers out of multiemployer bargaining and into bargaining on a single employer basis. A union's attempt to force an employer to resign from a multiemployer bargaining association was recognized as an 8(b)(1)(B) violation by the court in *Chewelah*, 621 F.2d at 1036, citing *Roofers Local 36 (Roofing Contractors)*, 172 NLRB 2248 (1968). Thus, even under the rationale of *Chewelah*, Respondent's fining of the supervisors as part of a course of conduct designed to cause the "good" employer-members of NECA to abandon multiemployer bargaining and to bargain on a single employer basis is a violation of Section 8(b)(1)(B) of the Act.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) and Section 8(b) of the Act.

2. Hulse, Peters, Rex Moore, McCubbin, Amos Walker, and M & M are employers engaged in commerce and in business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. By imposing fines on employees Dale Pettit, Don Verga, and Doyle McDaniel, who had effectively resigned from union membership, for their postresignation conduct, Respondent restrained and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. Robert Hogan (McCubbin), Curtis Watson (M & M), John Reese (Amos Walker), Gary Wheeler (Rex Moore), Ted Barlow (Rex Moore), Don Sutton (Rex Moore), Tim Bailey (Rex Moore), Dale Zicarelli (Rex Moore), Robert Slack (Rex Moore), and Francisco Orden (Rex Moore), at all times material, were supervisors for their respective employers within the meaning of Section 2(11) of the Act and employer representatives within the meaning of Section 8(b)(1)(B) of the Act.

5. By preferring charges against Hogan, Watson, Reese, Wheeler, Barlow, Sutton, Bailey, Zicarelli, Slack, and Orden, and imposing fines against them, Respondent restrained and coerced the above-named Employers in the selection and retention of their representatives for the purposes of collective bargaining and the adjustment of grievances, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respodnent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, International Brotherhood of Electrical Workers, Local Union 340, AFL–CIO, Sacramento, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Bringing charges against or imposing fines upon employees who have resigned from and are no longer members of Respondent or its sister locals because of postresignation conduct protected by Section 7 of the Act.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

(c) Restraining or coercing May-Han Electric, d/b/a M & M Electric, Clint McCubbin, Inc., Rex Moore Electric Company, or Amos J. Walker, Inc. in the selection of their representatives for purposes of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial, or grievance-adjustment functions for these Employers.

(d) In any like or related manner restraining or coercing M & M, McCubbin, Rex Moore, or Amos Walker in the selection of their representatives for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Rescind and expunge from its records all disciplinary actions taken against Pettit, Verga, and McDaniel because of their postresignation conduct and notify Pettit, Verga, and McDaniel, in writing, that the fines levied against them have been rescinded and that all records of disciplinary actions against them have been expunged.

(b) Rescind and expunge from its records all disciplinary actions taken against Hogan, Watson, Reese, Wheeler, Barlow, Sutton, Bailey, Zicarelli, Slack, and Orden, including the fines, because of their working as supervisors and employer representatives, and notify Hogan, Watson, Reese, Wheeler, Barlow, Sutton, Bailey, Zicarelli, Slack, and Orden, in writing, that the fines levied against them have been rescinded and that all records of disciplinary actions against them have been expunged.

(c) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Mail to the Regional Director signed copies of the notice for posting by the Employers, if those Companies are willing, in places where notices to employees are customarily posted. Copies of the notice to be furnished by the Regional Director, after being signed by Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT bring charges against or impose fines upon employees who have resigned from and are no longer members of International Brotherhood of Electrical Workers, Local Union 340, AFL–CIO, or its sister locals, because of postresignation conduct protected by Section 7 of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL NOT restrain or coerce May-Han Electric, d/b/a M & M Electric, Clint McCubbin, Inc., Rex Moore Electric Company, or Amos J. Walker, Inc. in the selection of their representatives for purposes of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial, or grievance adjustment functions for these Employers.

WE WILL NOT in any like or related manner restrain or coerce M & M, McCubbin, Rex Moore, or Amos Walker, in the selection of their representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind or expunge from our records all disciplinary actions taken against Dale Pettit, Don Verga, and Doyle McDaniel because of their postresignation conduct and notify Pettit, Verga, and McDaniel, in writing, that the fines levied against them have been rescinded and that all records of disciplinary actions against them have been expunged.

WE WILL rescind and expunge from our records all disciplinary actions taken against Robert Hogan, Curtis Watson, John Reese, Gary Wheeler, Ted Barlow, Don Sutton, Tim Bailey, Dale Zicarelli, Robert Slack, and Francisco Orden, including the fines, because of their working as supervisors and employer representatives, and notify Hogan, Watson, Reese, Wheeler, Barlow, Sutton, Bailey, Zicarelli, Slack, and Orden, in writing, that the fines levied against them have been rescinded and that all records of disciplinary actions against them have been expunged.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL–CIO

[31] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Coca-Cola/Dr. Pepper Bottling Company of Memphis *and* Jerry Valentine, Petitioner and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196, Union. Case 26–RD–532

14 December 1984

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The National Labor Relations Board, by a three-member panel has considered objections and determinative challenges to an election held on 28 May 1982 and [pertinent portions of] the attached hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots showed 203 for and 165 against the Union with 41 challenged ballots, including 3 ballots which had been declared void and challenged at the count. The challenged ballots were sufficient in number to affect the results.

The Board has reviewed the record in light of the exceptions[1] and briefs and has adopted the hearing officer's findings[2] and recommendations,[3] as modified.[4]

We agree with the hearing officer that the campaign here was not designed to inflame racial hatred or to engender conflict between black and white workers. Rather, the comments were obviously designed to express the view that blacks had not been treated fairly by their employer and that they needed to join forces to do something about it. Unlike the situation in *Sewell Mfg. Co.*, 138 NLRB 66 (1962), which involved the exacerbation of racial prejudices and tensions without regard to an employment relationship, the remarks were directed to the black employees' perceived relationship with their employer as employees and their dissatisfaction with the terms and conditions of employment. In that regard, the comments are similar to other types of campaign assertions relating to an employer's treatment of its employees.

In the instant case, union representative Sidney Chism's stating to employee Henry Gilley, that the Company had kept blacks down for a long time and now they had a chance to take care of it, represents nothing more than a view that the black employees had been mistreated in their employment with this employer—a legitimate issue for discussion during a union campaign. References to "plantation" and "Martin Luther King" simply put these matters in a historical setting well understood by all, blacks in particular. Chism's telling an employee either that material being handed out was white man's material or that the distributor was just a white man doing white man's work indicates

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In her report, the hearing officer relies on *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), and *General Knit of California*, 239 NLRB 619 (1978), to support her recomendation that the Employer's objections that allege the Petitioner made material misrepresentations warranting setting aside the election are without merit.

In *Midland Life Insurance Co.*, 263 NLRB 127 (1982), the Board ruled that it will no longer probe into the truth or falsity of the parties' campaign statements, and that elections will no longer be set aside on the basis of misleading campaign statements. We rely on that case in finding that these objections concerning misrepresentations are without merit.

In its exceptions the Employer contends that the Union made certain misrepresentations concerning 119 strikers and the manner of reinstatement of the strikers, which constituted an abuse of the Board's processes. The Employer would have us apply the standards in *Formco, Inc.*, 233 NLRB 61 (1977), to these allegations. However, the Board overruled *Formco, Inc.* in *Riveredge Hospital*, 264 NLRB 1094 (1982), holding that alleged misrepresentations of the Board's processes will be treated the same as all other alleged misrepresentations.

Applying the principles enunciated in *Riveredge Hospital*, we adopt the hearing officer's recommendation to overrule this allegation of objectionable conduct.

In finding no merit to the Employer's allegation that the Union engaged in objectionable activity by threatening employees with physical violence if they did not join, support, or select the Union as their bargaining representative, we do not rely on *Hickory Springs Mfg. Co.*, 239 NLRB 641 (1979) (or its progeny), which has been overruled in *Home & Industrial Disposal Service*, 266 NLRB 100 (1983).

In adopting the hearing officer's finding that alleged threats made to employees Valentine and Gilley did not warrant setting aside the election, we do not rely on the hearing officer's statement that the threats did not deter Valentine and Gilley from their efforts to campaign against the Union. As the hearing officer correctly stated, the proper test for evaluating such conduct is an objective one: whether the conduct involved was "likely to coerce prospective voters to cast their ballot in a particular manner." *Great Atlantic Tea Co.*, 177 NLRB 942 (1969).

Finally, in dismissing the Petitioner's Objection 2 and the Employer's Objection 3, the hearing officer, inter alia, found none of the alleged incidents described by Sammy Davis Jr. in his testimony objectionable. We adopt these findings solely on the ground that Davis' testimony was not credited. Accordingly, we find it unnecessary to pass on the remainder of the hearing officer's rationale for finding that the incidents involving Davis did not constitute objectionable conduct.

[3] In the absence of exceptions thereto, we adopt, pro forma, the hearing officer's recommendation that (1) the challenge to the Board agent's ruling that the ballot identified at the hearing as R.D. Exh. 3(b) be overruled and that said ballot be declared void; (2) the challenge to the Board agent's ruling that the ballot identified at the hearing as R.D. Exh. 3(d), a mail-in ballot, be sustained and that said ballot be counted consistent with the procedure adopted for all other mail-in ballots; (3) the challenges to the ballots of Alexander Cannon, Paul Turner, Bryant Randolph, and Houston Bramlett be overruled; and (4) since no determination can be made as to the validity of Gregory E. Blake's challenged ballot, in the event Blake's challenged ballot becomes determinative of the results, the election be set aside and a new election held.

[4] Thirty-three of the forty-one challenged ballots were cast by unfair labor practice strikers whose reinstatement rights were determined by the Board in Case 26–CA–4991, et al. (269 NLRB 1101 (1984)). As the Board in that decision found that only six of these strikers were unlawfully denied reinstatement by the Employer, the challenged ballots cast by eligible voters are no longer sufficient in number to affect the election results. Accordingly, there being no need to open and count any of the overruled challenged ballots or take further into account the challenged ballot of Gregory E. Blake, we shall issue a certification of representative to the Union.

a distrust of the motives of the distributing employee because of a perceived advantage resulting from his race.

Again, such comments represent the view that black employees have not been fairly treated because of their race. Whether this view is accurate with respect to a particular employer, thereby making it a "legitimate campaign issue" in our dissenting colleague's words, is of little consequence.

The right to raise the issue in a union campaign is not limited to situations where a white employer, or even the NLRB, believes that blacks have been unfairly treated. Nor is it any more necessary for blacks to establish the truth of the claim before they raise the issue than it is for any other employees to establish the truth of their claims of unfair treatment, for any reason, at the hands of their employers. The question of whether employees have been unfairly treated, for whatever reason, is always a legitimate topic of discussion in a union campaign.

This is not to say that all racial remarks involving the employer-employee relationship will be tolerated. But unless such racial remarks rise to the level that they are so inflammatory as to make a fair election impossible, we will not find them objectionable. Here the racial appeals do not rise to that level. We therefore overrule these objections.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots has been cast for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees at the Employer's plant located at 499 South Hollywood Street, Memphis, Tennessee, including route merchandisers, delivery drivers, helpers, pre-mix, advertising, garage, cooler and forklift drivers. Excluded: All account representatives (tel-sel, advance salesmen and sales merchandisers), clerical employees, guards, professional and technical employees, and supervisors as defined in the Act.

MEMBER HUNTER, dissenting.

Contrary to my colleagues, I would find that the Union destroyed the election's laboratory conditions by making irrelevant, inflammatory appeals to racial prejudice.

The hearing officer found that, during a union meeting 3 days before the election, union representative Chism told approximately 75 assembled employees[1] that the Employer's president Pidgeon ran his business like a "plantation." During the campaign the Union also distributed a leaflet to employees which stated: "If you believe that it's time to get off Pidgeon's plantation—Then Vote Yes." The Union also distributed an additional leaflet which included the following statement: "Tell the folks Pidgeon wants everyone back on his plantation with you as overseer."

The record further establishes that, 3 weeks before the election, Chism told antiunion employee Gilley that the Employer "had kept the blacks down for so long" that Gilley should not help the Employer do so, and that the employees now had a chance to take care of the problem. Two weeks before the election, antiunion employee Cullen heard Chism say that Cullen was "just a white man doing a white man's work," and that the antiunion literature which Cullen was distributing was "white man's material."

In *YKK (U.S.A.) Inc.*, 269 NLRB 82 (1984), the Board reaffirmed the principle of *Sewell Mfg. Co.*,[2] that an election will be set aside where a party launches a campaign to exacerbate racial feelings by making irrelevant, inflammatory appeals to racial prejudice. In my view, the circumstances herein are sufficiently analogous to those in *YKK* to warrant setting aside the election. In *YKK* the Board noted the Union's references to beating the "Japs" at Pearl Harbor, and emphasized that there was "no conceivable way" that such comments could be relevant to a legitimate campaign issue.[3] Similarly, I am unable to discern the connection between the Union's repeated "plantation" remarks and the legitimate issues which arose during the campaign in this case. I also view the Union's accusations as inflammatory because it is clear that their purpose was to spotlight the race of the Employer's president and to exacerbate racial tensions.

The Board in *YKK* further emphasized that the union's comments were not isolated since they were uttered at a meeting before 75–100 employees. Here, Chism's "plantation" remarks were made during a meeting of 75 employees only 3 days before the election, and similar statements were printed on leaflets distributed to an undisclosed number of employees.

Consequently, I would find that the Union made irrelevant, inflammatory appeals to racial prejudice. I would therefore sustain the Petitioner's Objections 1(a) and 3 and the Employer's Objection 1,

[1] The tally indicated that there were approximately 449 eligible voters.
[2] 138 NLRB 66 (1962).
[3] 269 NLRB 84.

and I would set aside the election and direct a new election.[4]

[4] Because I would set aside the election on this issue, I find it unnecessary to reach the other objections considered by the hearing officer.

APPENDIX

HEARING OFFICER'S REPORT ON CHALLENGES AND OBJECTIONS

Pursuant to a Stipulation for Certification upon Consent Election approved by the Regional Director for the Twenty-Sixth Region on May 7, 1982, an election was conducted on May 28, 1982, among certain employees[1] of the Employer, at its Memphis, Tennessee, location. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations. The tally of ballots revealed that of approximately 449 eligible voters, 203 were cast for the Union and 165 were cast against the Union. There were 41 challenged ballots which are sufficient in number to affect the results of the election.

On June 7, 1982, the Petitioner and Employer filed timely objections to conduct affecting the results of the election, copies of which were duly served upon the other parties. The objections of both parties are attached hereto.

On June 9, 1982, the Regional Director issued his Notice of Hearing on Challenges and Objections in which he ordered a hearing to be held on June 29, 1982, to resolve the issues raised by the Challenges[2] and the Employer's objections. On June 14, 1982, the Employer filed its motion to postpone Hearing and on June 17, 1982, the Regional Director issued an Order Rescheduling Hearing to July 6, 1982.

Pursuant to the Notice of Hearing on Challenges and Objections, said hearing was held on July 6 and July 7, 1982, at Memphis, Tennessee, before the undersigned hearing officer, duly designated for that purpose. All parties were afforded full opportunity to be heard, to examine and cross examine witneses, and to introduce evidence on the issues. My findings are based upon the entire testimonial record including exhibits and from my observation of the witnesses, including but not limited to their general demeanor as they testified under oath, partisan interest, guarded or indirect answers, conclusional and conflicting testimony, conclusionary statements as distinguished from fact, argumentativeness, self-serving answers, power of recall or lack thereof, responses to leading questions by Counsel, general attitude, memory for detail, and ability to comprehend the nature of the questions and answers thereto.

. . . .

PETITIONER

OBJECTION NUMBER ONE

From approximately May 4, 1982, until a day before the election, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196 (hereinafter referred to as the Union) passed out objectionable campaign propaganda to employees. The various union handbills were all designed to create and foster several false impressions, including:

(a) the idea that the Company owner and his staff were prejudiced against the black employees and would not treat them fairly, this impression was fostered through literature using analogies of the plant as a "plantation," its owner wanting "everyone back on his plantation," and the personnel director being the plantation "overseer." The literature made further racial pitches by referring to the employees as "folks," calling the personnel director's meetings with employees "captive audience meetings," making repeated references to company attempts to "keep you back," "hold you down," "keep you down," "insult you," "keep you under their thumb," and other racially charged phrases designed to support the impression that the Company policy was based on anti-black sentiments.

PETITIONER OBJECTION NUMBER THREE

At the Union meeting held the Tuesday before the election, the Union President, Mr. Sidney Chism, made the same racially slanted argument that was promulgated by the Union literature, i.e., that the Company owner did not like blacks, that he would do anything to keep them in their place, and that he did not want them working for him. Mr. Chism made the same analogies used in the Union literature concerning the plant being a plantation with the Personnel Director being the overseer, *etc.*

EMPLOYER OBJECTION ONE

The Union, its agents, and others, engaged in a deliberate and sustained campaign of appeals to racial emotions and prejudices designed to inflame racial hatred and to engender a conflict between black and white workers at the Employer's operations, and also between black workers and white managers.

DISCUSSION

Petitioner Objections 1(a) and 3 have been joined with Employer Objection 1 for examination and discussion as they relate to various allegations of racial appeal. Employee Henry Gilley testified that approximately three weeks before the election, Union Representative Sidney

[1] All production and maintenance employees at the employer's plant located at 499 South Hollywood Street, Memphis, Tennessee, including route merchandisers, delivery drivers, helpers, pre-mix, advertising, garage, cooler and forklift drivers. Excluded: All account representatives (tel-sel, advance salesmen and sales merchandisers), clerical employees, guards, professional and technical employees, and supervisors as defined in the Act.

[2] The challenges which are the subject of hearing do not include 33 of the 41 challenges. Thirty-three of the challenges represent ballots cast by individuals whose reinstatement rights have been litigated but not resolved in Case No. 26–CA–4991, *et al.* The Board in its Ruling on Administrative Action dated April 21, 1982, directed that these persons vote by challenge. Thus, the challenge ballot issues are limited to 8 ballots, 3 ballots declared void and challenged at the count, 4 persons challenged by the Board because their names did not appear on the list, and 1 individual challenged by the Board as the name had already been marked off the list.

Chism called him over to the fence outside the Employer's facility during lunch time. As Gilley and Chism walked up the sidewalk, Chism asked Gilley what he had against the Teamster Union and Gilley responded that he didn't have anything against them. Gilley testified that Chism had stated that the company had kept the blacks down for so long and now they got a chance to take care of it and don't help keeping them down. Gilley responded that he was just against the Teamster Union. He testified that no one else had heard Chism's statements.

Employer/witness Patrick Cullen, who, as well as Henry Gilley, passed out campaign literature for People Against Teamsters, herein referred to as P.A.T., testified concerning one particular day when he handbilled some two weeks prior to the election. Cullen testified that Chism, who was handbilling Teamster campaign literature while Cullen was handbilling P.A.T. literature had told four employees in a car that "there was no reason to take mine, that they might as well take his because his was the truth. Mine was a white man's material." When asked to repeat the conversation in later testimony, Cullen testified that Chism had said "there is no need to take his stuff." Cullen further testified that Chism had followed with a comment that Cullen was just a white man doing a white man's work. After the employees had passed in the car, Chism had told Cullen that there was no offense. There was no one present with Cullen when this occurred.

Two Employer witnesses testified concerning remarks made in a union meeting held on May 25, 1982. Employee Charles Odom testified that during the union meeting, Chism, in speaking to the approximately 75 persons present, had said that "if we lose, you lose." Odom also said that Chism has stated in the meeting that President Pidgeon runs his plant like a plantation and he has Personnel Director Donaldson the head of it. Odom also described the comments of union representative Fiveash in the meeting. Odom testified that Fiveash had used Martin Luther King as an example and talked on the issue of blacks going in the back and white in the front. According to Odom, Fiveash has also said that "Martin Luther King had fought for our rights as blacks and we were about to let it go down the drain." Odom also testified that Fiveash had said that "Pidgeon was trying to take your rights away from you." Odom also talked about a black union representative who had told the employees in the union meeting that he had a tape that he wished that they could hear. The tape was described as having some Coca-Cola supervisors talking about the employees and using the term plantation.

Employer/witness Jeffrey Battle testified that during the meeting, Chism had said Mr. Pidgeon had wanted "to get it back the way it used to be and compared that to a plantation." Battle testified that another unidentified union representative talked about Martin Luther King and discussed that King had come to Memphis to help the trashmen get better jobs and better benefits.

Battle confirmed on cross-examination that he did not think of Dr. King as a racist. He said that when someone mentions Dr. King, he has an image of a good man trying to do right. On cross-examination, Odom testified that when he heard Dr. King's name, he thinks about black against white and Dr. King's name means blacks speaking up for themselves without violence.

The Union distributed 11 pieces of literature to employees during the election campaign. In union handbill *Judgment Day* (Employer Exhibit 1(c)) there is one line which contains the words "If you believe that it's time to get off Pidgeon's Plantation—Then Vote Yes." In the union handbill entitled *Pidgeon's Pigeon Grounded*, (Employer Exhibit 1(h)), the Union ends a six paragraph statement with the words "Tell the folks Pidgeon wants everyone back on his plantation with you as overseer."

The Board has held privileged campaigns which consisted of racial propaganda designed to encourage racial pride and concerted action.[5] While in the present case, there are clearly references to racial pride, the evidence does not reflect that the Union's campaign was designed solely to inflame racial hatred and to engender a conflict between black and white workers.[6] Racial comments in the Union's literature and the Union meeting do not establish that the Union's campaign was a racially oriented campaign deliberately seeking to invoke the hatred of black employees for white people.[7] Additionally, I find that Chism's individual comments to potentially six voters[8] out of some approximately 449 eligible voters would not support Employer's contention that the Union engaged in a deliberate and sustained campaign of appeals to racial emotions and prejudices. Accordingly, I recommend that Petitioner's Objections 1(a) and 3, and Employer's Objection 1 be overruled.

. . . .

EMPLOYER OBJECTION SEVEN

The Union, its agents, and others, made material misrepresentations at a time which Respondent did not have an adequate opportunity to respond.

. . . .

Both Petitioner and the Employer allege misrepresentation by the Union in its use of the number of 119 employees in its handbills and which was introduced into evidence as Employer's Exhibits 12(a) and 12(i). Petitioner and Employer assert that the union misrepresented the number of strikers who could have been reinstated at the company and additionally the manner of reinstatement for those strikes. In Employer Exhibit 12(a) the critical words are "The facts are the *119* employees of P.A.T. (Pidgeon Against Teamsters) talks about having charges filed against the Company and if any of these people win their case, the Company may put them anywhere they want to."

In Employer Exhibit 12(i), the significant section dealing with this alleged misrepresentation is "We also want the 119 employees that Coca-Cola has refused to rehire to have their jobs back—that's why we appealed the

[5] *Baltimore Luggage Co.*, 1967, 162 NLRB 1230, enforced 4 cir. 1967, 387 F.2d 744. *Archer Laundry Co.*, 150 NLRB 1427 (1965).

[6] *Sewell Mfg. Co.*, 138 NLRB 66 (1962).

[7] *Bancroft Mfg. Co., Inc.*, 210 NLRB 1007 (1974). *Archer Laundry Co., supra.*

[8] The record is without any direct evidence that four of these employees did in fact hear Chism's comments.

election and because we know this is another J.R. scheme to take your union from you."

Chism testified that during the union meeting held on May 25, 1982, he talked about the history of Coca-Cola and the fight that the Union had experienced in organizing them. He said that in 1975, the company had fired one of the employees had there had been a strike and 119 people had lost their jobs because of the strike. He testified that he had told the employees in the meeting that these strikers had filed charges with the Board, and that they were still in litigation with these employees and he did not know their destiny or whether they would come back to the company.

On cross examination, Chism stated that he had used 119 as the number for his handbill as that was the original number of employees discharged after the strike, although he admitted that he might be off five or six people one way or the other. Chism said that the information was gathered for the handbills after the filing of the decertification petition. Chism said that from the time that the decertification petition was filed until the Union started handbilling, it was his understanding that there were 119 charges pending. Chism confirmed that he had talked with one of the Board Agents of the NLRB who had told him that there were possibly 90 as some of these cases had settled and some were still being litigated and some pending.

On further cross-examination, Chism testified that he had used the figure 119 because that was the number who had filed charges in 1976 after the strike. He said that he had attended a hearing in November, 1981 concerning those strikers but contended that he did not know the number of employees in that hearing who were still seeking reinstatement.

Personnel Manager Donaldson testified that he had represented the company for the hearing held in November 1981 and which dealt with the strikers' reinstatement. Donaldson testified that at the conclusion of the hearing, there were 48 strikers' reinstatement rights still in issue. Donaldson further testified that the Administrative Law Judge had issued a decision in the case within the last two weeks and the Employer had been ordered to reinstate five of the strikers. Donaldson further testified that the statement in Employer Exhibit 12(a) is not correct when it states, "The company may put these 119 employees anywhere they want to." He said that the employees to whom they would offer reinstatement according to the Judge's Order, would be placed in the same position that they left the company in.

The Petitioner and the Employer would, therefore, argue that the union has misrepresented the manner of strikers who could have been reinstated at the company and they would also contend that the union has misrepresented the manner of reinstatement for these strikers. The dates when Employer's 12(a) and 12(i) were distributed to employees are not clear to the record but the record evidence indicates that the distribution occurred during the campaign period. The Petitioner, however, distributed a handbill which has been identified as Petitioner 5(a) and which specifically deals with these 119 strikers and their reinstatement rights, and would appear to be in response to the union handbills on the strikers. The Petitioner would estimate that the date of the distribution was May 6 or 7 in the a.m.

When the Board overruled *Shopping Kart Food Market, Inc.*,[14] with its 1978 *General Knit of California, Inc.*[15] decision, it returned to the standards set forth in *Hollywood Ceramics*.[16] One of the important elements of the *Hollywood Ceramics* test is that the misrepresentation occur "At a time which prevents the other party or parties from making an effective reply."[17] In the present case, one of the parties did, in fact, make a response to the union's handbills which related to the "119 employees" and their reinstatement rights. I would note, however, that even though Petitioner addressed these 119 employees' rights, there was no attempt to correct the number from 119 to 48 or any other more accurate number. The Employer, however, apparently made no attempt to correct any alleged misstatement as to the number of strikers who could be reinstated. As the Petitioner had an opportunity and did, in fact, make a response in its handbill distributed on May 6 or 7, the Employer could have also have had time to respond accordingly. Additionally, I note that Petitioner's handbill was distributed some 21 to 22 days before the election, thus, indicating sufficient time for either the Petitioner or the Employer to respond to the alleged misrepresentation. Accordingly, I recommend that the objections relating to misrepresentation of the number of strikers for reinstatement and the manner of reinstatement be overruled.

EMPLOYER OBJECTION TWO

Employees were coerced, restrained and intimidated by threats of loss of jobs if they did not join, support or otherwise select the Union as their bargaining representative.

DISCUSSION

Employer presented no direct evidence concerning this objection. A review of the union literature which was presented into evidence by the Employer has been made. The Union makes reference in two handbills to subjects which could possibly be construed as pertaining to job availability and changes in the present work force. In Employer 12(a), the Union mentions the 119 employees who have filed charges against the company and states that if they win their case, the company may put them anywhere they want to. This same phrase is also dealt with the discussion of an alleged misrepresentation. For purposes of this objection, however, I have limited my discussion to the phrase as it relates to a threat of job loss. Additionally, the Union makes reference to these 119 employees in Employer 12(i) and states "We also want the 119 employees that Coca-Cola has refused to rehire to have their jobs back—that's why we appealed the election and because we know this is another J.R. scheme to take your union from you."

---

[14] *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).

[15] *General Knit of California, Inc., supra.*

[16] *Hollywood Ceramic Company, Inc., supra.*

[17] *Lipman Motors, Inc. v. NLRB*, 451 F.2d 823, 78 LRRM 2808 (3d Cir. 1971).

A review of the Petitioner's campaign handbills reflects that in its handbill identified as Petitioner Exhibit 5(a) and which was distributed on May 6 or May 7, 1982, the Petitioner specifically addresses any job threat associated with these 119 employees who have been displaced because of the strike. In response to the above-cited union statement in the handbill, employer 12(i), the Petitioner replies,

> *THEIR* JOBS?? WHAT DOES "CHISM" MEAN BY THEIR JOBS?
>
> WE DON'T SEE ANY 119 VACANT JOBS AROUND HERE. IN FACT, WE DON'T SEE *ANY* VACANT JOBS.
>
> WHAT "CHISM" REALLY MEANS IS THAT HE WANT *119* PEOPLE WHO NEVER GOT BACK TO WORK AFTER *HIS STRIKE* TO COME IN HERE AND TAKE *OUR* JOBS!!! THIS IS ANOTHER ONE OF SIDNEY'S *CHISELS.*
>
> HE TAKES AND USES OUR DUES MONEY AND USES IT TO HIRE LAWYERS TO TRY TO GET HIS BUDDIES BACK IN AND *119 OF US OUT!!*

The Petitioner's handbill further asks of the union the legal requirement of the Company to keep employees presently working at the plant if the 119 employees get back and also asks if the union will guarantee that none of the present employees will be fired if the union succeeds in getting the 119 employees back in.

In response to the Petitioner's handbill cited above, the Employer distributed a handbill dated May 11, 1982, and introduced into evidence as Employer Exhibit 18(d). In that handbill, the Employer confirms that the Company has stopped taking applications and that there is a freeze on hiring. The Employer clarifies that since January 1, the Company has cut 22 jobs and that sales are down nearly 5 percent this year. The Employer further tells its employees that "This means you and your company need to work *together* better than *ever before to protect your job security.*

The Union clearly expresses its intent for the return of the strikers to the work force and through its literature it has provided the vehicle for inferences to be drawn by the employees as to the consequences of their return. The Employer and the Petitioner, however, have by comparison, gotten to the heart of the matter and clearly pointed out to the employees the potential for job loss if the strikers return to the work force. Any threat of job loss with respect to the returning strikers could just as easily have come from the campaign of the Petitioner, with added support of the Employer's campaign literature, as it could have come from the Union campaign. Based upon the foregoing, I do not find that the Union has interfered with the election by threats of job loss. Accordingly, I recommend that Employer's Objection Two be overruled.

PETITIONER OBJECTION NUMBER TWO

Approximately two weeks before the election, Jerry Valentine received a phone call at his home. The caller asked "Are you the one responsible for the Coke election?" to which Jerry answered, "I'm one of the ones responsible," to which the caller responded, "If this election goes against the Teamsters, you'll be sorry." Then on the Monday or Tuesday before the election when Mr. Valentine was handing out literature at the plant's north drive, the Union campaigner standing next to him said words to the effect that "You'd better give this up or you're going to get hurt." Other employees, including Mr. Henry Gilley, were the victims of threats. The effects of the coercive activity were apparent, for instance, when one afternoon during the election week at the south gate of the plant, employees changing shifts refused Mr. Valentine's literature while taking that of the Union campaigners while the Union campaigners were present; however, when the Union campaigners left, employees came back to get Mr. Valentine's literature and ask him questions.

EMPLOYER OBJECTION THREE

Employees were coerced, restrained, and intimidated by threats of physical violence, if they did not join, support, or otherwise select the Union as their bargaining representative.

DISCUSSION

Petitioner Jerry Valentine testified that two to three weeks before the election, he received an anonymous telephone call at his house one evening. When Valentine answered the telephone, he was asked "If I was the one that had gotten the petition against the Union at Coca-Cola." Valentine responded by saying that he was one of a group of people that had circulated the petition. Valentine said that the calling party had then told him "that if there was an election and it went against the Union that I could get hurt." Valentine testified that the caller had then hung up after the comment. Valentine said that the call occurred about 8 p.m. in the evening. Valentine testified that he did not immediately tell anyone about this telephone call. He said that he did tell his attorney, Frank Cantrell, about the call, but did not tell any other employees, Personnel Manager Donaldson, or any other members of the P.A.T. association. Valentine also confirmed that after receiving this telephone call, he did not quit his anti-union campaign.

Employer in its brief contends that Valentine also received other threatening telephone calls at his home where no one said anything at all. I fail to comprehend the certainty of a threat in these telephone calls as perceived by Employer's counsel when Petitioner acknowledges that nothing was said.

Petitioner also testified that during the week prior to the election he was passing out literature at the north entrance of the plant. Valentine testified that he was told by a white man in his early 40's that if he continued his activity against the union he could get hurt. Valentine testified that he did not know the man who made the threat to him but he had seen this same man on two or three previous occasions passing out literature and talking to people who were walking into the entrance. Valentine testified that this threat was made to him in the

morning between 6:00 and 6:30. Valentine also confirmed that an unidentified black man was present at the time that the threat was made. Valentine said that the two men were passing out union literature and were there distributing their literature when he had arrived that morning. Valentine also testified that he had been present passing out his literature for about 15 to 20 minutes before the threat was made to him. After the threat was made, Valentine continued to distribute his literature for another half hour. Valentine said that he had five or six conversations all together with the man who had threatened him, and in one conversation, the man had told him that he was retired but Valentine could not recall from what or where. This particular conversation about the retirement had occurred some two or three mornings before the morning of the alleged threat. During these other conversations with the man, Valentine had been asked why he had left the union, why he was passing out literature against the union, and why had he not remained loyal to the union. Valentine admitted that he did not tell any other employees about this threat but had told his attorney Cantrell about a week later. Valentine testified that he had not discontinued his anti-union campaign after receiving the threat because he was not intimidated.

Employer witness Henry Gilley testified that he passed out campaign literature on behalf of the P.A.T. organization and did so some eight to ten times. He said that he distributed the literature at the north and south gates of the plant and in the morning before work and in the afternoon after work. Gilley also described two men who he identified not to be Coke employees who were also distributing literature outside the plant. He described the men as a big white guy and a short black guy. Gilley testified that one morning the black had asked his name and then had said "why don't I come on and get with them, you know, and leave the white people alone; and if I didn't, I would get hurt like that." Gilley said that he had taken this statement as a threat. Gilley affirmed that no one else had heard this comment by the black guy and he was unable to give the black man's name. Union Representative Sidney Chism testified that no one distributed union literature who was not an official of the local or with another part of the Teamsters Union. Chism identified those who handbilled for the union as Larry Doyle, Vice-President; Nathaniel Jackson, Trustee; Tony Civalich, Southern Conference Organizer; Joe Allgood, Organizer for the International; and Wesley Fiveash who is the Treasurer of the local union as well as himself. He clarified that Fiveash, Doyle Civalich, and Allgood are all white and Jackson is black.

Employer witness Sammy Davis, Jr. testified that on the day before the election he was threatened, pushed, and called bad names by another employee who was identified as Arthur Crutcher. Davis said that he was leaving work and intended to get a handbill from both Chism and from one of the P.A.T. supporters. When Davis started to get the literature from the P.A.T. handbiller, Davis recounts that "Arthur told me to get my black ass back up there where I was that I didn't need that P.A.T." Davis contended that Crutcher had started shoving him and Davis went back into the guard house to wait for Crutcher to leave. Davis later went back out to the area of the handbilling and Crutcher had not left. Davis said that he had asked the white guy who was passing out union literature to ask Arthur to leave him alone. Davis' testimony is somewhat confusing in that he recounts that the white man said something but Davis does not repeat it at that point in his testimony. Davis then describes that he began to talk with Chism who was also handbilling that particular day. Chism had talked with him and had asked Davis why the people believe that Chism is against the union and asked Davis if there was anything Chism was doing to make the people believe that. Chism made a comment about being accused of what he was not. Chism had also allegedly asked what was it in him that had the people believe that he was really working "for the people in the office" and he assured Davis that he was not. On cross-examination, Davis testified that Crutcher had left Davis alone and was leaving when Chism had called Davis over to talk with him. Davis said that when Chism first called him over, he had not wanted to go because he knew Crutcher was still there. Davis then testified that the unidentified white man who was passing out literature had said "you had just better go ahead on up there because you could feel sorry for them and turn a loose the union." He also admitted that while Chism in handing out handbills had been facing Crutcher and Davis, they were turned away from Chism and were not facing Chism. Davis named three other employees who were present during his altercation with Crutcher and said that they were rooting Crutcher on. Chism testified that he had seen present during the incident with Crutcher and Davis. He said that he had seen Davis and he had thought that the employees were just jiving and joking because Davis was dancing around, shadow boxing and the other guys were hollering and playing with him. Chism said that the entire incident lasted about 10 or 15 minutes. He said that Davis had come over and talked with him and had, in fact, come over to Chism on three separate times to talk with Chism as he handbilled. Chism said that Davis had told him that he (Davis) believed in God and he didn't need a union in order to take care of his beliefs because he paid his tithes. Chism said that Davis would talk with him for a while and then would run over and shadow box for a while, but he had not seen anyone push or shove Davis.

Chism testified that Tony Civalich had been handbilling with Chism on that day and had been about one or two feet away from Chism. Chism denied hearing Civalich threaten Davis and recalled that Chism and Civalich had been laughing at the way Davis was acting out on the lot. Davis had first said that Crutcher probably was clowning around, then later testified that he thought Crutcher was serious because Crutcher knew Davis was not in the Union.

Davis testified that also on the day before the election, he had been threatened by union steward Neely Dodson. Dodson, who was accompanied by another steward Leland Tatum, had approached Davis outside the plant premises. It was Davis' testimony that Dodson had told him that if he didn't vote for the union that "he would

be the first black something out of the gate." Davis went on to say that Dodson had said "if he voted for the union or didn't vote for the union, either way it goes, he would be the first black something out of the gate." She had also told Davis that she was going to bust his head. Tatum had not said anything but had just laughed. There was no evidence presented that other employees were present during this conversation. Davis confirmed that he is 5'11' tall and he was not sure how tall Ms. Dodson was. On cross-examination, he was asked if he thought that Ms. Dodson was going to bust his head and he replied "I never underestimate nobody." The record reflects that Ms. Dodson is black and I take notice that Mr. Davis is black.

Davis testified that there was an employee meeting at the company approximately May 18, 1982. He said that he spoke up in the meeting and he let the employees know that he was not for the union. Davis recounted a conversation which he had with steward Leland Tatum and employee Floyd Smith after this meeting. Davis was coming out of the bathroom and Tatum had said to him that he could be hurt and Smith had said that he could wind up with a knife in his back. Davis said that he did not say anything but just kept going. There were no other employees present during this conversation. While Employer in its brief contends that Tatum had said that Davis could be hurt because of his statements against the union, the record does not reflect that Davis' testimony included any mention of the union but only the threats of harm to Davis.

Davis' testimony also included a description of a conversation between Davis and the supervisor of the shell lot, Maurice Alexander. Davis claims that he had gone out to the shell lot to clean up the lot. It was Davis' testimony that when Alexander had spoke to him he "had told me just to get my black ass away from there and get back to them white-son-of-a bitches." Davis did not reply but went back into the plant to clean up. He said that this conversation had occurred after he had spoken up in the employee meeting. There was no evidence that the union or the employee meeting was mentioned by Alexander to Davis. Davis said that three or four employees working in the lot had been present during this comment but he could only remember two names; Willie and Frank.

Davis testified that about a week before the election, he had a conversation with employee Johnny Guy. This conversation had occurred at the north end of the plant and Guy had said "What in the hell is this that I heard that you stand up in them people's face?" Guy had also said "On May 28, if you don't act right, I am going to kick your black ass." Davis had asked if that was a threat. Guy had said "You damn right, and what do you want to do about it?" Davis ran. Davis confirmed that Guy is black. Davis went on to explain that prior to this incident, Guy had been "talking about me before my face to his other friends. They were making games of me." Davis described these friends as other forklift drivers and said that Guy had also tried to turn some of Davis' friends against him, and named Willie Stewart as one of those friends that Guy had tried to turn against Davis. Davis had clarified that Guy had not explained to him what "acting right" meant. Davis said, however, that in his interpretation, acting right means to vote for the union. He said that he was a person who reads through lines and as Guy was in the union and Davis was not, this was his impression.

Davis further testified that on the same day that Neely Dodson had threatened him, employee William Stewart had threatened that Davis had better keep his mouth closed or else he was going to bust Davis' head.

Davis continued to testify about threats made to him and recounted an incident that occurred after the election where employee Wesley Faulkner had told Davis that he had made a complete ass out of himself by making his speech in the company meeting. Faulkner was accompanied by employee Johnny Johnson who began grabbing and pushing Davis. Johnson talked about what he was going to do and was "talking about we was cool, we was friends, we was this, and we was that." Johnson then thumped a cigarette on him. Davis said that he reported these incidents to the company and that certain of these employees named above were called into the office. Davis said that he knew that they were because he heard their names being called over the intercom. He said that their names were all called at the same time and he recalled hearing the names of Johnny Johnson, Johnny Guy, William Stewart, and Arthur Crutcher being called into the office. Davis said that he did not know whether Tatum or Dodson had been called into the office. He also said that he could not remember the date when these persons were called to the office and was not able to recall whether this occurred before or after the election.

DISCUSSION

Petitioner and Employer present evidence concerning allegations of 10 threats to employees during the campaign period. Two threats were made to the Petitioner, one threat to a member of the P.A.T. association and seven were alleged to have been made to one employee. For clarity of discussion, I shall address my findings on the alleged threats in total.

Both Valentine and Gilley testified that they were threatened while they [were] handbilled by unidentified persons who were also handbilling campaign literature. Chism's testimony that only union representatives and officials of the local or Teamsters organization handbilled supports the conclusion that the unidentified men described by Gilley and Valentine may have been Teamster representatives. Valentine was allegedly threatened by a man with whom he had handbilled and conversed on five or six occasions. Some two or three mornings before the alleged threat this same man had been talking with Valentine about his retirement. On the day of the alleged threat, Valentine had been handbilling in this person's presence for 15 to 20 minutes before the threat occurred and Valentine testified that he continued to handbill after the threat and in the presence of this man for another 30 minutes. Valentine told no other employees about threat and only told his attorney a week later. Valentine said that he did not discontinue his anti-union campaign after the threat and, in fact, was not intimidated by the threat.

Gilley testified that he handbilled some 8 to 10 times on behalf on the P.A.T. organization of which he is a member and one of the founders. The threat he alleges to have been made to him on one of these days of handbilling was not overheard by any other employees. There is no evidence that Gilley discontinued his handbilling or his anti-union efforts after the threat was made. Gilley did, in fact, serve as an observer for the Petitioner in the election on May 28, 1982.

Assuming that the threats, as alleged by Valentine and Gilley, were made by union representatives and assuming that they were, in fact, made to both Valentine and Gilley, I do not find that these isolated threats by the union sufficient to set aside the election.[20] Where union conduct is involved, the Board has cited the test to apply to be "Conduct upon which an election is set aside must be found to have affected the outcome of the election, i.e., likely to coerce prospective voters to cast their ballot in a particular manner."[21] The record does not support the conclusion that Valentine and Gilley were deterred from their efforts to campaign against the union, much less to alter their support for Petitioner and the P.A.T. organization, nor is there evidence that the threats to Valentine and Gilley were even communicated to other employees or coerced other employees. The Employer in its brief cites *Congreso De Uniones Industries De Puerto Rico*, 237 NLRB 1406 (1978), for the proposition that where threats are made by union officials to the opposition, the election must be set aside. The above cited case involves a campaign with two opposing labor organizations identified as the S.I.U. and Congreso. The circumstances of that particular campaign included the organizer for the Congreso drove an automobile toward an S.I.U. supporter and appeared to be attempting to run down the employee. Threats were made by one organization against another during an employee gathering of some 400 employees assembled in front of the plant and the union. Representatives of one of the labor organizations on a daily basis told employees as they entered the plant that they (the union) would break the employees' face if the other union won the election. Additionally, a union delegate was blocked by a group of some 30 to 40 employees at the plant entrance during her lunch period and another group of employees surrounded her car and began striking it with their fists and yelling "out with the S.I.U." The group included the organizer of the opponent union and this attack occurred for some 15 minutes. I find no difficulty in distinguishing *Congreso* with the present situation involving two isolated and unpublished threats to two P.A.T. supporters and organizers. The other threat alleged to have been made to Valentine involved the threat in the anonymous telephone call.

Except in aggravated situations, the Board has applied the same rationale to anonymous telephone calls as it has to rank-and-file employees and other persons who are not parties to the election.[22] The record reflects that only one out of 449 eligible voters received an anonymous telephone call. Valentine through his own testimony confirms that this alleged threat was not communicated to any other employees or the Employer. Valentine also admitted that he did not stop his anti-union campaign after receiving the telephone call. The record does not support a finding that the anonymous telephone call to Valentine "created an atmosphere of fear and reprisal which rendered a free expression of choice of representation impossible and thus destroyed the laboratory conditions for the election."

The remaining seven allegations of threat involve but one employee, Sammy Davis, Jr. Davis testified about two alleged threats made by union stewards, three alleged threats by employees, one threat by a supervisor, and a threat by an unidentified person who may have been a union representative. Davis contended that on the day before the election, female steward Neely Dodson told him that if he voted for the union or if he didn't vote for the union, either way, he was going to be the first black something out of the gate. While Dodson's comment may have been a threat, the very wording denies that it was made to coerce Davis to vote for the union. If Davis were to be credited, Dodson was threatening him but letting him know that the threat stood no matter how he voted.

Davis also contends that a union steward Tatum accompanied by employee Floyd Smith threatened him as he passed them after he exited from the bathroom. Davis gave no testimony that these threats were prefaced by any comment or reference to the union election.

Davis also testified about a comment from an unidentified white man who was passing out literature on the day before the election. Union representative Chism had called Davis over to talk with him as Chism was handbilling in front of the plant. Davis testified as being hesitant to go because he had just had an altercation with another employee in the same area. When he hesitated, the unidentified white man had said, "You had better go ahead on up there because you could feel sorry for them and turn a loose the union." By Davis' own testimony, he describes that he did, in fact, talk with Chism and, in fact, engaged in a lengthy discussion where Chism asked Davis about how employees perceived Chism and enlisted Davis' advice about how to convince the employees of Chism's true interests. The conversation as described by Davis did not have the appearance of a coercive or intimidating discussion.

While Davis has testified concerning three separate incidents and threats which are alleged to have been made by union representatives and stewards, I do not find these threats as a basis for setting aside the election.

The Board has held that statements made to employees by union representatives which are reasonably calculated to interfere with the employees' exercise of freedom of choice exceed the permissible bounds of preelection activities.[23] The Board has also, however, agreed with the Fifth Circuit finding that "For conduct to warrant setting aside an election, not only must that conduct be co-

[20] *NLRB v. Bostik Division, USM Corp.*, 517 F2d 971 (6th Cir. 1975).
[21] *Professional Research, Inc., d/b/a West Side Hospital*, 218 NLRB 96 (1975). *Great Atlantic and Pacific Tea Company, Inc.*, 177 NLRB 942 (1969).
[22] *Monroe Auto Equipment Co.*, 186 NLRB 90.
[23] *KMS Corporation*, 242 NLRB 633 (1979).

ercive, but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls."[24] I do not find that these statements as allegedly by Davis rise to the level of interference which would have have affected the outcome of the election. Additionally, I note that the Board has also held that in certain circumstances employees hearing such threats may be more likely to vote against, rather than for, the Union.[25]

Davis also testified concerning threats made by employees Arthur Crutcher, Johnny Guy and William Stewart. There was no evidence presented that any of these three employees were acting as agents of the union or at the command or urging of union officials.[26] The Board has applied a somewhat different standard to conduct of employees who are not union representatives and has looked to whether the character of the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice of representatives impossible.[27] Petitioner in its brief cites *Steak House Meat Company, Inc.*, 206 NLRB 28 (1973) to support its contention that the "conduct alleged had created a general atmosphere among the voting employees and fear of reprisal for failing to vote for or to support the Union." While it is true that in the *Steak House Meat Company, Inc.*, the threat was made to only one employee, I find the circumstances distinguishable to the present case. In the *Steak House* case, the employee threatened was a 16 year old part-time employee who was threatened that he would be killed. I do not find that the threats made by Crutcher, Guy or Stewart had the same coercive effect upon Davis, or rose to the level of confusion and fear of reprisal as cited by the Board in the *Steak House* case. While Davis describes the comment by supervisor Alexander as a threat, there was no evidence that Alexander's comment was directed to the union or concerning the union. Davis gave no other testimony concerning anything which Alexander said to influence Davis' vote. I do not find that this isolated comment by Alexander which may have been perceived by Davis as a pro-union comment to be sufficient to set aside the election.

In summary, I do not find that the threats as alleged by Davis created a general atmosphere of fear and confusion nor do I credit in their entirety Davis' versions of the threats allegedly made. Petitioner would contend that due to the fact that there was not rebuttal of all the threats as alleged by Davis, that an adverse inference must be drawn, citing *Dynacor Plastics and Textiles Division of Medline Industries, Inc.*, 218 NLRB 1404, 1410–11 (1975). Regardless of Petitioner's contention, however, I find Davis' testimony is not without ambiguity or inconsistency.[28] Based upon his demeanor as a whole, I do not credit the testimony of Davis.

Petitioner further contends that one clear indication of the confusion and fear is the allegation that on some occasions when both Union and non-Union parties were present and engaged in handbilling, employees would take the Union literature and then wait until the Union organizers had left to return and take the non-union literature. Please see a discussion as to this allegation in this report as it deals with Employer's Objection Number 8.

On the basis of the foregoing, I do not find that the incidents as described above created a general atmosphere of fear and confusion or interfered with the employees' actions at the polls and thus I find no basis for the setting aside of the election. Accordingly, I recommend that Petitioner's Objection Two and Employer's Objection Number 3 be overruled.

[24] *N.L.R.B. v. Zelrich Company*, 344 F.2d 1011 (C.A. 5, 1965).
[25] *KMS Corporation, supra, Hickory Springs Manufacturing Company*, 239 NLRB 641 (1978).
[26] *Orleans Mfg. Co.*, 120 NLRB 630 (1958), *Allied Metal Hose Company Inc.*, 219 NLRB 1135.
[27] *Aladdin Hotel Corp.*, 229 NLRB 499 (1977).

[28] I note Davis' testimony of being allegedly coerced by the unidentifed union representative to talk with Chism and the incredibly personal discussion which Davis alleges to have resulted therefrom. Additionally, I find it incredible that after Davis testified about all the employees who had threatened him, he recalled that they had been summoned to the office on the same day but he could not remember whether this occurred before or after the election. These same employees he had identified as being called to the office were employees who had allegedly threatened him both before and after the election, according to his previous testimony.

Doral Building Services, Inc. *and* Abel A. Palma, *and* Juan Hernandez. Cases 31-CA-9403 and 31-CA-9420

14 December 1984

SUPPLEMENTAL DECISON AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 13 January 1981 the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it adopted Administrative Law Judge David G. Heilbrun's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Palma and Hernandez and Section 8(a)(1) by interrogating, threatening, and promising benefits to several of its employees. On 28 January 1982 the United States Court of Appeals for the Ninth Circuit denied enforcement of the Board's Order and remanded the case to the Board for the limited purpose of permitting the Respondent to cross-examine three witnesses regarding affidavits they submitted to the Board.[2]

On 11 August 1982 the Board remanded the case to the judge to reopen the hearing to permit the required cross-examination and to issue a supplemental decision following the reopened hearing.

On 30 August 1983 the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the original and supplemental decisions and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the supplemental decision's recommended disposition.

ORDER

Based on the judge's decision and supplemental decision and the entire record, the National Labor Relations Board reaffirms its Order issued 13 January 1981 and orders that the Respondent, Doral Building Services, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I cannot adopt the judge's credibility findings in this case.

In crediting the testimony of employees Palma and Hernandez, the judge indicated that he gave "major weight" to demeanor because of the problems which he considered inherent in the translation of testimony. The judge quoted extensively from law review articles analyzing the difficulties of translation, and he concluded that "the entire mechanism of interpreting a witness' answers is open to some question." The judge noted the numerous inconsistencies in the employees' testimony, but he attributed those inconsistencies to complications created by "the translation patterns of one language into another."

Even accepting the premise that there are inherent difficulties in translation, I conclude that the judge's lengthy discussion of these difficulties misses the mark. What is most apparent from the testimony of Palma and Hernandez is not that they misinterpreted or failed to understand the questions being asked, but that they were unable consistently to remember the significant events which transpired in this proceeding. Subtle differences of meaning surely arise during translation, but those differences have no relation to the question of whether a witness has the ability to remember a particular event. In my view, the judge's heavy

[1] 254 NLRB 105.

[2] *NLRB v. Doral Bldg. Services*, 666 F.2d 432 (9th Cir. 1982).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the initial decision, the judge found that employee Donado's testimony corroborated employee Palma's claim that Palma had discussed unionization of the Respondent's employees with General Manager Gamboa at a party in early September 1979. The decision also suggests, however, that Donado testified only to speaking with Gamboa at the party about possible employment and that Donado "could not testify as to any details" of the conversation between Gamboa and Palma. The record clearly shows and we find that Donado credibly testified that he heard Palma and Gamboa discuss unionizing at the party. Contrary to the dissent, the judge in several instances did reject the Respondent's allegations of inconsistency in the employees' testimony and affidavits. Moreover, we agree with the judge that the inconsistencies that do exist are minor and do not diminish the employees' credibility as established in part by their demeanor. Nor do the minor inconsistencies render credible the rejected testimony of the Respondent's witnesses.

[4] In the supplemental decision, the judge reaffirmed his conclusion that the Respondent interrogated employees in violation of Sec. 8(a)(1). The original decision, however, did not clearly identify those unlawful interrogations. The record discloses the following unlawful interrogations: (1) several days before 20 September 1979 General Manager Gamboa asked employee Ramiro Aleman if he had signed a union card; (2) on or about 13 September 1979 Gamboa asked employee James "what we thought about the union"; and (3) on 20 September 1979 President Alan Flores asked a group of assembled employees if they had signed union cards and if they knew those cards belonged to the Union. We note that the interrogations occurred against a background of other unfair labor practices and that there is no evidence the interrogated employees had openly proclaimed support for the Union. See generally *Rossmore House*, 269 NLRB 1176 (1984). Member Zimmerman, who dissented in *Rossmore House*, does not rely on that case, although he agrees with his colleagues that these interrogations violate Sec. 8(a)(1).

emphasis on the difficulties of translation is not dispositive of the issues in this case.

Apart from the issue of translation, I am not persuaded by the judge's reliance on demeanor. The Board has recently emphasized that "the invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence."[1] The judge set forth the employees' numerous inconsistencies, but instead of analyzing their testimony he simply stated that the inconsistencies were of "insufficient significance" and that the Respondent's contentions were "most sterile." In addition, the judge labeled Palma's extensive memory lapses as "personal musings during an extraordinary experience not fully understood as to purpose." The judge has simply obfuscated the issues, and I see little to distinguish his conclusional statements from the failure of the judge in *Jewel Bakery* to analyze the "internal ambiguity" and "confusion" of the testimony of a credited witness.[2]

In view of the foregoing, I would reverse the judge's credibility resolutions. As the judge noted, those findings were crucial to the General Counsel's prima facie case, and consequently I would dismiss the 8(a)(3) and (1) allegations with respect to Palma and Hernandez.

[1] *Jewel Bakery*, 268 NLRB 1326 (1984).
[2] 268 NLRB 1326.

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge. Following hearing on an 8(a)(1) and (3) complaint in May 1980, the Board issued its Decision and Order (254 NLRB 105) on January 13, 1981, adopting conclusions that certain unfair labor practices had been committed by Respondent and expressly finding no basis to disturb certain credibility findings made in the decisional process. Thereafter on January 28, 1982, the United States Court of Appeals for the Ninth Circuit rendered an opinion (666 F.2d 432), denying enforcement of the Board's Order and remanding the case with directions to reopen the record and permit Respondent a described measure of cross-examination. The Board accepted the court's remand after duly considering the matter and, on August 11, 1982, issued its Order reopening the record to permit cross-examination in reference to the affidavits of Abel Palma, Juan Hernandez, and Isaias Donado on the basis of official English language translations of prehearing Spanish language statements.

Pursuant to this reopening and remand Order of the Board, the matter was set for further hearing on April 5, 1983, at Los Angeles, California. This transpired with each of the three named individuals being cross-examined by Respondent respecting their original testimony in May 1980, based on official English translations of their investigatory affidavits as originally written in Spanish and in that form attested thereto. Following this the matter was reopened on June 2, 1983, at which time Board Agent Frank Kazsimer, the person investigating the unfair labor practice charges on which the complaint issued, was examined by Respondent concerning his affidavit-taking practices with foreign-speaking witnesses, and in particular reference to a witness response of Donado that notwithstanding the typical jurat to his own Spanish language statement he could not, in fact, read Spanish.

On the entire record as now made, my observation of witnesses, and consideration of the General Counsel's oral summation made on June 2, 1983, as well as Respondent's posthearing brief, I make these further findings, conclusions, and recommendation.

I. FULFILLMENT OF COURT REMAND

A. *Introduction*

In writing its opinion the Ninth Circuit noted that since "no one at the hearing understood Spanish" a proper cross-examination was rendered "impossible and unhelpful to a Judge charged with making credibility determinations." It was this factor which led the court to require that "Official English translations of the original Spanish statements should be prepared" and furnished in connection with reopening.

The reality of this proceeding, as would be expected in a modern polyethnic urban setting, is that language comprehension of persons involved had adumbral characteristics. This is exemplified by the situation of Ramiro Aleman, a witness for the General Counsel whose original testimony covered 46 pages of transcript. Aleman's testimony was assessed in my original decision, and he was specifically named as a "credible" witness[1] insofar as merits of the case were concerned. Aleman testified through an interpreter and initially negated any understanding of English (Tr. 188), but later modified this to say that he understood "A little bit" (Tr. 206). This raises the obvious question of how this "little bit" of comprehension manifests in the thought processes of an individual as he functions on the witness stand being asked questions about events of the past, and is a matter in harmony with my observations and those of counsel. Respondent expressly sought to have the record reflect that Aleman "was responding to the question prior to it being translated" (Tr. 167), while the General Counsel both expressly agreed to "making that representation" and further observed that Aleman "begins to answer some questions prior to the time the translater has completed the interpretation" (Tr. 191). I am on record as agreeing that Aleman "does seem to be anticipating some of these questions as though he has some command of the language [and] seems to understand the thrust of

[1] The pattern of Aleman's testimony was the same as Palma, Juan Hernandez, and Donado, inasmuch as Respondent requested prehearing statements and was provided the Spanish version and unofficial English translation (Tr. 175–175). Following Aleman's testimony a return of this material was requested by the General Counsel (Tr. 268). Nevertheless Respondent has not apparently included Aleman in its arguments to the Ninth Circuit, nor was his situation treated in the court's opinion.

some of [Mr. Kaplan's] questions, or part of them. It's one of these gray areas." (Tr. 167). And for this reason I asked the interpreter to instruct him "simply to hold his answer until he has heard the question in Spanish" (Tr. 167). This highlights the problem of dual-language comprehension at a given moment in time, separate and apart from the question of whether and to what extent an individual has increased (or decreased) such comprehension with the passage of time, and at a later point being questioned, again through an interpreter, about claimed inconsistencies in his or her previously translated testimony.

A further matter of significance is that during investigation and pretrial of an unfair labor practice case a witness (Palma being an example) is questioned at different points in time, for different purposes, and by different individuals. Initially such interrogation is to ascertain whether sufficient evidence exists in support of the charge for issuance of complaint in the matter. Once this threshold point is passed, the Government is advocating allegations of the charge and preparing its witnesses accordingly. Thus Palma was twice interviewed by Kazsimer and had his responses reduced to a version recorded in his native language. However, he was subsequently spoken with by trial counsel about factual circumstances (Tr. 1042–1043), and he expressly recalled that this involved "different" questions. In this general context some observations are in order, both from the standpoint of common experience and as focused on in literature concerning this phase of jurisprudence.

B. *Bilingualism*

Roberto Tschudin authored an article posing the question of whether a Federal court could impart the best kind of justice in Puerto Rico, a Spanish society. The answer, so termed by the author, "as I learned, is no." Essence of this article was a proposal for an intricate formula based on language fluency of defendants and counsel insofar as the United States District for the District of Puerto Rico was concerned, with proceedings that might be conducted in Spanish, English, or in both languages. In developing this idea the author pointed to a learned study which had identified "three kinds of bilingualism" relative to the Spanish language. The least fluent type is termed "incipient Bilingualism," and attaches to a populace other than "upper strata of . . . society" or "English-speakers, particularly those in the middle class." The resultant "large number" of persons to whom this sort of "pidgeon English" pertains are described as "incapable of forming complete sentences in English." In this context the author posits that "[u]se of interpreters delays proceedings, is rarely perfect, and interferes with effective cross-examination." Tschudin, *The United States District Court for the District of Puerto Rico: Can an English language court serve the interest of justice in a Spanish language society?*, 37 Revista Del Colegio de Abogados de Puerto Rico 41–86 (Feb. 1976).

It has also been observed as part of fundamental "Problems of Interpreting and Translating" that "Interpreting or translating a foreign language is a complex task. . . . Some nuances of language may escape all but expert linguistic interpreters." This article[2] also noted:

> In this country, numerous external and individual factors result in wide varations in the Spanish and English a person ultimately learns to speak. Such factors include the amount of education received in either language and the extent to which a family becomes acculturated into American society. Social and financial problems beyond individual control can also affect the amount of education and acculturation attained.
>
> Wholly distinct from linguistics are personal considerations such as pride and a desire to save face or family honor. These are frequently strong cultural aspects which can inhibit many from requesting an interpreter in court or from seeking other legal help. This presents a problem for those who must supervise interpreter personnel, since interpreters themselves may be too proud or too embarrassed to declare that they are unable to translate a given word or phrase. It is much easier to bluff or to pass over the matter. After all, who will know? Interpreters are usually the only bilingual persons in the courtroom.
>
> Among the uneducated, especially in the Southwest, a mixture of English and Spanish words has evolved which cannot be understood in any Spanish-speaking country and which can present a problem for many interpreters.

In a general sense this writer believed that (*Attorneys Guide*, supra at 472–473):

> Interpreting is not a mechanical substitution of words in one language with their verbatim equivalent in another. . . . An extensive vocabulary and a sure grasp of the meaning of words is necessary to translate scientific, technical, or legal transactions. Less obvious to many is that a similar linguistic skill is necessary to translate slang, dialects and everday idiomatic expressions. Such linguistic elements exist in every language. They pose a special problem for the courts because most courts are not prepared to evaluate the competency of interpreters with these elements in mind.

These observations are but a prelude to a second troubling aspect insofar as ferreting out what a person has seen, heard, or generally experienced as a matter of mature adult awareness. The aspect is directly that of the link that is provided by interpreters in an administrative proceeding such as this, or for that matter in any general legal setting.

C. *Interpreters*

The fundamental quality of conveying the essence of what an individual has once heard is compounded when

[2] *Attorneys Guide to the Use of Court Interpreters. With an English and Spanish Glossary of Criminal Law Terms.* 8 U. Cal., Davis L. Rev. 471 at 476 (1975).

the experience was in one language and it is to be evaluated by its attempted translation into another. This was exactly the theme of a recent article in which the following passage appears:

> Of course it does not follow, once a non-English speaker is provided with the services of a competent interpreter, that his chances in the courtroom situation are now as good as his English speaking counterpart. Nothing could be further from the truth. . . . The frailties of any evidence or arguments are so much more readily grasped when one is hearing them directly in one's own language.

[Crouch, *Interpreters, Translators and Legal Services Toward a Better Understanding*, 55 Law Journal Institute 264 (1981).] It also has been noted how it is "impossible" to equalize the position enjoyed by an English-speaking witness with a non-English-speaking one, because when the latter is "assisted by a competent interpreter [language], chameleon-like at its inception, may lose many of its fine distinctions when filtered through the additional medium of an interpreter." (*The Right to an Interpreter*, 25 Rutgers L. Rev. 145 (1970–1971).)

This conundrum goes even deeper as reflected in this insightful quotation:

> Yet behind the questions of competency of the interpreter and the quality of the interpretation lies the question of what the [witness] heard and agreed to. . . . The trial record often reveals almost nothing of what an interpreter has in fact communicated to the defendant or whether the defendant has understood.

[Safford, *No Comprendo: The Non-English Speaking Defendant and the Criminal Process*, 68 J. Criminal Law & Criminology 15 (1977).] Relatedly, another authoritative publication has identified and evaluated, "19 major dialectal forms of Spanish . . . and numerous minor forms. . . . It is very important for the interpreter to know the context within which the translation is made. Words, of course, change meaning within given context." (Rainof, *How to Best Use an Interpreter in Court*, 55 Cal. St. B. J. 196 (1980).)

In summation the entire mechanism of interpreting a witness' answers is open to some questions, and this is compounded when it is further realized that the "official" English language translations of this proceeding have been completed by a person not necessarily sharing the same etymological, semantic, or idiomatic frame of reference as the guiding court interpreter.[3]

[3] In the instant case a replacement interpreter was obtained during the very course of cross-examining Palma at the original trial, when illness prevented continuation by the one that had translated up to that point for Spanish-speaking witnesses (Tr. 395). Aside from the fact that the notion of "so-called literal or strict method rather . . . than a paraphrasing of witnesses' answers" was structured for the replacement interpreter after off-the-record conferring with counsel (Tr. 396–397), there is total uncertainty about whether the second interpreter had a parallel level of communication with Palma or later witnesses, as compared with the first interpreter. This concern is exactly at the root of what was written in the Rainof article, supra, where the author followed his point with an example about an "interpreter [being] replaced in the afternoon session."

D. *Methodology*

For these reasons I have given major weight to demeanor characteristics of the several witnesses cross-examined pursuant to the court's remand. This is not to infer that literal disparities, or unexplained aspects of testimony, as set forth in the record itself, are not fully considered. It does mean, as harmonized in another writing,[4] that the palpable effort at speaking truth has been fully assessed in the overall factfinding process.

II. CONTENTIONS

The nature of this supplemental proceeding is such that Respondent's contentions are set forth in advance of those by the General Counsel. This is so because Respondent marshaled its arguments more comprehensively and the General Counsel's role is essentially a responsive one, plus that the original trial attorney is no longer available to the Government.

A. *Respondent's Argument*

Here it is asserted that the testimony of Palma and Juan Hernandez should not now be credited. As to these witnesses it is argued, respectively, that their testimony is "rife" and "riddled" with contradictions, inconsistencies, and omissions. In support of these assertions Respondent points out various aspects of their testimony as given on April 5, 1983. With respect to Palma, Respondent's posthearing brief on remand makes these detailed observations (transcript references and footnotes omitted):

> At hearing, Palma testified that his cousin Donado was present when he had a conversation with Gamboa in September, 1979, during which Gamboa allegedly promised him certain benefits if he gave up his support of the Union. However, after twice reading over his pre-trial afidavit he was unable to point to any reference to Donado, and had to admit to the omission. Nevertheless, he adamantly claimed that he told the Board agent who took the affidavit that Donado was with him when he spoke to Gamboa. Palma did concede that the agent had him read the affidavit over before he signed it, and told him that he could make changes and additions to it. He attempted to explain his failure to add Donado to the affidavit by saying that he must have forgotten to tell the agent that Donado had been omitted.
>
> In his affidavit, Palma stated that during the conversation with Gamboa he understood that he was being offered certain benefits, "so that I would leave the Union, *Gamboa did not say it with words* but that was how I understood it." [Emphasis added.] And he confirmed this by his testimony at the reopened hearing. However, this is in direct conflict with Palma's testimony in the initial hearings that *Gamboa said, "that in LA they were going to*

[4] Here the emphasis was noted as importance of "Attentive[ness] . . . to the [witness'] manner of testifying and link it with the English translation afterwards." (Comment, *Trying Non-English Conversant Defendants: The Use of an Interpreter*," 57 Or. L. R. 549 at 552 (1978).)

get a building, and that he would give it to me so that I could make more money. But that I should stop going back and forth to the Union." [Emphasis added.] When asked to explain this conflict, Palma answered, "Maybe it's something that I forgot." Pressed as to what he forgot, Palma said, "It's been so long ago. So much time." Finally, Palma attempted to rationalize his different responses by claiming that he didn't actually understand the question asked of him in the prior hearings.

At hearing, Palma testified that he told Gamboa that he "could not back off from the union, because my co-workers had elected me to go pick up those cards." But this does not appear in his pre-trial affidavit. Palma's only explanation for this omission was that it "could have been something that I forgot."

In his affidavit, Palma averred that other than the conversation he had with Gamboa in early September, 1979, "I was not interrogated, nor did I talk to the supervisors about the union." Yet he testified at both the initial and reopened hearings that he had not one, but three conversations with Gamboa about the Union. When this inconsistency was pointed out to him, Palma claimed that he recalled telling the Board agent who took the affidavit about all three conversations. But pressed on this point, he backed off and testified, "I don't recall very well if I told him." Palma's explanation for not telling the Board agent about all three of the supposed conversations was, once again, that he forgot.

At hearing, Palma testified that he had two conversations with his supervisor Ruben Hernandez about the Union. But these conversations are not reflected in his pre-trial affidavit. Asked to explain this omission, Palma cryptically answered, "If I can recall, perhaps I thought that it wasn't important." Upon further examination, Palma responded, "I don't recall. I am very confused." Finally, Palma fell back upon what had become his standard answer: "Forgot. Perhaps I forgot."

At the initial hearing, Palma testified that he had two conversations with supervisor Oscar Sanabria about the Union. However, at the reopened hearing he was only able to recall one of these conversations. And no such conversations were mentioned in his affidavit. Once again, Palma's only explanation for this omission was, "Perhaps, something that I forgot. I don't remember."

In his pre-trial affidavit, Palma stated that on September 10, 1979, when he and Ruben Hernandez were found in an office looking at magazines during working time, "Gamboa only told me that he ordered Ruben to do something with me. *Gamboa did not say anything about a warning* . . . ." [Emphasis added.] And he confirmed this by his testimony at the reopened hearing. But at the initial hearings, Palma testified that *Gamboa told him that "he had given Ruben Hernandez an order so that he could give me a warning.*" [Emphasis added.] When asked to explain this contradiction, Palma's only answer was, "I can hardly recall well. I don't recall that. I don't recall."

During the initial hearings, Palma testified that on September 10 Ruben Hernandez told him that he had been ordered by Gamboa to prepare written warning notices for both himself and Palma. However, this is not mentioned in Palma's pre-trial affidavit. Queried about this omission, Palma's only response was "I don't recall why I didn't mention it."

According to Palma's affidavit, on September 17, 1979, Gamboa told him that he was fired. That same night, Gamboa also told Ruben Hernandez to prepare a warning notice for Palma. At the reopened hearing, Palma testified that he was told that he was fired *before* Gamboa directed that a warning be written. But in the initial hearings, Palma had testified that he was fired *after* Gamboa told Hernandez to write the warning. Palma tried to explain away this inconsistency by saying that perhaps he hadn't been asked about the order of events when he was originally called to testify. However, it was pointed out to him that he had been asked that very question. Again asked to explain the inconsistency in his testimony, Palma answered, "It could be, because up to this date I don't recall well." Pressed to explain further, Palma could only say, "I need words at this moment in order to explain."

At the reopened hearing, Palma testified that he refused to sign the warning that Ruben Hernandez prepared on September 17. However, he didn't tell Hernandez why he wouldn't sign it. But at the initial hearings he testified that he told Hernandez that he wouldn't sign because "I did not see any reason for them to fire me." Questioned about this inconsistency Palma stated, "I don't recall well. If was Mr. Hernandez. I don't recall."

According to Palma, after he refused to sign the warning notice prepared by Hernandez, Gamboa directed that he be given a second warning notice. So he actually received two notices on September 17, both of which he refused to sign. Yet at the initial hearings he had testified that he was only given one warning notice on his final day of work. When asked to explain why if he was given two warnings he only testified to one of them, Palma's response was, "I forgot. I forgot."

The comparable observations with respect to Juan Hernandez are:

> In his pre-trial affidavit, J. Hernandez stated that, "I was never given any warning about my work. Gamboa told me once that I was a good worker. . . ." at the reopened hearing, J. Hernandez confirmed that he was only complimented by Gamboa on one occasion. And yet at the initial hearings he testified that he was thus praised two or three times. Asked to explain this inconsistency, J. Hernandez first claimed that "In the statement, it doesn't exactly indicate that it was just once." However, the official translator of the proceedings

contradicted this, stating that the original Spanish language affidavit reflected that Gamboa made the statement attributed to him by J. Hernandez just once. Hearing this, J. Hernandez said, "when they asked me about that in my statement, I told them once. Now, when I gave testimony, I recalled that one time, and the other times." Of course, this doesn't explain his original answer at the reopened hearing that Gamboa only praised him once.

When he gave his affidavit, J. Hernandez was unable to remember when he had been praised by Gamboa. But at the initial hearings he testified that this occurred a few days before his transfer. And he tendered no reason whatsoever for his spotty recollection.

In his affidavit J. Hernandez quoted Florea as saying that, "If the union wins, you will lose your job." At hearing, he testified that Florea also said, "that they could get other buildings, in other places, and would not give us any jobs." But this is not reflected in the affidavits. When questioned about this omission, J. Hernandez first answered, "Because they didn't ask." Then he conceded that the Board agent who took his affidavit had asked him about what Florea had said. And he sought to explain the omission from his affidavit by claiming that "at that moment I didn't remember." However, when queried about what had happened between the time he gave his affidavit and the time he originally testified which had helped him to remember additional "facts," J. Hernandez could only say, "I started remembering more things."

In his pre-trial affidavit, J. Hernandez said that on his final day of work he sat down in a chair and fell asleep. When asked at the reopened hearing if he hadn't actually lain down on a sofa, J. Hernandez said, "No." Pushed on this matter, he conceded that he wasn't certain if it was a chair or a sofa. But, he was sure that he wasn't laying down. However, at the initial hearings he testified that he "laid down in a sofa and I fell asleep." J. Hernandez tried to explain this inconsistency saying, "I didn't think there was much of a difference."

In his affidavit, J. Hernandez stated that Gamboa said nothing to him when he found him asleep and awakened him. And he confirmed this at the reopened hearing. But at the initial hearings, he testified that Gamboa asked him what happened when he woke him up. J. Hernandez explained this inconsistency by claiming that he simply didn't recall Gamboa saying anything when he gave his affidavit. Yet, he offered no explanation at all for the change in his testimony from the initial to the reopened hearings.

B. *The General Counsel's Argument*

Here the assertion that original credibility findings should be adhered to is summarized under four principal arguments made in this regard. As orally delivered upon close of the hearing these were:

First, although Respondent has pointed to a number of instances wherein Palma testified at the 1980 hearing herein to facts which did not appear in his pre-trial affidavits, the Board has held that such circumstance does not constitute a sufficient basis for impeachment.

It is common for a Board agent to fail to ask questions while taking a statement which questions are later asked by a field attorney during trial preparation. And sometimes witnesses recall for the first time on the stand matters previously forgotten. See *Civic Center Sports*, 206 NLRB 428 at 431; *Intl. Union of Electrical Workers, Local 601 (Westinghouse Electric Corporation)*, 180 NLRB 1062 at 1066.

Secondly, although Respondent has pointed to a number of instances of discrepancies or inconsistencies between witness testimony and the presumably corresponding pre-trial affidavit, most of these instances involve minor variances, such as for example, whether Gamboa told Juan Hernandez that he was a good worker once or two or three times, and whether at the end of his shift on September 25th, 1979, Juan Hernandez fell asleep on a chair or a sofa. And where the discrepancy is of that type the Board has held it to be too minor to vitiate a witness' general credibility. See *Federal Copper & Aluminum Co.*, 193 NLRB 819; *Westinghouse Electric Corporation, supra.*

Thirdly, Respondent pointed to one major discrepancy between Palma's 1980 testimony and his 1979 pre-trial affidavits. In this connection, Palma testified tht Gamboa told him—I emphasize "told him"—quote, "In Los Angeles they were going to get a building and that he could give it to me so that I could make more money, that for me to stop going at the union in relation to the union."

In his affidavit, Palma said that when he talked with Gamboa at his home in September 1979, he understood that Gamboa was offering him benefits, such as a new building in Los Angeles, so that he would not support the union. And Gamboa did not say it in so many words, but that's how Palma understood it.

However, an affidavit inconsistent with subsequent testimony is not completely dispositive of the credibility issue, particularly where as here the affiant did not draft the statement and failed to give it close scrutiny before signing it. See *Trailways, Inc.*, 237 NLRB 654.

In this connection, it need hardly be mentioned that the witnesses here were nowhere near as sophisticated as the lawyer who was cross-examining them.

Moreover, major discrepancies may be resolved on the basis of a comparison of demeanor on the stand as between the witness who testified inconsistently with his affidavit and the witness who testified contrary to the testimonial version of the inconsistent witness. See *Mangurian's, Inc.*, 227 NLRB 113. Such comparison of demeanors may well serve as the basis for concluding that the discrepancy or in-

consistency was the result of a faulty memory rather than a deliberate effort to conceal the truth.

Moreover, a witness may properly be generally believed notwithstanding that he is somewhat confused in his testimony on particular items. See *Maximum Precision Metal Products*, 236 NLRB 1417.

Fourth, although Palma, Juan Hernandez, and Donado were generally unable to explain why there were some inconsistencies between their 1980 testimony and their 1979 affidavits, such inability should not be held against them. Even sophisticated persons may be hard put to articulate their motivations, *and the witnesses here were in particular difficulty because of the differences in language and the use of different translators or interpreters at every step in the Board's procedures.* [Emphasis added.]

III. ANALYSIS

The perspective of this case must remain firmly in mind for purposes of assessing what has been educed during the principal remand hearing. This perspective includes the fact that pure timing of discharges at issue was a factor in inferring unlawfulness to Respondent's actions, that Gamboa as a significant figure in the eventful employment dynamics of September 1979 had, deliberately but inexplicably, set out to "catch" at least Palma in an offense, and that Gamboa's own credibility was extremely poor both as a matter of demeanor and as contradicted by Respondent's own witness Miguel Murillo.

A. *Palma's Testimony*

Regarding the omission from Palma's pretrial affidavit of any reference to Donado being at the Gamboa home in early September 1979, I find insufficient significance to this standing alone or as an aggregate matter with other details to which Respondent points. *Trailways, Inc.*, 237 NLRB 654 (1978).This evaluation also applies to the matter of whether Palma had told Gamboa how he would not back off from supporting the Union because his coworkers were counting on him to take this lead. It similarly applies to the matter of how many conversations Palma had about the Union with both Ruben Hernandez and Sanabria, the supervisor for another building. Finally, I also apply the same evaluation to the point of whether on September 10, 1979, Ruben Hernandez had been ordered by Gamboa to prepare certain written warnings.

Regarding the exact mode of how Gamboa communicated an enticement that if Palma forsook the Union he would obtain a more beneficial assignment to a new building to be maintained, Respondent has raised little of substance at which to point. Palma's prehearing affidavit (as officially translated) and his original testimony are merely a routine synopsis of the gist of what he credibly recalls being outlined to him by Gamboa during party atmosphere. The claimed "rationaliz[ation]" whereby Palma supposedly commented on his "differing responses" of the time cannot be taken as more than an unsophisticated attempt to respond about something which the individual only dimly comprehends. This specific area was one that I termed an "extremely fine distinction" at the remand hearing, and I find nothing in the laborious cross-examination of Palma on the point which casts doubt on his general credibility.

In regard to the number of conversations had with Gamboa that were relevant to issues of this case, Respondent notes that Palma's prehearing affidavit states, in essence, that he had only one such conversation with Gamboa. However, the context of this statement is that it is part of a discretely marked paragraph with a time frame "beginning" in September 1979, whereas Palma ultimately testified, as expectably so after pretrial witness preparation, that he recalled earlier conversations of 1 to 2 months prior to the September time period. Thus neither in a literal or likely sense has Palma been shown to be inconsistent on the point.

In regard to whether or not Palma had inconsistently first testified that he was told of being fired *after* Gamboa told Ruben Hernandez to write a warning and then at the remand hearing testified that advice of being fired occurred before, I find this entire subject area to be only an illusory point that Respondent has constructed on an erroneous premise. Palma's original testimony was plainly that Gamboa told Ruben Hernandez to make a written notice "after" Gamboa told him he was fired (Tr. 230), which conversely establishes that such advice was, as Palma reiterated on April 5, 1983, *before* the directive that he receive such a warning. Respondent's reference to transcript page 393 on this point is insufficient, for the responses there to questions as posed are inconclusive to establish any later inconsistency.

As to circumstances surrounding the warning notice given Palma on September 17, 1979, I find little significance to any discrepancy of recall insofar as whether he faced one or two notices that day, or whether he actually uttered a refusal to sign one from Ruben Hernandez versus his testimony being taken only as a personal value judgment with respect to the distasteful termination from employment that had materialized.

Thus, none of the points raised by Respondent are sufficient to shake the essential veracity of Palma's testimony. *Federal Copper & Aluminum Co.*, 193 NLRB 819 (1971). The overriding consideration is that of demeanor, for at all stages he impressed me as one vouching the truth and his frequent lapses into confessing forgetfulness during the searching, if not scathing, cross-examination is taken only as personal musings during an extraordinary experience not fully understood as to purpose, and complicated by the translation patterns of one language into another. On this basis I reaffirm my belief that Palma rendered credible testimony in regard to the essentially important issues on which an inference of unlawful discrimination was drawn.

B. *Juan Hernandez' Testimony*

The first point made by Respondent here is that the prehearing affidavit refers to praise from Gamboa "once," while testimony referred to several such instances as subsequently recalled by the witness. This is a variation of only the slightest moment affording no reason to doubt the essentials of other testimony. A similar outlook obtains insofar as cross-examination at the

remand hearing produced a minor refinement in what Juan Hernandez remembered in expanding on remarks made by Florea (as interpreted by Gamboa) during an interrogation in mid-September 1979. I find nothing unusual about this witness testifying in fuller detail about such an episode, particularly because it was specifically alleged as an 8(a)(1) violation in the complaint. Predictably the General Counsel would attempt to enlarge on the supporting witness' version of the incident, and this in essence is all that Juan Hernandez has done in credibly having "remember[ed] more things."

The only other subject pointed to by Respondent here is that of circumstances when, on September 24, 1979, Juan Hernandez fell asleep on an article of furniture and was awakened by Gamboa. Considering the remoteness of these details to issues of the case, coupled with a natural uncertainty when sleep or drowsiness has affected an experience, I discount any claimed significance to what Respondent argues as inconsistencies in this regard.

Essentially Respondent has a most sterile basis to contend that basic credibility findings respecting Juan Hernandez should be varied, and with a repetition of satisfactorily impressive demeanor on his part during the remand hearing I am not influenced to reach any changed outlook for this witness.[5]

C. *The Record as a Whole*

Section 10(c) of the Act provides that the Board may properly find unfair labor practices to have been engaged in "upon the preponderance of the testimony taken." This associates to Section 10(e) and (f) in which such findings shall be conclusive "if supported by substantial evidence on the record considered as a whole."

On June 15, 1983, the United States Supreme Court issued its opinion in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). This holding reversed the First Circuit Court of Appeals, resolved decisional conflicts among the courts of appeals and relatedly approved the Board's 1980 decision in *Wright Line*, 251 NLRB 1083 (1980). To the extent that Respondent may not have had the benefit of this recent opinion in briefing the instant matter, I observe that the reaffirmed credibility findings establish a prima facie case which it is the General Counsel's burden to prove, and that in such a situation it is proper to require an employer seeking to avoid such a conclusion that it meet or neutralize such a showing by "demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union." *Transportation Management*, supra. Respondent has not done so in this situation for the very reason that evidence as a whole shows hostility toward union activities among its employees, and that it seized upon implausible reasons to effect the discharge at issue. Respondent has not, therefore, met its burden of persuasion, and on the contrary its affirmative defense does not elevate from merely a pretext level. Since the protected conduct of Palma and Juan Hernandez was a substantial or motivating factor in these adverse actions, and Respondent has not shown they would have nevertheless resulted, both discharges remain violative of Section 8(a)(3) as originally found by the Board on the *Wright Line* doctrine as now settled by the Supreme Court's construction of the statute.

Disposition

Having reaffirmed my original credibility findings in this matter, I again reach the same conclusions of law as previously made and adopted by the Board, determining now that Respondent take the remedial action set forth in my original recommended Order.[6]

[5] Respondent did not assert in its brief that the testimony of Donado, as given at the remand hearing, contained contradictions, inconsistencies, or omissions as would warrant discrediting him in any material regard.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The Kroger Company *and* Local 37, United Food And Commercial Workers Union, AFL–CIO and CLC. Case 25–CA–14427

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 15 November 1983 Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order.

The judge concluded that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing or refusing to bargain with the Union about its decision to close its egg processing facility located in Wabash, Indiana, and the effects of that decision. We agree with the judge's conclusions, but we do so for the following reasons.

The Board recently held in *Otis Elevator Co.*[2] that management decisions which affect the scope, direction, or nature of the enterprise are excluded from the limited mandatory bargaining obligation of Section 8(d). The Board stated that the critical factor in determining whether a management decision is subject to mandatory bargaining is "the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives."[3] Applying that analysis to the facts of the instant case, we find that the Respondent's decision to close its egg processing facility and to subcontract its egg processing operation to others turned not upon labor costs but upon a significant change in the nature and direction of the business and therefore was not subject to mandatory bargaining.[4]

The Respondent is one of the largest food chains in the United States, operating retail food and grocery stores in 20 States. The Respondent also operates, through its agri-products division, 30 manufacturing or food processing plants which supply goods for sale at its retail stores. At issue in this proceeding is an egg processing facility located in Wabash, Indiana, which the Respondent began operating some 25 years ago and which it closed on 9 April 1982.

The Respondent's Wabash plant was a "nest run" facility, meaning that eggs were purchased from others and then transported in flats to the Wabash plant, where they were washed, inspected, graded, boxed in egg cartons, and shipped to the Respondent's distribution warehouses. As found by the judge, "nest run" egg processing operations are distinguished from "integrated" egg processing operations where the production and processing of eggs are accomplished at the same location. Thus, in an integrated operation, the laying hens are owned by the processor and the eggs are immediately transported by a conveyor belt to the processing area when laid. The integrated operation enjoys many advantages over the nest run, including avoidance of double packing and transportation, less handling and processing time, and a higher yield of fresh, good quality eggs. Because an integrated operation has no expenses connected with egg gathering, storage, and refrigeration prior to being transported to a grading plant, and no loading and transportation costs related to bringing the ungraded egg to the grading plant, it is also generally less costly and more profitable than a nest run operation.

The Wabash plant was the Respondent's last remaining nest run operation. A trend toward integrated operations in the egg processing industry had resulted in a growing scarcity of nest run eggs and rapidly rising prices for nest run eggs that were available. Although the Respondent had once owned nine nest run plants, all except three had been closed down by 1980. In 1980 the Respondent closed its two other nest run plants because of the lack of raw materials at competitive prices, leaving only the Wabash plant in operation as a nest run facility.

In early 1982, the Respondent made a decision to close the Wabash facility as well. Its supply of nest

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 269 NLRB 891 (1984). *Otis Elevator* issued after the judge's decision in this case.

[3] 269 NLRB 891.

[4] The Respondent contends in its exceptions that its action was not a subcontracting, but a closing of its egg grading business, and a partial closing of its agri-products division. As we noted in *Otis Elevator*, the appellation of the decision is not important, particularly where, as here, the decision involves elements of several types of actions.

run eggs was dwindling, and the outmoded nest run operation could no longer compete with integrated egg producers and operators. In recent years the Respondent had made efforts to salvage the Wabash plant. It had purchased its own flock of laying hens which it contracted out to farmers in the Wabash area in an attempt to keep the plant supplied with eggs, and it spent substantial amounts on new equipment. It also had negotiated with the Union[5] productivity agreements whereby employees received increases in wages only in relationship to increased productivity. Despite all this, the Respondent had reached a point where it could purchase cartoned eggs from integrated operators for less than it could produce them at the Wabash plant. This was the case not because of labor costs arising under its collective-bargaining agreement with the Union, which constituted a relatively insignificant amount of the production costs,[6] but rather because of the lack of raw materials at a competitive price.[7] As noted by the judge, the fundamental basis for the Respondent's action in closing the plant was that its nest run operation was outmoded.

Following the plant's closure, the Respondent no longer operated any facility at which it simply graded and cartoned nest run eggs.[8] It is thus apparent that the Respondent's closure of the Wabash plant constituted a significant change in the scope, nature, and direction of the business.

Otis Elevator, as stated, now provides the method of analysis for determining whether management decisions are subject to mandatory bargaining. We find here that the essence of the Respondent's decision to close the Wabash plant did not turn upon labor costs. It centered, rather, upon the scarcity of raw materials and the inability of the Respondent to operate this outmoded grading facility to compete with integrated egg producers. These facts establish that the Respondent's decision to close the operation, no matter what it is labeled, clearly turned on a fundamental change in the nature and direction of the Respondent's business. See *Columbia City Freight Lines*, 271 NLRB 12 (1984). Accordingly, since we conclude that under *Otis Elevator* the Respondent had no duty to bargain about its decision to close its Wabash plant, we affirm the judge's dismissal of this portion of the complaint.

We also agree, for the reasons stated by the judge, that the Respondent met its obligation of notifying the Union of its intention to close the plant and that it offered the Union an opportunity to bargain regarding the effects of that decision upon the Respondent's employees. Accordingly, we affirm the judge's dismissal of the complaint in its entirety.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, concurring.

I agree with my colleagues that the management decision in issue here was not a mandatory subject of bargaining. Several factors influenced the Respondent's decision, but the fundamental basis for that decision was the fact that the Respondent's nest run operation was simply outmoded. This was a factor over which the Union had little or no control. I therefore conclude that the Respondent's decision to alter its operation was not amenable to resolution through collective bargaining and agree that this portion of the complaint should be dismissed. See my dissent in *Milwaukee Spring*, 268 NLRB 601 (1984), and my concurrence in *Otis Elevator*, 269 NLRB 891 (1984). I also agree with my colleagues, for the reasons stated by the judge, that the Respondent satisfied its obligation to bargain about the effects of its decision, and that the complaint should be dismissed in its entirety.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Adminstrative Law Judge. Since the late 1950s or early 1960s, Local 119, United Food and Commercial Workers Union, AFL–CIO and CLC, the predecessor to Local 37 (the Union),[1] has represented the production and maintenance employees at the egg processing facility of Respondent The Kroger Co. in Wabash, Indiana. On April 9, 1982, Respondent terminated its egg processing operations and discharged its 70–75 employees. The General Counsel and the Union allege that Respondent did not merely close its facility; it subcontracted its work to others, without bargaining with the Union either as to the decision to subcontract or the effects thereof, all in violation of Section 8(a)(5)

[5] Local 37, or its predecessor, has represented a unit of production and maintenance employees at the Wabash plant since the late 1950's or early 1960's. The Respondent and Union have been parties to a series of collective-bargaining agreements, with the most recent agreement being effective from 27 July 1980 to 30 July 1983.

[6] The Respondent's direct labor costs comprised only approximately $.0381 of its $.7396 cost of producing each dozen eggs in 1982.

[7] In addition, the Respondent was presented at this time with an opportunity to sell its laying flock. The Respondent's flock alone did not keep the plant supplied with nest run eggs.

[8] It sold its flock of laying hens for $812,000; sold the plant and realty for $525,000; sold machinery, equipment, and other personalty for $300,545; transferred assets valued at $113,736 to other locations; and scrapped various items worth $27,522.

[1] Effective January 1, 1983, Local 119, the Charging Party herein, and Local 10 merged into the Union. The caption of the proceeding was amended at the hearing.

and (1) of the National Labor Relations Act.[2] They rely on *Fibreboard v. NLRB*, 379 U.S. 203 (1964). Respondent, however, contends that it did not engage in subcontracting; rather, it partially closed its business and had no duty to bargain about its decision to close, citing *First National Corp. v. NLRB*, 452 U.S. 666 (1981). Further, it contends that it bargained both about the decision to close and the effects of the closing.

As of the end of 1981, Respondent, an Ohio corporation, operated 1258 retail food and grocery stores in 20 States—the second largest food chain in the United States.[3] In addition to selling name-brand items at its stores, it also operates, through its agri-products division, 30 manufacturing or food processing plants which supply goods for sale at its retail establishments, such as cheese, delicacies, catfish and trout, pet food, and eggs, the source of the instant controversy.

Until April 9, 1982, Respondent operated a "nest run" facility in Wabash, Indiana, so-called because eggs were purchased from others and then shipped in flats to the Wabash facility, where they were graded, inspected (or candled), boxed in egg cartons, and shipped to Respondent's distribution warehouses. The nest run operation is distinguished from an integrated egg operation, where the laying hens are owned by the processor, so that the production and processing of eggs are accomplished at the same location. Because the integrated operation involves no additional costs of placing the eggs on flats and then transporting them from where they are laid to the place of processing,[4] the nest run operation was claimed by Respondent to be more costly. Furthermore, because additional transportation involves more handling and time, there is a lower yield of good, fresh,[5] and undamaged eggs, which result adversely effects the profitability of nest run eggs.

In 1980, when Respondent and the Union were negotiating for a new collective-bargaining agreement, Ken Gordon, Respondent's director of labor relations, stated that the future of the Wabash plant might depend on the result of negotiations because integrated operations were continuing to grow and Respondent's labor costs were no longer competitive. As a result, in the agreement executed by the parties for the period from July 27, 1980, to July 30, 1983, there was included, for the first time, a productivity clause, which was further amended and refined in 1981 when Respondent's plant manager, Gary Florent, convinced the Union of Wabash's continuing need to compete with the economically less costly integrated egg operations.

Florent also raised the spectre of a further problem of the Wabash facility, the increasing difficulty obtaining ungraded eggs for processing because more egg producers were changing to integrated operations. Apparently, rumors about the continuing viability of the plant began to take hold but in January 1982 General Foreman Gary Stull informed the employees that he desired to squelch rumors that the plant was going to close, that it was not, and that, while Respondent would be losing a source of nest run eggs in February or March, Respondent had some new contracts and 1982 would be a good year.

On March 2, however, Gordon informed Local 119 President Thomas McCall that they should meet soon because Kroger was considering closing the Wabash plant.[6] Florent was also advised by Gordon the same day, and both he and McCall relayed to the employees, in separate meetings, what each had been told. On March 3, McCall met with Gordon and George "Wes" Archiable, Respondent's personnel manager for the agri-products division and manufacturing. What was said is somewhat at issue, but I find that Gordon mentioned that the Wabash plant was obsolete, that the nest run operation involved double transportation costs, that the Wabash facility could not compete with integrated operations,[7] and that increasingly farmers were converting to integrated operations. He reminded McCall that earlier shortages of nest run eggs had prompted Respondent to buy its own flock of approximately 900,000 laying hens[8] to keep the Wabash plant supplied with eggs and that the productivity agreements had been entered into with the Union to meet the competition of the integrated operators. McCall left the meeting believing that Gordon had asked him for concessions that the members would give in order to keep the plant in operation. Gordon testified, however, that he merely wanted to give McCall the opportunity to suggest any thoughts or ideas that might have some impact on Respondent's decision. The different implications of the testimony indicates that McCall thought he could give back some previously won benefits, but Gordon was looking for some suggestions as to how to compete with an inherently more effective method of producing marketable eggs.

In any event, McCall met with employees on March 5 and represented to them that Respondent was looking for concessions, but that Respondent would not commit itself to stating what concessions would be helpful. The employees were responsive in suggesting that they might be willing to accept a four 10-hour day workweek and a reduction of certain wages, benefits, and contributions, but they expressed unwillingness to go too far before knowing what was Respondent's position. On March 7,

[2] The relevant docket entries are as follows: Local 119's charge was filed on April 14, 1982, and complaint issued on November 29, 1982. The hearing was held in Wabash, Indiana, February 14–16, 1983.

[3] Respondent was the fifth largest retailing chain in the United States on the basis of sales, which in 1981 were in excess of $11.2 billion. I conclude, as Respondent admits, that it is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] In the integrated operation, the eggs, when laid, go onto a conveyor belt where they are immediately transported to the processing area. Respondent also employed at its Wabash facility clerical employees who are involved in the purchase of integrated eggs.

[5] Nest run eggs are normally refrigerated prior to shipment to the processors and, because days might pass until delivery, dirt becomes imbedded into the shells.

[6] By letter dated March 1, Gordon wrote to McCall that Harold Wall, vice president of Respondent's agri-products division, which included the Wabash plant, was giving "serious consideration" to closing the plant "due to business reasons."

[7] McCall did not recall this specifically, but testified that Gordon mentioned it at a later meeting on March 31. I find it likely that Gordon also made the same statement on March 3, as he testified.

[8] This flock was contracted out to various farmers in the Wabash area and is referred to as the NK flock.

McCall telephone Gordon and told him of some of the items the employees had discussed but explained their problem of wanting to know what Respondent wanted. Gordon agreed to contact McCall after he had discussed the matter with his people.

On March 15, Gordon telephoned McCall but, McCall not being in his office, left a message stating that he had not heard from top management about the Wabash plant; that he was leaving for California; that, if McCall needed to contact him, he should call Gordon's office and leave a message; and that, if Gordon heard anything from top management, he would contact McCall. On March 23, McCall received a letter from Gordon, dated the previous day, stating that Respondent had decided to close the Wabash egg processing plant on April 10, for the reasons previously discussed with McCall. On the same day or the next, McCall called Gordon to try to work out something to keep the plant open, but Gordon said that the decision had been made and that he wanted to meet for impact bargaining.

The Union and Respondent met on March 31. Gordon proposed that Respondent would maintain coverage for employees for health and welfare benefits and would make various payments for severance, holidays, and vacations. The Union would have to agree that an agreement on these offers would encompass the Union's forgoing of any legal action in connection with the closing.[9] McCall tried to negotiate concessions to keep the Wabash facility open, but Gordon refused to do so, insisting that bargaining commence on the effects of the closing and that, if the Union did not agree to bargain over the impact of the closing, the employees might lose some benefits. The Union refused to reply to Respondent's offer. Some time thereafter a meeting was set up for April 7, but McCall canceled the meeting at the very last moment. No further meetings were requested by either party; the plant closed on April 9 and the employees were terminated; and the unfair labor practice charge followed a week later.

In *First National Corp.*, supra, the Supreme Court concluded that a decision by an employer to terminate part of its business is not a mandatory subject of bargaining under Section 8(d) of the Act and, thus, it was unnecessary for the employer to give notice of the partial closing to the union prior to effectuating it or to bargain with the union about the decision. 452 U.S. at 686. It left untouched *Fibreboard*, supra, in which it had held that subcontracting of bargaining unit work is a mandatory subject of bargaining, but it noted, at footnote 22, that each case must be considered on its particular facts. Since *First National Corp.*, 264 NLRB 1369, 1370 (1982):

> [I]t is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework.[9] If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operation,"[10] or a decision lying at "the very core of entrepreneurial control"[11] the decision will not fall within the scope of the employer's mandatory bargaining obligation. A determination of the suitability to such factors as the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives

[9] Respondent's offer was essentially the same arrangement Respondent had agreed to with another labor organization when it earlier closed its nest egg processing plant in Jackson, Missouri.

[9] *Fibreboard Paper Products Corporation* v. *N.L.R.B.*, 379 U.S. 203, 213–214 [1964]; *First National Maintenance* [supra], 452 U.S. at 679.

[10] *Id.* at 688.

[11] *General Motors Corporation* [191 NLRB 951 (1971)], supra at 952.

The nature of the business before and after the action taken: In order to determine whether the business closed or was subcontracted in *Bob's Big Boy*, the Board first examined the scope of the employer's business. There, the employer operated a commissary composed of five departments—shrimp preparation, meat, salad dressing, produce, and bakery—at which food was prepared and thereafter distributed to the employer's restaurants. In particular, the processing of shrimp had been the work of 12 of its employees, who were terminated when the employer contracted with an outside firm to supply it with package shrimp. The administrative law judge characterized the employer's business as packaging and breading shrimp and concluded that, when the employer contracted with another to supply the shrimp and then dismantled its own shrimp processing operation, the employer ceased its business of preparing shrimp.

The Board disagreed,[10] finding that the judge too narrowly construed the employer's business, which it characterized as providing prepared foodstuffs to its individual restaurants. The Board stated (264 NLRB at 1371):

> More accurately, Respondent is in the business of providing prepared foodstuffs to its individual restaurants. Thus, shrimp preparation existed as a component part of Respondent's business along with the preparation of meats, salad dressing, produce, and bakery goods and did not constitute a separate and distinct business enterprise.

To the same effect, Respondent's agri-products division provides foods to Respondent's individual retail stores and, thus, egg processing is a component part of its business along with the preparation of other foods at its 30 manufacturing facilities. Its Wabash facility did not constitute a distinct and separate business enterprise. But

[10] Then Chairman Van de Water and Member Hunter dissented on this point.

even this is a restricted application of what Respondent does. One does not look at The Kroger Co. as egg processor or as a producer of foodstuffs. More properly, it is the second largest grocery food chain in the country. When the Wabash facility was open, Respondent was a food chain; and when the facility was closed, Respondent was still a food chain.[11] Of equal significance, both before and after April 10, 1982, Respondent's stores sold eggs—earlier, some were processed at its Wabash facility; later they were produced at other facilities.

The distinction between partial closing of a business and subcontracting is not a fine one. When an employer closes its business, it ceases to transact that business. When it subcontracts its business, it does not directly conduct that business but, instead, has someone else do it. Whether the subcontractor sells the employer normal stock or has an item produced on specifications supplied by the employer makes no difference. The ultimate fact is that the employer is having work performed not its own facility by its own employees, but in the facility of its subcontractor and by employees of the subcontractor. One example of Respondent's subcontracting was its sale of its NK flock, from which Respondent obtained about 41 percent of its nest run eggs, to Croton Egg Company, a sale which was orally agreed on several months before March 10, 1982, when a written agreement was executed by the parties. Commencing in April, Respondent purchased from Croton each month approximately a million dozen cartoned eggs in excess of what it had purchased before. These purchases of integrated eggs replaced the nest run eggs which Respondent had earlier processed. Similarly, Respondent also had committed itself to buy cartoned eggs from an affiliate of Midwest Poultry Services, Inc., from whom it had previously purchased nest run eggs.

Respondent, therefore, ceased production of eggs for sale in its retail stores only in Wabash, where it laid off its employees. Otherwise, its hens were producing eggs for an integrated operator who then sold eggs to Respondent, and eggs previously supplied to it as nest eggs were being supplied in cartons. Unlike *First National Corp*, where the employer terminated its contract with a nursing home to provide maintenance work, here Respondent has not ceased doing business, but merely fostered the production and processing of the very same item by others. I conclude, therefore, that based on Respondent's continuation of its business of retail food markets, where it sells eggs, Respondent has subcontracted its egg processing operation.

The extent of capital expenditures: In *Bob's Big Boy*, the Board noted that, when the employer began to subcontract shrimp processing, the employer was not required to engage in any substantial capital restructuring or investment. Some 5 months later, however, the employer sold some of its machinery to the subcontractor for $30,000, but other machines were returned to a lessor. The plant area where the employer formerly processed the shrimp remained part of its facility, as did certain other equipment. The Board found (264 NLRB at 1371) that: "[N]o immediate restructuring of capital was necessitated by the decisions to subcontract and the subsequent capital transactions, while not *de minimus*, occurred at a leisurely pace with Respondent retaining possession of the basic facility and certain of the equipment used in shrimp processing." Accordingly, it held that "the capital transactions undertaken . . . are not substantial enough to remove the decision from the scope of Respondent's mandatory bargaining obligation," adding in the Board's footnote 14 in *Bob's Big Boy*, "We note that in *First National Maintenance, supra*, the Court indicated that the extent of investment or withdrawal of capital was not crucial. 452 U.S. at 688."

There can be no question that the capital transactions involved in the subcontracting herein were substantial on their face. Respondent sold its NK flock hens, feed, and flats for more than $812,000. It sold its Wabash realty for $525,000. It sold its machinery, equipment, and other personalty for $300,545.44. In addition, it transferred to its other locations various assets valued at $113,736.35 and scrapped various items worth $27,521.75. Many of these sales were of assets originally purchased by Respondent over a period of years in an attempt to keep its Wabash facility in operation, including the purchase of its own flock of hens to make up for the unavailability of nest run eggs elsewhere and the installation of new grading machines and other equipment.

The General Counsel and the Union contend, however, that, when the amounts cited above are compared with Respondent's 1981 sales of $11 billion; investments in property, plant, and equipment of over $1 billion; and capital expenditures of $260 million, the amounts are de minimus. The General Counsel argues, for example, that the sale of the NK flock amounted to only .08 percent of Respondent's total assets. However, if the scope of Respondent's business is limited to its agri-products division, as both the General Counsel and the Union have contended, the percentage is greater; but the record is barren of the worth, investments, and sales of that division, and so it is impossible to state what comparative amounts are involved.

Although I recognize the Board's footnote 14 in *Bob's Big Boy* about expenditures not being crucial, it would appear that the extent of capital expenditures must have at least some significance. If it does, it leans in the direction of a finding that Respondent need not bargain further over the closing of the Wabash facility, which clearly affected the scope of Respondent's enterprise and involved substantial divestitures. *General Motors Corp.*, 191 NLRB 951 (1971), petition to set aside denied 470 F.2d 422 (D.C. Cir. 1972).

The basis for the action and, in general, the ability of the Union to engage in meaningful bargaining in view of the Employer's situation and objectives: Before reaching the issue of whether prior notice of and bargaining about the closure is required, I conclude, as a matter of law, that there was no bargaining in good faith about Respond-

[11] The decision to close the Wabash facility was made by Wall, with the approval of John Cornett, one of Respondent's senior vice presidents and a member of Respondent's board of directors.

ent's decision to close its Wabash facility.[12] Gordon's notice to the Union on March 2, 1982, that Respondent was considering the closing of that facility and the subsequent discussions were merely ruses, because the decision to close was a foregone conclusion. The contract to sell the NK flock to Croton Egg Company had been discussed in late January 1982; Croton made a formal proposal on February 26 and a contract was signed on March 10. In June 1981 Respondent agreed to purchase processed and cartoned eggs from Midwest Poultry Services, Inc. Based on that agreement, Midwest formed a partnership, Hi-Grade Egg Producers and Processors, which sought economic development revenue bonds to build an egg processing plant in North Manchester, Indiana; obtained financing and began construction of its egg facility in October 1981; and executed a formal agreement with Respondent on February 6, 1982, to sell its cartoned eggs to Respondent and withdrew its supply of nest run eggs.

Accordingly, by the time Gordon notified McCall of Respondent's "consideration" of closing the Wabash facility, the loss of approximately 15–16 percent of Respondent's supply of nest run eggs previously sold by Midwest[13] and the soon-to-be loss of 41 percent of its nest run eggs from the NK flock was a fait accompli, which may give at least some insight as to why negotiations in March lacked meaning. However, it is also apparent that by March Respondent had exhausted its imagination in devising new methods to salvage the Wabash plant and its request of the Union was merely to come up with something that the Respondent had not thought of, thus presenting squarely the issue of whether the Union was able in these circumstances to engage in meaningful bargaining.

In this connection, *First National Corp.*, a partial closure case, recognizes that an employer "may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss." 452 U.S. at 683. Although the Supreme Court rejected the Second Circuit's test that Section 8(d) of the Act creates a presumption in favor of mandatory bargaining over a decision to partially close a business and that the presumption is "rebuttable 'by showing that the purpose of the statute would not be furthered by imposition of a duty to bargain,' for example, by demonstrating that 'bargaining over the decision would be futile,'" the defense of futility appears to be imbedded into the court's decision in determining whether the issue is peculiarly suitable for resolution within the collective-bargaining framework.[14]

The General Counsel notes that Wall had stated early in his testimony that Respondent's labor cost was not significant enough to make *much* difference in his decision and that Wall had contended that Respondent had lost $220,000 in its Wabash operation.[15] Thus, the General Counsel contends, labor costs could have made some difference and, once Respondent stated as one of its reasons for closing the Wabash facility its profitability compared with buying eggs from integrated operators, Respondent made production costs an issue, which creates a duty to bargain over wages, fringe benefits, and other employment costs, over which the Union can exercise substantial control, citing *Bob's Big Boy*, supra.

In the abstract, this is clearly true. Indeed, in both 1980 and 1981, the Union and Respondent had bargained for and negotiated provisions intended to relieve Respondent from the excess costs involved in the nest run operation; but those provisions, intended to increase productivity, were not effective in making the operation competitive. By the time Respondent made its first moves toward subcontracting, labor costs constituted a minimal portion of its total costs,[16] and it has been adequately demonstrated that the Union no longer could give back sufficient reductions to make up for the difference that it cost Respondent to produce cartoned eggs above its cost of purchasing them. Thus, in 1980, Respondent purchased cartoned eggs for $.5998 per dozen, but produced them for $.6123, $.0125 more. Yet its direct labor cost was $.0279, a little more than double the amount of the difference. In 1981, its labor cost of $.0322 was less than the $.0394 difference between purchased and self-produced eggs; and, in 1982, its labor cost of $.0381 only slightly exceeded the purchase price difference of $.0325. McCall's attempt to "give back" nominal benefits could not be of any aid, a fact recognized on March 31 by Gordon who, when asked whether there was anything that the Union could do to keep the facility open, replied with amusement—only if the employees wanted to work below minimum wages and that was against the law.[17]

---

[12] I also reject Respondent's contention that it was relieved of any duty to bargain because it had engaged in a longstanding unchallenged practice of purchasing cartoned eggs from others with the tacit approval of the Union. It cannot be said that the subcontracting of all its work, the closure of the Wabash facility, and the layoff of all the production and maintenance employees were agreed on past practices, excusing or justifying Respondent's unilateral action. *Westinghouse Electric Corp.*, 150 NLRB 1574, 1576 (1965).

[13] The loss of the Midwest nest run eggs caused the layoff of eight of Respondent's employees.

[14] The dissenting opinion of Justice Brennan, although disagreeing with the majority as to the result of *First National Corp.*, agreed that "a showing that bargaining would be futile" can relieve an employer of its duty to bargain. Id. at 691.

[15] Wall later testified, however, that labor costs had nothing to do with his decision to close the Wabash facility and that the unprofitability of the facility related to the costs of the entire operation, including the purchase of cartoned eggs, and not just the processing of eggs.

[16] I recognize that vacation pay, unemployment taxes, and workmen's compensation were omitted from Respondent's calculations of its labor costs. On the assumption that the omissions increase its costs by 20 percent, which may be quite inflated, my conclusions would be no different.

[17] This testimony was related by one of Respondent's laid-off employees and is fully credited. By so crediting, I find it incredible that Gordon would have used the word "concession" in his March 3 meeting with McCall, although the words Gordon used could have conveyed the idea to McCall that he was being asked for concessions. In discrediting McCall, I rely, among other things on his denial of a later conversation with Gordon concerning McCall's letter to Respondent's president and, specifically, to his averment that he alone wrote the letter. From McCall's speech and use of words on the witness stand, I find the language of the letter was prepared by union counsel, just as Gordon testified that McCall had claimed in a conversation with Gordon. I further do not believe McCall's denial that Gordon specifically stated that wage costs were not a reason for the closing of the Wabash facility. Gordon's credited statement on March 31 demonstrates the truth of Gordon's testimony.

Accordingly, I find that labor costs were not the source of Respondent's decision nor was there any meaningful proposal which could have been made by the Union. The supply of nest run eggs was diminishing;[18] and it was simply a fact that Respondent could purchase cartoned eggs for less than it could have produced eggs in Wabash, paying its employees nothing. Respondent made efforts to salvage its Wabash plant: faced with a shortage of nest run eggs, it bought its own flock of hens; it spent over $300,000 on new equipment; it negotiated new productivity agreements—all to no avail.

The fundamental basis for Respondent's actions was that its nest run operation was outmoded. Its doubled transportion costs and lower yield of quality eggs could not have been resolved within the framework of 8(a)(5) obligations because Respondent could purchase integrated eggs for less than it could process them. Indeed, in 1980, Respondent closed its last two (except for Wabash) nest run facilities, which were located in Coldwater, Michigan, and Jackson, Missouri, because Respondent's supply of nest eggs dwindled or it could purchase integrated eggs for less than it could process them. If there were any remote possibility that the Union could have influenced the final decision, I would find a bargaining obligation; but the facts and circumstances herein convince me that the Union was powerless to offer any reasonable alternative to Respondent's action. *Brooks-Scanlon, Inc.*, 246 NLRB 476 (1979). Accordingly, I conclude that the Union could not engage in meaningful bargaining about the decision and that Respondent was under no obligation to engage in bargaining under the Act.

I further conclude that Respondent did not refuse to bargain about the effects of the closure or subcontracting of its egg processing operation. Rather, it initiated negotiations and made an offer. It did not condition its offer on the Union's agreement not to file unfair labor practice charges and did not insist to impasse that the Union must give up its right to file such charges.[19] Rather, Respondent made an offer to pay certain benefits to the affected employees, an offer which the Union elected not to reply to at the meeting of March 31. Later, McCall arranged for a meeting to be held on April 1 in South Bend, Indiana, to make it convenient for International Union representative Sam Delfino to attend.[20] While Respondent was present for that meeting (Gordon driving 6 hours from Cincinnati, Ohio), McCall refused to discuss the effects of the closing because Delfino could not be present, and only Delfino had the authority to bargain. McCall told Gordon that Delfino would call Gordon the following day. Delfino did call and asked about setting up another meeting. Gordon agreed to do so, with the sole qualification that he was not going to drive to South Bend again. Delfino then told Gordon that unfair labor practice charges against Respondent would be filed that day, and the request for another meeting apparently was not pursued. The Union thereafter made no further attempts to negotiate the effects of the closing. Respondent was utterly blameless, and I find no violation of the Act.

On these findings of fact and conclusions of law and on the entire record,[21] I issue the following recommended[22]

ORDER

The complaint herein is dismissed in its entirety.

[18] In 1980, Respondent was unable to renegotiate a favorable price to purchase nest run eggs from Triangle Feed, a supplier of 20 percent of the eggs to the Wabash facility in 1979 and 1980; as a consequence, 10 of Respondent's employees were laid off. However, I acknowledge that part of the reason for the diminishing supply was Respondent's sale of the NK flock.

[19] *Peerless Food Products*, 231 NLRB 530 (1977), cited by the General Counsel, is thus distinguishable. It holds that the "insistence on the dropping of" a lawsuit as a "precondition" to signing an agreement violates Sec. 8(a)(5).

[20] To the extent that the General Counsel's case is grounded on testimony that the Union threatened on March 31 to file unfair labor practices and Gordon replied that he would meet again after the charges were settled, I discredit such testimony. Despite the alleged threat, Gordon agreed to meet in South Bend on April 7. Contemporaneous notes of Archiable support Gordon's denial of this testimony.

[21] The General Counsel moved to add G.C. Exh. 16, p. 2, thereof, which was inadvertently omitted. There being no opposition, the motion is granted.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

City Markets, Inc. *and* Juanita Larson, Terry Paulson, Larry D. Beckwith, John O. Price, William Portouw, Petitioner and United Food and Commercial Workers, Local No. 7. Cases 27–RD–614, 27–RD–617, 27–RD–619, and 27–RD–622

14 December 1984

DECISION AND DIRECTION OF ELECTIONS

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On petitions duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Michael J. Belo. Following the hearing and pursuant to Section 102.67 of the Board's Rules and Regulations, the Regional Director for Region 27 transferred this case to the Board for decision. The Employer and the Union filed briefs.

On the entire record in this case, the Board finds

1. The Employer is engaged in commerce within the meaning of the Act.

2. The Union is a labor organization which was certified as the majority representative of certain of the Employer's employees.

3. A question of representation affecting commerce exists within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

The Employer is a Colorado corporation engaged in the retail sale of groceries in Colorado, Utah, and Wyoming. The Union is the certified bargaining representative of four separate geographical units of the Employer's employees in Colorado. One unit encompasses the Employer's stores in Grand Junction and Clifton, one the store in Steamboat Springs, one the store in Aspen, and one the store in Glenwood Springs. The Union and the Employer were parties to a separate collective-bargaining contract for each location, all of which expired on 4 September 1982. When the old contracts expired, the parties were bargaining over the terms of new contracts but had not yet reached agreement.

Between 7 September and 8 November 1982 decertification petitions were filed by employees from each of the four Colorado units. Meanwhile, as a result of charges filed by the Union, the General Counsel issued a complaint on 15 October 1982 alleging, inter alia, that since 5 September 1982 the Employer had been violating Section 8(a)(5) of the Act by conditioning its contract offer on employees' refraining from engaging in protected activity such as handbilling and picketing. By letters dated 19 October 1982 the Regional Director informed the Petitioners from the Aspen, Steamboat Springs, and Grand Junction units that their petitions were being dismissed because the alleged violation of Section 8(a)(5), unremedied at the time the petitions were filed, precluded the finding of a question concerning representation. The letters further informed the Petitioners that the petitions were subject to reinstatement if appropriate upon their application after the disposition of the unfair labor practice allegations. An identical letter was sent to the Petitioner from the Glenwood Springs unit on 16 November 1982.

The Union and the Employer continued to negotiate over new contracts while the unfair labor practice allegations were pending. On 16 February 1983 they entered into collective-bargaining agreements covering each of the four units. The agreements were to be effective retroactively from 5 September 1982 and to expire on 1 March 1986.

After the agreements were executed, the Union requested withdrawal of the charges that prompted the 15 October 1982 complaint. The Regional Director approved the withdrawal of the charges and dismissed the complaint on 21 March 1983. Thereafter, on various dates in March, April, and May 1983 the Petitioners from all four of the above-described units asked the Regional Director to reinstate their petitions.

The Union contends that the current and valid collective-bargaining agreements executed on 16 February 1983 prevent the subsequently requested reinstatement of the decertification petitions under the Board's discretionary contract-bar doctrine.[1] The Board has established the general rule that where, as here, a contract of definite duration is reduced to writing and executed by both parties, it will act as a bar for up to 3 years of its term to an election petition filed by an employee or rival union after the contract is executed. *General Cable Corp.*, 139 NLRB 1123 (1962); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958); *Pacific Coast Assn. of Pulp Manufacturers*, 121 NLRB 990 (1958). If, on the other hand, a petition is filed before the execution date of a contract effective either immediately or retroactively and is otherwise timely, the contract subsequently entered into will not bar the processing of the petition and the holding of an election. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). If the incumbent union prevails in the election held, any contract executed with the employer will be valid and binding; but if the union

[1] The Board has held that in circumstances in which a contract will normally act as a bar it will be disabled from doing so if, for example, it does not contain substantial terms and conditions of employment or embrace an appropriate unit. The parties do not contend that the contracts in themselves lack the requisites established by the Board for valid contract-bars.

loses, the contract will be null and void. See *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982) (certification petition filed by rival union) (same rule applied to decertification petitions in *Dresser Industries*, 264 NLRB 1088 (1982)).

Here, the decertification petitions were timely when originally filed according to the Board's contract-bar rules. Each was filed after the prior contracts had expired and before the new contracts were executed. The new contracts therefore would not normally act as a bar to the petitioned-for elections. The Union urges, however, that the new contracts do operate as a bar to the elections because they were executed after the Regional Director had dismissed the petitions and before the requests for reinstatement were made; in other words, during the hiatus in the processing of the petitions caused by the Regional Director's determination that, in view of the pending unfair labor pratice litigation, no question concerning representation could exist. We reject the Union's contention because it attributes undue significance to the Regional Director's dismissal of the petitions here.

As the Union points out, the Regional Director dismissed the petitions pursuant to the Board's "blocking charge" policy as exemplified by *Big Three Industries*, 201 NLRB 197 (1973). In that case the Board weighed the right of employees under Section 9(c) of the Act to decertify their bargaining representative against the employer's obligation to bargain in good faith. The Board concluded that where a complaint has issued alleging that the employer has refused to bargain in violation of Section 8(a)(5) of the Act and the appropriate remedy if the allegation be proved is an affirmative bargaining order, the employees' opportunity to decertify the union must be postponed pending litigation of the bona fides of the employer's bargaining efforts in order to preserve the orderly procedure of collective bargaining contemplated by the Act. Accordingly, the Board will sustain the Regional Director's dismissal of a decertification petition in the face of unremedied refusal-to-bargain charges under its authority granted by Section 9(c) of the Act to determine if a question of representation warranting an election exists. The Regional Director's dismissal of an election petition in these circumstances does not operate as a determination that the petition itself is defective, i.e., that it does not raise a real question concerning representation because, for example, it lacks a sufficient showing of interest or is tainted by employer support. It merely indicates that the petitioner must await the outcome of the unfair labor practice litigation, at which time he is entitled to request reinstatement of the petition, and that there is no point in processing the petition further because the disposition of the alleged violation of Section 8(a)(5) of the Act may lead to the issuance of an affirmative bargaining order which would preclude an election for a certain period of time in any event. A dismissal of this kind does not in itself extinguish the employee right to an election invoked by the timely filing of a valid decertification petition.[2]

The unfair labor practice proceedings in anticipation of which the Regional Director dismissed the petitions will not take place since the charges have been withdrawn and the complaint dismissed. Moreover, the Employer and the Union have returned to the bargaining table and agreed upon new contracts. The countervailing considerations that compelled the Board to sustain the dismissal of the decertification petition in *Big Three Industries* are thus no longer present.[3] Therefore, in accord with the Board's avowed intent to process valid petitions and conduct elections as expeditiously as possible, *RCA Del Caribe* and *Dresser Industries*, we will direct reinstatement of the petitions and the holding of elections in each of the designated units.[4]

---

[2] The Union contends that the Regional Director's determination that no question concerning representation existed became final upon the failure of the Petitioners to request review of the dismissal of their petitions. The Union thus seeks to equate the requests for reinstatement with the untimely filing of new petitions after the current contracts were executed. While the Union's contention that the dismissals were final would be correct had the petitions been dismissed on their merits, there is no requirement that the Petitioners here request such review in order to preserve their ultimate right to request reinstatement of their petitions following the unfair labor practice proceedings. Moreover, for the purpose of applying the Board's contract-bar rules the original filing date of a petition will control where the petition is dismissed on its merits and later reinstated pursuant to a favorable ruling on appeal. *Deluxe Metal Furniture*, supra at 1001. A fortiori, the original filing date of a petition which is dismissed subject to reinstatement after blocking charges have been resolved, as were the petitions here, controls in determining timeliness.

[3] Member Zimmerman finds no merit in the Union's contention that the withdrawn complaint precludes reinstatement of the petitions. The Union argues that the complaint alleging a violation of Sec. 8(a)(5) involved a substantive refusal to bargain. Therefore, it urges that it is impossible to say whether absent the Employer's refusal to bargain a collective-bargaining agreement would have been signed prior to the filing of the petitions. The chief difficulty with the Union's position is that it in effect urges the Board to find that 8(a)(5) allegations are meritorious solely on the basis that the Regional Director issued a complaint. The Union has withdrawn the charge; as a result the complaint has been dismissed, and no evidence has been presented indicating that the Employer engaged in conduct which would require a finding that the petitions should not be processed. In these circumstances I find no basis for concluding that the Employer engaged in unfair labor practices which preclude reinstating the petitions.

[4] Member Hunter agrees with his colleagues that the circumstances of this case warrant reinstatement of the petitions. In doing so, however, he does not pass on the continued viability of the Board's decision in Big Three Industries.

The parties stipulated at the hearing on the requests for reinstatement that, should an election be directed, the four existing single location units as described in the documents comprising the collective-bargaining agreements entered into on 16 February 1983 are appropriate units.

[Direction of Elections omitted from publication.]

CHAIRMAN DOTSON, concurring.

The Employer contends that *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), is controlling. That case holds that an employer must continue to bargain with an incumbent union after a representation petition is filed, but should the parties execute a contract, its validity will rest on the outcome of the petitioned-for election. The same rule was applied to the filing of a decertification petition in *Dresser Industries*, 264 NLRB 1088 (1982). While I do not pass on the wisdom of the rule in *RCA Del Caribe* and *Dresser*, which effectively converts a Board-conducted representation election into a ratification vote on an existing contract, I do agree with my colleagues that the circumstances here do not deprive the petitioning employees of their prerogative under Sections 7 and 9(c) of the Act to indicate in a secret-ballot election whether the Union continues to be the majority representative. I therefore concur in the reinstatement of the decertification petitions and the direction of prompt elections.

Henry Miller Spring & Manufacturing Company, Inc. *and* District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 6–CA–16466

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 30 March 1984 Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order[4] as modified.

The issue presented in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by announcing and implementing its last contract offer without having reached a valid impasse in its contract negotiations with the Union. We conclude that the parties never reached that point in their negotiations which warranted the assumption that further bargaining would have been futile.

When the Respondent implemented its last contract offer on 6 June 1983, the parties had not communicated to each other the paramount importance of any of the issues presented at the bargaining table, or that one party's failure to achieve a desired degree of concession on such issues would necessarily deadlock the entire bargaining process. Rather, the parties were continuing to negotiate several significant issues, reaching agreement as to some, exchanging concessions as to others. In the meantime, numerous lesser issues were settled. Indeed, on 2 June, when the Respondent contended impasse was reached, the parties held a lengthy session during which agreement was reached on several items. We agree with the judge, therefore, that the bargaining history does not support the Respondent's claim of impasse and its unilateral implementation of contract terms. Accordingly, the Respondent circumvented its duty to bargain in violation of Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Henry Miller Spring & Manufacturing Company, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b) and reletter subsequent paragraphs accordingly.

"(b) Maintain the terms described in the collective-bargaining agreement with the above-named Union which expired 3 June 1983 until such time as the parties have bargained in good faith and have reached a new agreement or a valid impasse."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Make whole its employees, with interest, for any losses they may have suffered by reason of the Respondent's implementation on 6 June 1983 of unilateral changes in their wages and working conditions."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HUNTER, dissenting.

My colleagues have decided to adopt the judge's finding that, during the course of collective-bargaining negotiations, the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing its most recent contract proposals at a time when no valid impasse existed.[1] In reaching this conclusion however, my colleagues find it necessary to disassociate themselves from the judge's attempt to justify his no-valid impasse finding on subsequent events which demonstrated that the Respondent continued to bargain in good faith with the Union. I can well understand my colleagues' desire to reject the faulty reasoning offered here by the judge, but in so doing, they have removed the very

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In his discussion of the 10 May 1983 bargaining session between the parties, in sec. III,A, par. 6 of his decision, the judge stated, "The Purpose and Intent of the parties provision was modified to eliminate language stating that the 'no-strike' language applied to strikes 'of any kind or nature.'" The Respondent's exceptions correctly assert that the "Purpose and Intent" proposal which it submitted to the Union on 10 May specifically applied the no-strike language to strikes "of any kind or nature."

[3] In affirming the judge's conclusion that no valid impasse existed, we do not rely on his discussion and analysis of the parties' bargaining history after 6 June 1983 in sec. III,B, par. 2 of his decision.

[4] We will modify the recommended Order and notice to require the Respondent to bargain to agreement *or* until a valid impasse is reached.

We will also extend the Order to require the Respondent to make whole the employees for any lost wages or benefits incurred as a result of the Respondent's unilateral changes in their terms and conditions of employment on 6 June 1983 as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[1] The majority also adopts the judge's finding that the subsequent strike by employees was an unfair labor practice strike.

basis for his finding that a valid impasse did not exist.

In analyzing the issue of whether a valid impasse existed prior to the Respondent's implementation of its contract proposals, it is not necessary to detail the give-and-take that occurred during each of the numerous bargaining sessions. A brief history of the negotiations will suffice.

The Respondent and the Union have been parties to a series of collective-bargaining agreements, the most recent of which had an expiration date of 30 April 1982. By agreement of the parties, the contract expiration date was first extended until 1 May 1983 and, thereafter, it was extended on a day-to-day basis subject to termination by either party upon a 24-hour written notice. The Respondent served such notice on the Union on 2 June 1983 and the contract terminated the following day.

From the commencement of these negotiations on 21 March 1983 until the implementation of the Respondent's contract proposals on 6 June 1983, the parties held 15 bargaining sessions. During these meetings the parties tentatively agreed on many significant issues and, for all practical purposes they were engaged in good-faith bargaining. However, throughout these meetings the parties experienced little success in resolving certain issues raised in the Respondent's proposals which called for a reduction in wages and benefits, the Respondent's control of the scheduling of work, and a broad management-rights clause. There matters stood until the meeting of 2 June when the Respondent accused the Union of submitting regressive proposals; i.e., pulling back from previously expressed positions. At this juncture, the Respondent notified the Union that it was giving notification of the termination of the contract and of its intention to implement on 6 June the proposals which had been tentatively agreed to as well as the Respondent's latest proposals which had not been agreed on. The Union countered by requesting that the contract be extended for 90 days, but the Respondent refused. The Respondent offered to continue with the negotiations, but the Union declined because it wished to confer with its counsel concerning "the new developments." The next contact between the parties was on 5 June when the Union again urged the extension of the contract and the Respondent refused. The Union then asked if implementation of the Respondent's proposal meant working with reduced wages and benefits and the Respondent answered that it did. This meeting then closed with the understanding that the parties would meet the following morning, 6 June. As found by the judge, the meeting of 6 June was unproductive, the parties merely restating their previously expressed position. On 6 June the Respondent implemented its proposals and the employees went out on strike.

As previously mentioned, my colleagues have correctly rejected the erroneous notion that the Respondent's willingness to continue good-faith bargaining after the implemention of its proposals serves to demonstrate that no impasse was actually arrived at. I presume also, although they have not so indicated, that my colleagues' no-impasse finding does not in any way rest upon the judge's finding that the parties reached agreement on many significant issues. If that is so, what then does their finding rest on? The answer is there is nothing that will support a finding of no-valid impasse.

There is undisputed evidence that the parties were unable to reach agreement on wage and benefit reductions, work scheduling, and a management-rights clause. When the Respondent announced its intention to implement these among other proposals, the Union's only response was that it was their desire that the contract be extended. Even when the Union inquired as to whether the implemented proposals would require that the employees work at reduced wages and benefits and the Respondent answered yes, the Union did not offer anything by way of a counter or suggest that new proposals would be forthcoming. In fact, the Union's actions at these crucial meetings, on 2, 5, and 6 June, would lead one to believe that the Union had decided that it had gone as far as it wished to go and that the only further action it contemplated was a strike.

In such circumstances, I would find that the parties arrived at a valid impasse on or before 6 June and, as a consequence, I would dismiss the complaint in its entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of our employees in the appropriate unit by unlawfully announcing and implementing our last contract proposals, without a valid impasse having been reached. The appropriate unit is:

All production and maintenance employees including working foreman and truckdrivers of Henry Miller Spring & Manufacturing Company, Inc., Pittsburgh, Pennsylvania; excluding all office clerical employees, watchmen and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of all the employees in the above-described unit and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL maintain the terms described in the collective-bargaining agreement with the above-named Union which expired 3 June 1983 until such time as the parties have bargained in good faith and have reached a new agreement or a valid impasse.

WE WILL make whole our employees, with interest, for any losses they may have suffered by reason of our unlawful implementation on 6 June 1983 of unilateral changes in their wages and working conditions.

WE WILL, on application, offer immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who went out on strike on or after 6 June 1983, dismissing, if necessary, any persons hired on or after that date, and WE WILL make them whole for any loss of pay they have suffered as the result of our refusal, if any, to reinstate them within 5 days of such application.

HENRY MILLER SPRING & MANUFACTURING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The original charge in the above-captioned case was filed on June 9, 1983 by District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union or Charging Party). The charge was amended on July 28, 1983, and on July 29, 1983, a complaint issued alleging that Henry Miller Spring & Manufacturing Company, Inc. (Employer or Respondent) violated Section 8(a)(1) and (5) of the Act by, during negotiations for a successor contract, announcing the implementation of its last contract offer without a valid impasse having been reached. An answer thereto was timely filed. Pursuant to notice, a hearing was held before me on December 15, 1983. Briefs timely filed by Respondent and the General Counsel have been considered.

FINDINGS OF FACT

I. THE EMPLOYER

The Employer is a Pennsylvania corporation with a facility in Pittsburgh, Pennsylvania, where it is engaged in the manufacture and sale of coil springs. During the year ending June 30, 1983, Respondent purchased and received at its Pittsburgh, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Union and Respondent have been parties to a series of collective-bargaining agreements. The most recent of these was a 3-year agreement with an expiration date of April 30, 1982. The contract was extended by the parties to May 1, 1983.[1] Upon failure to reach agreement by May 1, the contract was extended for a short period of time and finally extended on a day-to-day basis subject to termination by either party upon 24-hour written notice. Respondent served on the Union the written notice terminating the contract on June 3, and a strike began on June 6.

During the period from March 21 until the beginning of the strike on June 6, a series of some 15 meetings took place at which agreement was reached on many contract provisions and others modified after negotiation, but without final agreement. At these sessions, Respondent was represented by R. Mark Solano, attorney-negotiator, while the Union's spokesman was James L. Elnyszky, directing business representative. At the initial negotiating session on March 21, Respondent presented to the Union, as its proposal, a full blown collective-bargaining agreement. This contract differed substantially, in both form and content, from the agreement then in effect. The language of the management-rights clause of the proposed contract was quite comprehensive.[2]

[1] All dates refer to 1983 unless otherwise indicated.

[2] It reads as follows:

ARTICLE 31–MANAGEMENT RIGHTS

31.1 Except as expressly limited by a specific provision of this Agreement, the Company reserves and retains and shall continue to

Continued

In addition, the proposed contract provided for a 20-percent reduction in wages from the wage rates then in effect. The existing contract also provided for a 5-day workweek, Monday through Friday. The Company, desiring greater flexibility in that regard, proposed a work schedule within its sole discretion.[3] The March 21 meeting accomplished little more than the submission of the Company's proposal to the Union. A second meeting was held on April 13, at which there was general discussion devoted primarily to differentiating the Company's proposal from the existing contract.

April 25, the parties met for the third time. The Union submitted its first written proposal, which essentially provided for a 1-year contract with various improvements from the existing contract. Those improvements included a 20-percent wage increase, cost-of-living adjustment, and with respect to "Hours of Work," sought a guaranteed 35-hour workweek of 5 consecutive days at 7 hours per day, Monday through Friday. Solano testified that this proposal was not "responsive" to the Company's proposal. However, progress was made as to other contract provisions and by the end of this session tentative agreements had been reached on provisions dealing with recognition, union shop, checkoff, military service, savings clause, and arbitration.

At the next negotiating session on May 5, the parties continued to bargain and succeeded in reaching tentative agreements on several more contract provisions, i.e., bulletin boards, alteration of agreement, and leaves of absence.

At the May 10 bargaining session the Company submitted to the Union revised management-rights, hours of work, and "Purpose and Intent" proposals. The management-rights section was modified to add language limiting the right of discharge for cause to add "or other legitimate reason." As to hours of work, language was added to reflect that the Company would attempt to schedule workdays Monday through Friday and hours of work for the daylight shift to between 7 a.m. and 4 p.m. The Purpose and Intent of the parties' provision was modified to eliminate language stating that the "no-strike" language applied to strikes "of any kind or nature."

The next bargaining session was held on May 13. Discussion took place and agreement was reached at this meeting on several contract proposals dealing with the Purpose and Intent provision, shop committee, grievance, discharge and discipline, and picket line. The Purpose and Intent provision, as agreed to, includes the broad "no-strike" language contained in the Company's proposal of May 10, while Respondent accepted language defining the Union's responsibility in strike situations.

At the next negotiating session on May 19, negotiations continued and much of the discussion involved the workweek issue. The Union retreated from its written submission of April 21 and proposed scheduling 5 days on and 5 days off so as to meet the problem of a split workweek, and expressed a willingness to accept a guaranteed workweek of fewer days, as few as 3 days per week. Respondent also backed off previously held positions on the matter of paid holidays by adding an additional paid holiday; on the matter of severance pay, by improving it; and the matter of call-in pay and reporting pay by agreeing to provisions as they were in the existing contract.

The meeting on May 20 produced tentative agreement on those provisions involving reporting pay, visitation, availability of agreement, and discrimination. The Company also agreed to add dependent coverage as it had appeared in the existing contract and to eliminate that portion of its proposal that eliminated dependents coverage.

The next meeting on May 24 was spent discussing, without significant progress, the hours of work provision. As to the management-rights provision, the Union expressed its desire to return to the language of the existing contract. Solano, however, maintained the Company's position that it wanted to retain the management-rights proposal as it appeared in its original proposal.

---

have the sole and exclusive right to manage its business and direct the working forces, including but not limited to, the right to plan, direct and control operations, the right to hire, suspend, discipline, discharge for cause, the right to maintain order and efficiency, transfer or promote, or to relieve employeees from active duty because of lack of work or other legitimate reasons, the right to study, determine and regulate the methods, quantity, and quality of work, the sources and kinds of merchandise, materials, parts, facilities and equipment used, handled or sold, the right to schedule and reschedule and reduce or increase, work hours, work shifts and shift hours and overtime requirements and the assignments thereto, the right to select customers, the right to extend, limit or curtail operations when and in such manner as it deems advisable to do so, the right to establish, modify and enforce rules and regulations, the right to close, sell, liquidate or move the business or any part thereof, including the consequences of such decisions, the right to expand, reduce, alter, combine, transfer or terminate any job, job content, department, operation of service, the right to subcontract any work, maintenance or otherwise, and the right to determine the number, location and operation of its plant(s) without prior notification or consultation with the Union. The rights of management described above and all other inherent rights of management not expressly limited by a specific provision of this Agreement are vested exclusively in the Company.

31.2 With respect to hirings, firings, lay-offs, recalls, transfers, and work assignments, the Company shall be the sole and final judge as to the qualifications of its employees, unless otherwise specifically provided for in this Agreement.

31.3 The Company and the Union agree that this Agreement contains their full and complete understanding and that any prior practices, benefits or oral agreements, except as specifically referred to in this Agreement, are superseded by the terms of this Agreement. The Company and the Union further agree that no oral understandings, practices or benefits will be recognized or regarded as binding unless committed to writing and signed by the parties as a supplement to this Agreement and that the Company may, in its discretion, discontinue or modify the provision of any benefit or privileges not required under this Agreement.

[3] It reads as follows:

ARTICLE 6–HOURS OF WORK

6.1 The Company shall establish a work schedule in accordance with the Company's need to satisfy the delivery requirements of its customers and the overall dictates of business. This work schedule shall be established at the Company's sole discretion and shall include the number of days per week, the number of shifts per day, the starting time of each shift and the number of hours to be worked on each shift. Starting time, lunch period and quitting time in the various classifications shall be established by the Company in order to achieve a high level of uninterrupted productivity and employee performance.

At the May 26 session, further discussion ensued concerning the management-rights proposal. The Union offered to accept, as the management-rights provision, the first nine lines of the Respondent's management-rights proposal, adding "just" before "cause" on line seven and a period after "work" on line nine, so as to read:

ARTICLE 31–MANAGEMENT RIGHTS

31.1 Except as expressly limited by a specific provision of this Agreement, the Company reserves and retains and shall continue to have the sole and exclusive right to manage its business and direct the working forces, including, but not limited to, the right to plan, direct, and control operations, the right to hire, suspend, discipline, discharge for just cause or other legitimate reasons, the right to maintain order and efficiency, transfer or promote, or to relieve employees from active duty because of lack of work.

On May 27 the Union offered several modifications to previous positions, as did the Company. The Union agreed to accept a 3-year contract, as proposed by the Company. The Union also agreed essentially to abandon its proposal on hours of work and overtime and to accept the existing contract language as to those items. The Company agreed to reduce its wage reduction demand from 20 percent to 15 percent and also agreed to schedule workdays beginning with Monday, with the understanding that employees could be recalled later in the workweek as dictated by production needs.

On June 2, the last meeting before the strike, continuing give-and-take in discussion led to agreement being reached as to the matters of nonbargaining unit employees, statute of limitations, jury duty, and overtime. It was also at the June 2 meeting that the Union made new proposals with the view to reaching agreement on a management-rights provision. These were a provision prohibiting the subcontracting of bargaining unit work; a "coverage" provision generally providing for contract coverage in the event of mergers, sales, transfers, etc.; and a provision defining the Company's right to establish reasonable work rules. Solano summarily rejected these proposals as "unresponsive." Solano testified, "My feeling at this point is that this was not responsive to the Company's request on the management rights proposal and that in fact the Union had made new proposals which were in fact going backward, pulling away from the position that they had already come to and in fact were putting additional burdens on the Company in this regard. This also resulted in the termination of the contract at that time, serving a letter which is in evidence."

Thus Solano presented the Union with a typed letter giving the requisite written 24-hour notice terminating the day-to-day extension of the contract, to be effective the following day at 3 p.m. Elnyszky, who testified that he was "shocked," requested a further 90-day extention of the contract to pursue negotiations, which Solano rejected. Elnyszky inquired about the availability of work the following week beginning Monday, June 6. Solano told him that work would be available; however, such work would be performed under the terms of those contract provisions on which tentative agreement had been reached, and Respondent's last proposal as to those provisions on which no agreement had been reached. Solano did, however, express a desire to continue the negotiations on June 2, but the Union declined further negotiations on that date because it wanted to consult counsel about the new developments. On June 3, Solano wrote a letter, apparently hand-delivered to the Union, confirming the terms under which work would be available on June 6 and expressing a willingness to continue negotiations.

Elnyszky next contacted Solano on Sunday, June 5. Elnyszky told Solano that the union members were ready and willing to work under the terms of the terminated contract, and that the Union was willing to extend that contract. Elnyszky asked if Respondent's proposal meant working with the reduced wages and benefits of the most recent company proposals and Solano replied affirmatively. During this conversation, a meeting was arranged for the morning of Monday, June 6. Elnyszky and Solano met about 7 a.m.; however this meeting was unproductive, both parties reiterating previously expressed positions. The employees did not report to work on June 6 since they were unwilling to accept the reduced wages and modified working conditions put into effect by the Company at that time. They have been on strike since that time.

The parties did, however, continue to meet. On June 15, they reached agreement on a seniority clause. On August 10 they reached agreement on a management-rights clause, including a provision limiting the subcontracting of unit work. The management-rights provision was one of the items which precipitated the Company's termination of the contract on June 2. Including the meeting on June 6, 12 bargaining sessions have been held since the strike began on various dates in June, July, August, October, November, and December 14, the day before the hearing in the instant case which produced agreement on call-in pay and pension provisions.

One of the most vexing negotiating items involved the temporary transfer of unit employees from one job to another. The existing contract provides for temporary transfers to be paid the higher wage rate. Also, as a matter of past practice, and not any specific contract provision, when an employee was so transferred from one job to another, the job from which he was transferred could not be filled for the day. In some of the earlier discussions, particularly May 5, and as a part of a more comprehensive discussion about management rights, Respondent proposed to modify that practice to permit the Company to fill the transferee's job for the day. The Union opposed this proposal, and a discussion on that subject in various subsequent meetings failed to produce agreement. After the strike began, in negotiations on July 25 the Company submitted a proposal dealing with temporary transfers and the Union responded thereto on August 10; however, despite discussions through December 14, the day before the hearing in the instant case, agreement has not yet been reached on that aspect of the temporary transfer issue regarding the Company's right to replace the transferee, although

agreement was reached as noted above, on a management-rights provision on August 10.

B. *Discussion and Analysis*

The General Counsel contends that Respondent violated Section 8(a)(5) of the Act by announcing and implementing its last contract offer despite the fact that no invalid impasse in contract negotiations had been reached. Respondent argues that impasse had been reached and accordingly it was entitled to implement its last contract offer.

Applicable precedent makes it clear that the parties in this case had an obligation to bargain in good faith over the terms of a new contract. However, this obligation does not run to infinity, and if a valid impasse had been reached in the negotiating process, Respondent would have been free to announce and implement its last contract offer. *Presto Casting Co.*, 262 NLRB 346 (1982). Thus the controlling question is whether or not a valid impasse existed at the time Respondent announced and implemented its last contract offer, together with the other contract provisions tentatively agreed to at that time. Having carefully examined the entire record herein, I am convinced that no valid impasse existed.

First, a review of the sessions prior to June 2 discloses that substantial progress had been made and agreement had been reached on 22 contract provisions, many of which were significant, including union shop, checkoff, arbitration, discharge, and discipline, and reporting pay. The last of the sessions on May 27 produced substantial concessions from the Union in agreeing to modify its proposal from a 1-year contract to a 3-year contract, as proposed by the Respondent, and proposing to substitute the language of the existing contract for its proposal as to overtime and hours of work. Respondent also showed a willingness to compromise by reducing its wage reduction demand from 20 percent to 15 percent, and agreeing to a workweek beginning on Monday.

These sorts of substantial and productive negotiations certainly do not suggest the existence of an impasse. Similarly, on June 2, the day on which Respondent contends that an impasse was reached, parties held a lengthy and productive negotiating session during which agreement was reached on several more contract items.

Even as Respondent terminated the contract and declared the existence of an impasse, Respondent expressed its intention to pursue negotiations and negotiating sessions were held all during the period of the strike and continuing until the day preceding the hearing in the instant case. Not only were negotiating sessions continued, but agreement was reached on several outstanding contract items, including one which had proved most troublesome during prior negotiations, namely a management-rights article, including a paragraph limiting Respondent's right to subcontract work.

In summary, nothing in this record suggests that continued bargaining would have been futile. Rather quite the opposite, where the facts show that continued bargaining could, and did result in agreement on several contract provisions. In these circumstances I cannot conclude that an impasse in negotiations existed at the time Respondent announced and implemented its contract proposals.

The General Counsel also contends that Respondent refused to bargain, violating Section 8(a)(5) of the Act, by proposing and continuing to insist on an overly broad management-rights clause. The Supreme Court has held that the mere insistence on a management-rights clause is not a per se violation of the Act. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). However, the General Counsel argues that, by submitting to the Union a predictably unacceptable management-rights proposal, Respondent violated Section 8(a)(5) of the Act. I do not agree. The record herein discloses that the management-rights proposal begins with the phrase, "Except as expressly limited by a specific provision of this agreement". Such language provides the parties with the opportunity to negotiate other contract provisions in derogation of and limiting the effect of the management-rights proposal as written. The fact is that there was substantial negotiation, modification, and eventual agreement on a management-rights proposal. In these circumstances I conclude that, despite the comprehensive language of the Respondent's management-rights proposal, it was not submitted in bad faith and no 8(a)(5) violation can be predicated thereon.

2. The unfair labor practice strike

There remains for resolution the question of whether Respondent's unfair labor practices caused the Union to strike on June 6. The record supports this conclusion.

On June 2, Respondent terminated the existing contract and, as I have concluded, committed the unfair labor practice of announcing that, as to the contract items still open, it would implement its most recent contract proposals. While work was available on June 6, it was available only under those conditions. The Union suggested continuing to work under the terms of the existing contract, but Respondent refused. Respondent reiterated its position on June 5 and 6, and the Union, unwilling to work under those reduced conditions, went on strike. Clearly the reason for the Union's refusal to work was Respondent's unfair labor practices. The cause-and-effect relationship between the Respondent's labor practices and the Union's refusal to work is manifest, and I conclude that Respondent's unfair labor practices caused the strike in the instant case.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent as set forth in section III, above, in connection with Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I recommend that it

cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that the strike which began on June 6, 1983, was an unfair labor practice strike from its inception, I find that it will effectuate the purposes of the Act to order Respondent to offer to all strikers who make unconditional offers to return to work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any person hired on or after June 6, 1983, and make them whole for any loss of earnings they may suffer as a result of Respondent's refusal, if any, to reinstate them in a timely fashion, by payment to each of them a sum of money equal to what they would have earned as wages during the period commencing 5 days after the date on which each one unconditionally offers to return to work to the date of Respondent's offer of reinstatement, less any net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[4] The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in a orderly manner. Accordingly, if Respondent herein has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.

Any dispute as to who is to be offered reinstatement and what backpay if any is due shall, if necessary, be determined at the compliance stage of this proceeding.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including working foreman and truckdrivers of Henry Miller Spring & Manufacturing Company, Inc., Pittsburgh, Pennsylvania; excluding all office clerical employees, watchmen and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for all of Respondent's employees employed in the unit described above in Conclusion of Law 3.

5. The strike which commenced on June 6, 1983, was an unfair labor practice strike from its inception.

6. By unlawfully announcing on June 2 and implementing on June 6 its last contract proposals, without a valid impasse having been reached, Respondent violated Section 8(a)(l) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

Respondent, Henry Miller Spring & Manufacturing Company, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of its employees in the appropriate unit set forth herein above by unlawfully announcing on June 2 and implementing on June 6 its last contract proposals, without a valid impasse having been reached.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Bargain collectively and in good faith with District Lodge 63, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of all the employees in the above-described unit and embody any understanding reached in a signed agreement.

(b) Honor and enforce the terms of the collective-bargaining agreement with the above-named Union which expired June 3, 1983, until a new agreement is reached.

(c) On application, offer immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, to all those employees who went on strike on June 6, 1983, or thereafter, dismissing if necessary any person hired by the Respondent on or after that date, and make them whole for any loss of pay which they may have suffered by reason of the Respondent's refusal, if any, to reinstate them in conformity with the section of this decision entitled "The Remedy."

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[4] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Post at its premises at Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Banner Tire Company, Inc. *and* Teamsters, Automotive, Petroleum and Allied Trades, Local Union No. 50, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 14–CA–16409

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 18 July 1983 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent's failure to sign and implement a collective-bargaining agreement with the Union violated Section 8(a)(1) and (5) of the Act. He found that Union Negotiator John Gonzales' misrepresentation to Respondent Negotiator Steven Laiderman regarding the status of a competitor's wage and pension offer was insufficient basis to warrant avoidance of the contract upon which oral agreement had been reached. The Respondent excepts to the judge's finding and contends that the Union's misrepresentation regarding the outcome of the ratification vote by employees of the Respondent's competitor justified avoidance of the agreement. For the reasons set forth below we agree with the Respondent's contentions.

The Respondent is engaged in the wholesale and retail sale of automobile tires in the Belleville, Illinois area. It was a party to a collective-bargaining agreement with the Union which was effective from 1 July 1979 to 30 June 1982.[2] On 17 June the Respondent along with 10 other tire dealers in the area began negotiations with the Union. The Respondent's counsel Steven Laiderman represented the employer group and John Gonzales represented the Union. However, the Employers did not bargain as an association and each bargained for its own agreement.

By 28 September the Union and the employer including the Respondent reached agreement on all bargaining issues except for wages and pension plan contributions. On 28 September the employees, excluding the Respondent, proposed to the Union an annual raise of 40 cents per hour for each of the 3 contract years and pension payments of $16, $18.50, and $21 a week during the 3 successive years. That same day the Respondent's major competitor in the area, the Wells Tire group[3] (hereinafter Wells) which was conducting separate negotiations and had also reached agreement on remaining bargaining issues, offered the Union a wage and pension package. The Wells proposal called for a wage increase of 20 cents per hour in each of the 3 contract years and weekly pension contribution of $13, $13, and $16 over the 3 contract years.

On 30 September Gonzales called Laiderman. He advised Laiderman that he would be conducting a union meeting that night so that the various employers' employees could vote on the wage and pension proposals. Laiderman told Gonzales that if the Wells employees voted for a 20-cent package that is what he wanted and that he would not accept a package that was different or for more money and pension benefits than Wells. He further advised Gonzales that if the Wells employees rejected the 20-cent package then he would probably go along with everyone else. Gonzales was then instructed to call Laiderman that evening to inform him how the employees voted.

That evening at approximately 7 p.m. Gonzales did call Laiderman and advised him that the Respondent's employees had rejected the 20-cent package. Laiderman then asked how the Wells employees voted. Gonzales responded that Wells had nothing to do with the Respondent because they were in a different area and that all of the employers in the Respondent's area had accepted the 40-cent package. After Laiderman repeated his question regarding the Wells vote Gonzales told him that the Wells employees had rejected the 20-cent package. Laiderman then stated that "he would go along with the rest of them," referring to the 40-cent package.

Gonzales' statement to Laiderman that the Wells employees had rejected the 20-cent offer was a misrepresentation. The Wells employees did not vote on any proposal until after the completion of the above telephone conversation and they voted to accept the 20-cent offer.[4]

In December Gonzales sent Laiderman a copy of the contract with the 40-cent package. Laiderman

[1] The Respondent has requested oral argument. The request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] All dates are in 1982 unless otherwise indicated.

[3] This group of five stores was bargaining as an association.

[4] At the hearing, Gonzales admitted that the Wells employees did not vote until after his conversation with Laiderman.

refused to sign the contract after learning that the Wells employees had accepted the 20-cent offer.[5]

The judge found that Gonzales' statement regarding the Wells employees' rejection of the 20-cent offer was a misrepresentation. However the judge concluded that it was not a material misrepresentation reasoning that, if the Respondent wanted parity with Wells, the material fact would have been what wage and pension proposal Wells agreed to rather than what the Wells employees rejected.

Contrary to the judge, we conclude that Gonzales' misrepresentation to Laiderman was not made in good faith and justifies the Respondent's refusal to sign or implement the agreement. The misrepresentation that the Wells employees had rejected the 20-cent package goes to the ultimate issue of whether the Respondent desired to reach agreement on the 40-cent package. Here Gonzales was told specifically that the Respondent wanted the same wage and pension contract as its competitor and Gonzales as union negotiator was in a superior position to know how the competitors' employees voted on the package. It follows that Gonzales' deliberate misrepresentation regarding the Wells employees' vote was intended to and had the effect of inducing the Respondent to accept the 40-cent package. In view of the good-faith considerations which underscore Section 8(d) affecting all parties' dealings in the collective-bargaining framework, the Respondent's refusal to sign or implement an agreement which was the direct result of the Union's deceit is not unlawful. We shall therefore dismiss the complaint in its entirety.[6]

ORDER

The complaint is dismissed.

[5] Laiderman became aware of the Wells employees' ratification of the 20-cent offer after receiving a copy of an unfair labor practice charge in late December which had been filed by Wells against the Union for its refusal to sign the contract. The claim was settled by the Union agreeing to accept the 20-cent package.

[6] Member Zimmerman notes that agreement by the Wells group to the same package that the Union proposed to the Respondent was not a condition precedent to a collective-bargaining agreement between the Respondent and the Union. Even if it were a condition precedent, he notes that, in a collective-bargaining context such as in the instant case, the Board is not strictly bound by technical rules of contract law, including, for example, strict notions of condition precedent. See generally *Pepsi-Cola Bottling Co.*, 251 NLRB 187 (1980), enfd. 659 F.2d 87 (8th Cir. 1981). See also *NLRB v. Donkins Inn*, 532 F.2d 138 (9th Cir. 1976), enfg. 214 NLRB 1 (1974). It is true that, where parties have actually reached agreement, the Board normally will require that the agreement be incorporated in writing and signed. However, in the instant case, Laiderman had explicitly stated that "if Wells got a 20 cent package, that's what I want." Knowing this, when Laiderman asked Gonzales what the Wells employees had done, Gonzales told Laiderman that they had rejected the 20-cent package, when in fact they had not yet even voted. Gonzales obviously felt that the only way he could get what he wanted from Laiderman was to consciously mislead him. In such circumstances, Member Zimmerman agrees with his colleagues that the Board cannot condone such tactics in bargaining.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried before me on May 24, 1983, in St. Louis, Missouri, based on an unfair labor practice charge filed by Teamsters, Automotive, Petroleum and Allied Trades, Local Union No. 50, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Local 50 or the Union), on January 7, 1983, and a complaint issued by the Regional Director for Region 14 of the National Labor Relations Board (the Board), on February 10, 1983. The complaint alleges that Banner Tire Company, Inc. (Banner or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by failing and refusing to execute and implement an agreed-to collective-bargaining agreement. Respondent's timely filed answer denies that any agreement to the terms of a collective-bargaining agreement was validly reached.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a Missouri corporation, engaged in the wholesale and retail sale and distribution of automobile tires and related products and services, with an office and place of business in Belleville, Illinois, and other places of business in the State of Missouri. Only its Belleville, Illinois facility is involved in this proceeding. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

The Union, and its predecessor, Teamsters Local 971, which merged into Local 50 in June 1980, have represented Respondent's Belleville employees in the following unit, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, for a number of years:

[1] The General Counsel's unopposed motion to correct the record is granted.

> All vulcanizers, recappers, tire repairmen, tire changers, wheel balancers, front end men, brakemen, tune up men, road and pick-up men, battery men and glass installers at Respondent's Belleville, Illinois store excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The collective-bargaining agreement between Teamsters Local 971 and Respondent, which was assumed by Local 50, was effective from July 1, 1979, to June 30, 1982.[2]

Negotiations were opened by a timely letter from the Union and the first bargaining session was held on June 17. Respondent bargained jointly with a number of other employers in the same industry. However, they did not bargain as an association; each bargained for its own agreement. Steven Laiderman, Respondent's in-house counsel, was Banner's spokesman and, together with a representative of the Bond Stores, was the principal spokesmen for all of the employers. Business agent John Gonzales was the Union's negotiator. Separate negotiations were being conducted between the Union and the Wells group of five stores, which, it was ultimately determined, were bargaining as an association. The Wells group, Laiderman testified, was Respondent's competitor in the wholesale tire market.

By September 28, after a series of meetings, the Union and the employer group which included Banner had agreed on all of the terms of their collective-bargaining agreements except wages and the welfare and pension plan contributions. On September 28, Bond and the other stores, except Banner, offered the Union a package which included a 40-cent-per-hour wage increase in each of the 3 years of the contract plus welfare and pension fund contributions of $16 per week per employee in the first year of the agreement, $18.50 per week in the second year, and $21 per week in the third. At the same time, the Wells group was offering a contract package which included wage increases of 20 cents per hour in each of the 3 years and pension and welfare fund contributions of $13, $13, and $16 weekly.

B. *The Disputed Conversations*

On the morning of September 30, Gonzales called Laiderman and told him that the Union would be meeting with the employees that evening to consider the employers' offers. He told Laiderman what Bond and the other Belleville tire stores had offered, i.e., the 40-cent package, and asked Laiderman what Banner was going to do. According to Gonzales, Laiderman asked what the Wells group was offering and was told of the 20-cent package. Laiderman asked that Gonzales first present the 20-cent package to his employees for a vote and asked further that Gonzales call him at home that evening to let him know how the employees voted. Laiderman's version is slightly different. On direct examination he testified that he asked Gonzales what the Wells group was offering, saying that "if Wells got a 20 cent package, that's what I want." Responding to a leading question and in conclusionary terms, he further testified that "ratification of the same package as the Wells group" was "a condition precedent to any agreement between Banner and Local 50." More specifically, when questioned by the judge, he claimed to have told Gonzales that he "was not going to accept a package any different or for more money and pension than the Wells group," that "it would come down to if Wells rejects the 20 cent package, then I would probably go along with everyone else."

Gonzales met with the employees of the various tire companies on September 30. The employees of Bond and Kenny each voted to accept their employers' 40-cent contract package offers. Gonzales then presented the 20-cent package to the Banner employees and they rejected it.

As Laiderman had requested, Gonzales called him immediately after the vote. Listening to their conversation on a speaker phone was Robert Yock, a Banner employee. As Laiderman recalled this conversation, Gonzales told him that his employees had rejected the 20-cent package. Laiderman asked, "What did the Wells people do?" Gonzales replied, "The Wells people had nothing to do with us because they were in a different area, that all the people in Belleville had accepted the 40 cent package," and asked what Banner was going to do. Laiderman repeated his question, "What did the Wells people do?" Gonzales told him, "The Wells people had rejected the 20 cent offer" and, when he was again asked what he would do, Laiderman told Gonzales that "he would go along with the rest of them," i.e., the Belleville employers.

The version of this conversation presented by Gonzales and Yock varies in only one particular. As they described it, when Laiderman asked what the Wells people had done, Gonzalez only said that the Wells offer was of no concern to him and did not tell Laiderman that the employees of Wells had rejected the 20-cent package. Laiderman then asked what Bond, Kenny, and the others with whom Banner had been bargaining had done and was told that Bond and Kenny had agreed to the 40-cent package. To this, Laiderman allegedly stated, "I guess if those people offered that, I have to offer the same thing."

Gonzales confirmed that Laiderman was offering the Banner employees the 40-cent package, took that package to the employees, and received their assent to it.

According to both Gonzales and Yock, the Wells group employees did not vote on their employer's proposal until after the conversation between Gonzales and Laiderman. Moreover, when they voted, two ballots were taken. Initially, all of the Wells stores' employees voted as a single group and accepted the proposal. Then, on objection by some of the employees, separate votes were taken for each of the five Wells stores. The employees of some stores accepted the 20-cent package; others rejected it. The ratification of the Wells group offer became the subject of unfair labor practice charges filed by both Wells and the Union. An unfair labor practice complaint issued on the basis of the employer's charge which alleged that the contract had properly been ratified by the vote of all five stores' employees voting as an associationwide unit. That complaint was

[2] All dates hereinafter are 1982 unless otherwise stated.

settled when the Union signed a contract with Wells, providing for the 20-cent package in the associationwide unit.

C. *Refusal to Sign or Implement*

In November, Gonzales sent Laiderman a letter setting forth the terms of the agreement which the Union believed had been reached on September 30, i.e., the 40-cent package. Subsequently, Gonzales asked Laiderman when he intended to pay the employees their backpay. Laiderman acknowledged his obligation to make those payments but asked whether he could do so in two payments. Gonzales checked with the employees and informed Laiderman that they would not agree to such a payment plan. Laiderman made no reference at this time to there being any error in the Union's interim agreement.

In early December, the Union sent each of the employers, including Banner, the contract for signing. On December 6, Gonzales called Laiderman to ask whether he had received and reviewed the contract. Laiderman stated that he had reviewed it, that it looked to be in order, and that he would sign it after he had his attorney look it over. He would pay the backpay, he said, as soon as the contract was approved by that attorney.

In December, Laiderman saw a copy of the complaint against the Union which was based on Wells' unfair labor practice charge. This was his first knowledge, he said, that the Wells employees had accepted the 20-cent package. Laiderman then told Gonzales that he was not prepared to sign the contract unless the Union gave Banner the wages and welfare and pension fund agreements reached in the Union-Wells negotiations. Gonzales told Laiderman that he could not do that because the Banner employees had rejected that offer while the Wells employees had accepted it.

Respondent has not signed the 40-cent package agreement proffered by the Union, and it has not implemented the wage, pension, or welfare fund contributions called for in that agreement.[3]

D. *Discussion*

The General Counsel contends that the testimony of Gonzales and Yock must be credited and that, based on their testimony, I must find that there was complete agreement to the terms of a collective-bargaining agreement. Respondent, arguing the credibility of Laiderman, asserts that "ratification of the same contract by Wells" was an unfulfilled "condition precedent to an agreement with Banner" and that, therefore, "there was no agreement." Respondent further argues that, even if an agreement was reached, it was avoidable because it was based on a material misrepresentation.

While I have essentially found Laiderman's recollection of the conversations to be more accurate than those of either Gonzales or Yock, I find that full agreement had been reached and that there had been no material misrepresentation justifying avoidance of that agreement. I find, as Laiderman testified on direct examination, that Laiderman told Gonzales that he wanted to know what the Wells group was "going to do because if Wells got a 20 cent package, that's what I want." However, I do not find that Laiderman told Gonzales specifically or in haec verba that agreement to the same package as the Wells group was a "condition precedent" to their reaching an agreement. Parity with the wages and benefits paid by the Wells group was obviously and understandably Laiderman's goal and Laiderman expressed this to Gonzales. However, his statement to Gonzales was merely the expression of a bargaining position and, I find, did not establish achievement of that position as a condition precedent to agreement.

Similarly, while I credit Laiderman over Gonzales and Yock with respect to the conversation in the evening of September 30, I find no material misrepresentation. Laiderman's response to Gonzales, to the effect that he would have to offer the 40-cent package which the other Belleville stores had offered, only makes sense if he had been told that the Wells group employees had rejected the 20-cent package. Laiderman knew, from his earlier conversation with Gonzales, what Bond was offering and he had expressed his opposition to making a similar offer. If, as Gonzales and Yock testified, Laiderman had only been told that the Bond employees had accepted the 40-cent offer, he would not have been impelled to make that same 40-cent offer. Similarly, he would not have been persuaded to make such an offer merely because Gonzales told him that "Wells' offer was of no concern to him." However, at best, Gonzales only told Laiderman that the Wells employees had rejected the 20-cent package. Laiderman did not ask, and he was not told, whether the Wells group had then agreed to pay the 40-cent package. If parity with Wells was of such critical importance to Respondent, the material fact would have been what Wells had agreed to, not what the Wells employees had rejected. Perhaps Laiderman assumed that rejection of the 20-cent package by the employees of Wells would have forced Wells to accept the 40-cent package, but the record herein provides no basis for him to have made such an assumption. Moreover, as subsequent events reveal, there appears to have been a substantial dispute over whether the Wells employees had accepted their employer's offer. Both Wells and the Union filed unfair labor practice charges and it was not until a complaint issued based on Wells' charge that the dispute was resolved and an agreement, on the 20-cent package, was finalized. In all of these circumstances, I find that Gonzales' statement to the effect that the Wells employees had rejected their employer's offer was not a material misrepresentation.

Accordingly, I must conclude that Respondent offered its employees the 40-cent package, those employees accepted that package, all aspects of the collective-bargaining agreement had thus been agreed to, and Respondent was statutorily obligated to execute that agreed-to contract when the Union proffered it. Its failure to do so, and its failure to give effect to the terms and conditions of that agreement, is violative of Section 8(a)(5) and (1)

[3] Respondent made one welfare fund payment, for December, at the new contract rate. Thereafter, all payments were at the lower rate of the old contract.

of the Act. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941); *Gollin Block & Supply Co.*, 243 NLRB 350 (1979).

FURTHER CONCLUSIONS OF LAW

1. The following employees of Banner Tire Company, Inc. constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All vulcanizers, recappers, tire repairmen, tire changers, wheel balancers, front end men, brakemen, tune up men, road and pick-up men, battery men and glass installers at Respondent's Belleville, Illinois store excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. At all times since at least October 23, 1979, Banner Tire Company, Inc. has recognized and bargained with Teamsters, Automotive, Petroleum and Allied Trades, Local Union No. 50, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or its predecessor, Automotive, Petroleum and Allied Trades, Local Union No. 971, as the designated exclusive bargaining representative of its employees in the above-described unit.

3. By refusing to bargain collectively in good faith with Teamsters, Automotive, Petroleum and Allied Trades, Local Union No. 50, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America by refusing, upon request, to sign the collective-bargaining agreement submitted by said Union in December 1982, embodying the terms and conditions of employment on which the parties had reached agreement on September 30, 1982, and refusing to give effect to such contract retroactive to July 1, 1982, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. Respondent did not commit any unfair labor practices not specifically found herein.[4]

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has failed and refused to sign the collective-bargaining agreement embodying the understanding which the parties reached on September 30, 1982, I shall recommend that it be ordered, on request, to sign said collective-bargaining agreement forthwith. In addition, I shall recommend that it be ordered to give effect to the terms of said agreement retroactive to July 1, 1982, and make the employees whole for any losses they may have suffered by reason of Respondent's failure to execute and implement the aforesaid agreement, with interest thereon to be computed in the manner described in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

---

[4] The complaint had also alleged a discriminatory failure to implement the agreement in violation of Sec. 8(a)(3). There was no evidence of discriminatory motivation, the 8(a)(3) allegation, if proven, would not have affected the remedy herein, it was not pursued in the General Counsel's brief and, it appears, that allegation has implicitly been withdrawn.

Albany Medical Center Hospital *and* New York State Nurses Association, Petitioner. Case 3–RC–8289

14 December 1984

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held 23 September 1982 [1] and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to the Decision and Direction of Election issued by the Regional Director on 17 August. The tally of ballots shows 259 for and 303 against the Petitioner, with 100 challenged ballots.[2]

Following a hearing conducted on 19 through 21 July, the Regional Director for Region 3 issued his Decision and Direction of Election referred to above and determined that, contrary to the Employer's assertion, its 94 assistant head nurses and operating room charge nurses (all referred to as AHNs)[3] are not supervisors within the meaning of Section 2(11) of the Act and that they should be included in the following described unit:

> All full-time and regular part-time registered professional nurses, and all persons authorized by permit to practice as registered professional nurses, employed by the Employer in the nursing department to perform registered professional nursing, including assistant head nurses and operating room charge nurses; excluding all other employees, guards and supervisors as defined in the Act.[4]

The Employer subsequently filed a request for review which was denied by the Board. However, as there remained unresolved the question of whether AHNs assume supervisory authority when they substitute for head nurses, the Board directed that the AHNs vote subject to challenge.

In the ensuing investigation of those challenged ballots, both the Employer and the Union acknowledged that, although AHNs substitute to varying extents for head nurses, they do not assume additional duties on these occasions. Since it had previously been determined that the AHNs' regular duties do not support a finding that they are supervisors, the Acting Regional Director, on 20 October, issued his Report on Challenges in which he found that mere substitution for head nurses was insufficient to confer supervisory status on AHNs and recommended that the challenges to their ballots be overruled.

The Employer has filed timely exceptions to the Acting Regional Director's report in which it reasserts its contention that AHNs' performance of their regular duties—irrespective of their substituting for head nurses—compels a finding that they are supervisors. Having reviewed the record in light of the exceptions and briefs, we agree.

The Employer is a 720-bed hospital that employs 3300 employees, approximately 725 of whom are registered nurses. The Employer's nursing department is comprised of four nursing divisions and is further broken down into nursing units. The nursing department is headed by an assistant vice president of nursing and each of its divisions is headed by an assistant director of nursing. Nine supervisors of nursing and 12 assistant supervisors run the several units. Supervisors of nursing generally work the day shift while assistant supervisors work the evening and night shifts. Next in the department's supervisory hierarchy are 43 head nurses who usually work the day shift. The 94 AHNs, whose status is at issue in this proceeding, work all three shifts. Those AHNs assigned to the day shift report to the head nurses on duty and the AHNs assigned to the evening and night shifts report to the assistant supervisors on duty.

AHNs spend an average of 50 percent of their time taking care of patients' needs and the rest of their time performing administrative tasks. AHNs are primarily responsible for ensuring that staffing requirements for subsequent shifts are met. Although basic schedules are prepared by computer in accordance with a staffing formula, AHNs adjust the base schedules to reflect nurses' vacation and personal days. The AHNs do have authority to grant days off so long as staffing levels are met. AHNs also have authority to request that nurses work overtime although only head nurses and nursing supervisors can compel nurses to do so. Additionally, AHNs initial the timecards of nurses who work overtime and those whom they allow to start shifts early or leave early. No one below the level of AHN has authority to adjust schedules, initial timecards, or otherwise affect nurses' hours of work. Additionally, AHNs have authority to issue written warnings to nurses. These warnings are re-

[1] All dates are in 1982.

[2] Six ballots were challenged on the basis that the names of the voters casting them did not appear on the eligibility list. Our disposition of the other 94 challenged ballots renders those 6 ballots nondeterminative.

[3] The parties stipulated that assistant head nurses and operating room charge nurses perform essentially the same duties and should be accorded the same status.

[4] In view of our resolution of the challenges and the disposition of this proceeding as set forth below, we find it unnecessary to pass on the appropriateness of the designated unit.

viewed by and may be changed by a head nurse or supervisor.

Although AHNs have no authority regarding several of the statutory indicia of supervisory status, they regularly prepare written evaluations of nurses which are given substantial weight in determining merit wage increases and promotions. AHNs evaluate nurses 3 months after hire, 6 months after hire, and annually thereafter. On this basis, we find that AHNs have authority effectively to promote and reward employees working under them. In support of this conclusion, we note particularly that the Employer's assistant director for nursing services stated that she would not promote an employee unless the assistant head nurse assigned to that unit had recommended such action.

Inasmuch as the statutory indicia set forth in Section 2(11) of the Act are stated in the disjunctive and only one need exist to confer supervisory status, we find that the vesting of authority in AHNs to evaluate employees and thereby to reward and promote them compels a finding that AHNs are supervisors [5] and that the challenges to their ballots must be sustained. We also find significant the fact there is an extraordinarily low supervisor-to-employee ratio if AHNs are not supervisors. The record establishes that, if AHNs are found statutory employees, the supervisor-to-employee ratio on the evening and night shifts would average approximately 1-to-37 and be as low as 140-to-1 in some units. Such an inordinately low ratio further supports the conclusion that they are supervisors.

On the basis of all of the foregoing, we sustain the challenges to the 94 ballots cast by AHNs, and shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for New York State Nurses Association and that it is not the exclusive representative of these bargaining unit employees.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would not find the assistant head nurses (hereafter referred to as AHNs) to be supervisors within the meaning of Section 2(11) of the Act.

I do not agree with the majority's conclusion that because AHNs prepare written evaluations of nurses they effectively recommend them for rewards (raises) and promotions. The record reveals that AHNs fill out written evaluation forms that are restricted to evaluating an employee's care of patients. Although these forms become part of an employee's personnel file, the record fails to indicate how the AHN's role in completing the forms constitutes an effective recommendation for a promotion or raise. Nowhere on these forms is there a section, provision, or space for recommendations about raises and promotions. That AHNs evaluate the performance of nurses does not, without more, establish that they have the authority to effectively make recommendations concerning raises and promotions.[1] All the record shows is that, as found by the Regional Director in his Decision and Direction of Election, decisions about such matters are made by several levels of authority in the nursing department beyond the AHN. Nor does Assistant Director Spath's testimony that she would not promote an employee if the AHN objected establish that the AHNs effectively recommend employees for promotion. That testimony is speculative and not probative of any pattern of action in the hospital. Indeed, it implies either that AHNs make no recommendations concerning these matters, or that the AHNs' comments in the evaluation about the employee's performance play little or no part in the decision. In either case, the implication militates against a finding that AHNs effectively recommended action to be taken concerning the employees' terms and conditions of employment.

My colleagues' reliance on the low supervisor-to-employee ratio that will exist if AHNs are not found to be supervisors is also misplaced. They fail to take into account the AHNs duties of assigning employees to patients and directing those employees in their professional capacity. The AHNs' principal administrative function is assignment of personnel, including granting time off and approving overtime. The question is whether AHNs, in performing this function, exercise independent judgment. The record establishes that the Employer uses a basic formula for assignment which the AHNs follow. For example, in authorizing overtime, AHNs act within the standards set by the Employer; further, they cannot compel employees to work overtime. Similarly, in granting time off to employees, AHNs may do so only if the employee is entitled to leave and staffing needs can be otherwise met. As for making assignments of nurses to patients, AHNs are guided by the patients' needs rather than the Employer's employment interests. In these circumstances the AHNs' scheduling and

[5] See *Moon Valley Health Services*, 238 NLRB 916, 925 (1978). In view of our reliance on the AHNs' authority to evaluate employees, we need not consider whether their supervisory status is further shown by additional responsibilities, such as their involvement in the issuance of written warnings and their authority to adjust schedules and grant days off to employees.

[1] *St. Mary's Hospital*, 220 NLRB 496 (1975).

assigning employees does not require the exercise of independent judgment. Under these circumstances, it is not extraordinary that a head nurse could be the only immediate supervisor of from 30 to 140 employees.

Accordingly, I would find that the AHNs are not supervisors and that any independent judgment exercised on their part was incidental to the professional treatment of patients.[2]

[2] *Wing Memorial Hospital Assn.*, 217 NLRB 1015 (1975).

Glenoaks Convalescent Hospital *and* Hospital and Service Employees Union, Local 399, SEIU, AFL–CIO. Case 31–CA–13158

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 4 September 1984 Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Glenoaks Convalescent Hospital, Glendale, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In his decision, the judge refers to the Respondent's administrator as both Livingston and Hamilton. The administrator testified that her name was Pamela Hamilton and the complaint alleged that Pamela Nance-Hamilton, administrator, was an agent of Respondent and a supervisor within Sec. 2 of the Act. Accordingly, it appears that the Respondent's administrator was inadvertently referred to as Pamela Livingston and the decision should be corrected to identify her as Pamela Hamilton.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On October 12, 1983,[1] I conducted a hearing at Los Angeles, California, to try issues raised by a complaint issued on July 29 based on a charge filed by Hospital and Service Employees Local 399 (the Union) on May 24 and amended on July 8. The complaint alleges that Glenoaks Convalescent Hospital (the Hospital) violated Section 8(a)(1) the National Labor Relations Act by interrogating employees about their and other employees' union activities and sympathies, creating the impression the union activities of its employees were under surveillance, requesting employees to ascertain and report on the union activities of other employees, and telling employees it was futile to seek union representation; and that the Hospital violated Section 8(a)(1) and (3) of the Act by changing employee Anna Barker's workshift and discharging employee Melody Miranda because of their union activities.

The Hospital conceded it discharged Miranda; denied it changed Barker's workshift; denied that it committed the acts alleged above as independent violations of Section 8(a)(1) of the Act; and denied violating the Act.

The issues for determination are whether the Hospital committed the acts alleged as violative of Section 8(a)(1) of the Act; if so, whether the Hospital thereby violated the Act; whether Barker's workshift was changed; if so, whether that change violated the Act; and whether Miranda's discharge violated the Act.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, to argue, and to file briefs. Both counsels argued orally and the Hospital filed a brief.

Based on my review of the entire record, observation of the witnesses, perusal of the oral arguments and the brief, plus research, I enter the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find at all pertinent times the Hospital was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. The Union's organizational campaign

The union campaign to organize the Hospital's employees began when employee Anna Barker contacted the Union in the spring. The Union supplied Barker with cards authorizing the Union to act as the collective-bargaining agent of the Hospital's nonsupervisory employees and asked her to solicit employees to sign those cards in sufficient number to support a petition for certification as their collective-bargaining representative. Barker recruited other employees to assist her in circulating the cards among the employees and soliciting signatures thereto, including employee Melody Miranda.[2] Barker, Miranda, and others secured a substantial number of signed cards from the employees and turned them over to the Union, which utilized the cards as the basis for filing a petition with the Region for certification as their collective-bargaining representative. The Hospital received formal notification of the filing of the petition about the end of April.

[1] Read 1983 after all further date references omitting the year.

[2] The native language of over one-half of the Hospital's nonsupervisory employees (approximately 60) was Spanish. Many of those employees had a very limited grasp of English. Miranda was bilingual and was called by on the Hospital management to translate communications between management and the employees.

2. The alleged independent 8(a)(1) violations and the alleged workshift change violative of Section 8(a)(1) and (3) of the Act

Hospital management[3] became aware of the union campaign, the holding of a union meeting in a building adjacent to the Hospital, and Barker's leading role in the campaign sometime in late April.[4]

Not long after the time he held his conference with Wright and Johnson and instructed them to keep watch over the employees' union activities, Powers conferred with Miranda. Powers informed Miranda that supervisory personnel were ineligible for union representation, stated the Hospital was opposed to union representation of its employees and would let the employees strike rather than deal with the Union; that a union attempted to organize another facility where he was employed and one of the employees there took him to court, to her regret; stated that while Miranda did not have to answer his questions, could she identify the employees behind the union campaign; and requested that she keep watch over the employees' union activities. Miranda replied she was unable to identify any union supporters and promised to comply with Powers' request.[5]

In the course of the conference with Johnson wherein he advised Johnson that Barker initiated the union campaign, Powers instructed Johnson to change Barker's work shift (then 7 a.m to 3:30 p.m, Monday through Thursday) so management could keep an eye on her union activities. In accordance with those instructions, Johnson changed Barker's work shift beginning the week of May 9 to 8 a.m.—2:30 p.m., Monday though Friday (management personnel normally worked a 5-day workweek, commencing at 8 a.m.).[6]

About the same time, in the course of a discussion between Wright and Miranda concerning the union campaign, Miranda told Wright that Johnson had informed her what transpired during the meeting between Powers, Johnson, and Wright; i.e., that Johnson informed her Powers told Johnson and Wright the Hospital was opposed to union representation of its employees and asked Johnson and Wright to watch the employees' union activities. Wright asked Miranda her views concerning union representation and Miranda replied she was well paid and uninterested in union representation. Wright contacted Johnson and repeated Miranda's remarks to her. Angry over what she felt was a breach of confidence, Johnson contacted Miranda and instructed Miranda to stay away from her unless official business required a contact. Miranda went to Wright and expressed her concern over the disruption in her relationship with Johnson caused by Wright's repeating her comments. Wright brought the two together, said they all should try to get along, and reiterated Powers' request that all three watch the employees' union activities.

Miranda subsequently heard Wright interrupt a conversation between Barker and Patterson to ask them what they were discussing, and heard Wright ask Barker and Patterson to identify the union ringleaders, commenting one of them must speak Spanish. On other occasions when she was not able to overhear what was being said, Wright asked employees what they were discussing.[7]

3. The alleged discriminatory discharge

Miranda was hired in October 1982 to handle and chart patient activities. In January 1983, Powers assigned her the additional duty of handling and recording the patients' social services, granting her at that time an increase of 75 cents per hour, with the promise of an additional 25 cents when she completed an academic course in social services work.

Approximately 3 months later (in April), Miranda told Powers she had not been able to find a social services course in which to enroll, that she had checked and found out the State did not require an academic credential for the performance of the work in question, that she believed she was performing the work efficiently, and requested he waive the academic requirement and grant the promised 25-cent-per-hour increase. Powers acknowledged she was performing the work well and the academic training was not required by regulatory authorities, but stated he nevertheless wanted Miranda to complete the academic work and stated he would not give her the 25-cent increase until she did. He promised to try to locate a course in which she could enroll.

On May 9, Pamela Hamilton assumed the position of administrator at the Hospital.[8] During the entire period

[3] Douglas Powers, general administrator; Altha Wright, dietary supervisor; and Marie Johnson, director of nurses. The complaint alleges, the answer admits, and I find that at all pertinent times Powers, Wright, and Johnston were supervisors and agents of the Hospital acting on its behalf within the meaning of Sec. 2 of the Act.

[4] The signature solicitations, the pros and cons of union representation, and a union meeting held in late April in the apartment of employee Lois Patterson in a building adjacent to the Hospital were widely discussed among employees prior to the petition filing in late April; in the course of a meeting between Powers, Wright, and Johnson about the time the petition was filed, Powers told Johnson and Wright a union campaign was in progress, a union meeting had been held near the Hospital, and instructed Wright and Johnson to keep close watch over the employees' union activities. At a later meeting the same day between Powers and Johnson, Powers told Johnson that Barker initiated the union campaign. These findings are based on Johnson's testimony, which I credit; Johnson impressed me as a sincere, honest witness.

[5] These findings are based on Miranda's testimony, which I credit. Miranda was a direct and forthright witness, and very convincing. Powers apparently thought Miranda was a supervisor, along with Johnson and Wright. The Hospital did not advance this contention in its oral or written argument, nor in the course of the hearing, and Miranda testified without contradiction she did not hire, fire, discipline, or direct the work of any employees and there was no evidence produced to establish the contrary, nor any independent evidence she performed supervisory functions. I therefore find that at all pertinent times Miranda was not a supervisor and/or agent of the Hospital acting on its behalf within the meaning of Section 2 of the Act.

[6] These findings are based on Johnson's testimony, which I credit, and supporting statistical data.

[7] The findings in this and the previous paragraph are based primarily on Miranda's testimony, which I credit, because she was a direct and forthright witness. Her testimony to matters in the former paragraph was corroborated by Johnson and her testimony to matters in the latter paragraph was corroborated by Barker, while Wright was hesitant in her testimony and professed an inability to recall her statements.

[8] The complaint alleges, the answer admits, and I find that at all pertinent times Hamilton was a supervisor and agent of the Hospital acting on its behalf within the meaning of Sec. 2 of the Act.

of Miranda's employment prior to May 9, she worked directly under Powers, who conceded she was an excellent employee and that he had on several occasions complimented her on her work performance.

Hamilton was aware when she assumed her position at the Hospital that a union campaign to represent the Hospital's nonsupervisory employees was underway.

On either May 10 or 11, Miranda approached Hamilton and renewed her request for a 25-cent increase, reciting the same argument she utilized in her approach to Powers the previous month. Hamilton replied she was unfamiliar with the situation, but would look into it. She conferred with Powers; he remained firm in his position that Miranda should not receive the increase until and unless she completed the academic work he established as the prerequisite for Miranda's receipt of the increase.

When Miranda inquired about the increase on May 12, Hamilton recited Powers' position, expressed irritation over Miranda's persistence in what she characterized as a petty matter, stated she was familiar with and capable of performing the social service work, and stated she thought she might assume those functions and reduce Miranda's wages by 75 cents per hour, to the rate Miranda received prior to her assumption of the social services functions. Miranda promptly withdrew her wage increase request, stating she liked the work in question and would abandon any effort to secure the promised 25-cent-per-hour increase rather than lose it. Hamilton ordered Miranda to leave her office and to return in 15 or 20 minutes. On Miranda's return to her office, Hamilton informed Miranda she was discharged.[9] Miranda's subsequent appeal to Powers for reinstatement was unsuccessful.[10]

B. *Analysis and Conclusions*

1. The alleged 8(a)(1) independent violations

The complaint alleges that the Hospital violated Section 8(a)(1) of the Act by Powers' interrogating an employee about her and other employees' union activities and sympathies, by his requesting employees to spy on the union activities and sympathies of other employees, by his creation of the impression he was spying on the employees' union activities and sympathies, by his informing an employee it was futile to seek union representation, and by Wright's interrogating employees about their and other employees' union activities and sympathies.

a. *The alleged spying (Powers)*

Findings have been entered that Powers, in the course of his conferences with Miranda, Johnson, and Wright, solicited the former and instructed the latter two to spy upon the union activities of the Hospital's employees. Such a solicitation and instruction, whether to a rank-and-file employee or to a supervisory employee, is violative of Section 8(a)(1) of the Act.[11] I therefore find that by such solicitation and instruction, the Hospital violated Section 8(a)(1) of the Act.

b. *The alleged interrogation, creation of the impression of surveillance, and futility statement (Powers)*

Findings have been entered that Powers, in the course of his conference with Miranda, asked her to identify employees supporting the union campaign, inferred that it was futile for the employees to seek union representation by stating the Hospital would take a strike before it would deal with the Union, and conveyed the impression he was maintaining a surveillance of the employees' union activities by asking Miranda to spy upon the employees' union activities.

All three of those actions (the interrogation, the conveyance of the inference, and the conveyance of the impression) are violative of Section 8(a)(1) of the Act,[12] and I therefore find that by those actions the Hospital violated Section 8(a)(1) of the Act.

c. *The alleged Wright interrogations*

Findings have been entered that Wright asked Miranda's views concerning union representation after Miranda informed Wright that Johnson told her what transpired in an earlier conference between Powers, Wright, and Johnson and that Wright subsequently, within earshot of Miranda, asked Barker and Patterson what they were discussing and who the union ringleaders were, commenting that one of them must speak Spanish.

Both these interrogations occurred after Wright received instructions from Powers to spy on the employees' union activities.

Findings have also been entered that Wright on other occasions asked employees what they were talking about.

From the foregoing, I conclude that Wright questioned Miranda, Barker, and Patterson as part of her

[9] Hamilton testified that she conferred with Powers and related what occurred in the course of her conference with Miranda; that Powers solicited her reaction; that she stated she was dissatisfied with Miranda's attitude; that Powers authorized her to discharge Miranda if she wished; and that she decided to discharge Miranda because of her "negative attitude," as evidenced by Miranda's frank comment that, while she accepted Powers' position, she felt she was not being treated fairly by the Hospital.

[10] The findings in this paragraph are based on the testimony of Miranda, with partial corroboration by Hamilton and Powers.

[11] *NLRB v. St. Vincent's Hospital*, 729 F.2d 730 (11th Cir. 1984); *Howard Johnson Co. v. NLRB*, 702 F.2d 1 (5th Cir. 1983); *NLRB v. Chem Fab Corp.*, 691 F.2d 1252 (8th Cir. 1982); *J. P. Stevens & Co. v. NLRB*, 668 F.2d 767 (4th Cir. 1982); *L'Eggs Products v. NLRB*, 619 F.2d 1337 (9th Cir. 1980); *NLRB v. National Garment Co.*, 614 F.2d 623 (8th Cir. 1980); *Belcher Towing Co. v. NLRB*, 614 F.2d 88 (5th Cir. 1980); *Gulf States Mfrs. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978); *Russell Stover Candies v. NLRB*, 551 F.2d 204 (8th Cir. 1977); *Enterprise Products*, 265 NLRB 544 (1982); *United Sanitation Services*, 262 NLRB 1369 (1982); *Union Carbide Corp.*, 259 NLRB 974 (1982); *St. Mary's Infant Home*, 258 NLRB 1024 (1981); *St. Francis Hospital*, 249 NLRB 180 (1980); *International Medication Systems*, 244 NLRB 861 (1979); *Wex-Tex of Headland*, 236 NLRB 1001 (1978); *Harvey's Resort Hotel*, 236 NLRB 1670 (1978).

[12] See the cases cited in fn. above plus *McLane/Western v. NLRB*, 723 F.2d 1454 (10th Cir. 1983); *NLRB v. Intermedics, Inc.*, 715 F.2d 1022 (5th Cir. 1983); *Raley's Inc. v. NLRB*, 703 F.2d 410 (9th Cir. 1983); *Ahrens Aircraft v. NLRB*, 703 F.2d 23 (1st Cir. 1983); *NLRB v. Keystone Pretzel Bakery*, 696 F.2d 257 (3d Cir. 1982); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3d Cir. 1980); *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir. 1976); *Aero Tec Laboratories*, 269 NLRB 705 (1984); *L'Ermitage Hotel*, 268 NLRB 744 (1984); *Rikal West, Inc.*, 266 NLRB 551 (1983); *Cardio Data Systems*, 264 NLRB 67 (1982); *Best Products*, 259 NLRB 95 (1981); *Brownsboro Hills Nursing Home*, 244 NLRB 269 (1979).

effort to comply with Powers' surveillance instructions, thereby violating Section 8(a)(1) of the Act.[13]

2. The alleged work shift change

I have entered findings that, in late April or early May, Powers informed Johnson that Barker was the prime mover in the union campaign and instructed Johnson to change Barker's work shift so management could spy on her union activities; and that Johnson carried out Powers' instructions, changing Barker's work shift from a 4-day (Monday through Thursday), 8 hours per day (7 a.m.—3:30 p.m.) work shift to a 5-day (Monday through Friday), 6 hours per day (8 a.m.—2:30 p.m.) work shift, thereby placing Barker on the premises only during hours management personnel was present. The change reduced Barker's work shifts by 2 hours per week and required her presence at the Hospital 5 days per week rather than 4.

The Board has held that changing an employee's work area in order to keep a watch on his or her union activities and changing an employee's work duties because of his or her union activities are violative of the Act.[14] I find it reasonable to conclude that it is likewise violative of the Act to change an employee's work shift in order to spy on his or her union activities, and thus conclude that by changing Barker's work shift for that purpose, the Hospital violated Section 8(a)(1) and (3) of the Act.

3. The alleged discriminatory discharge

Findings have been entered that Miranda was an active and important supporter of the Union, active in that she signed a card authorizing the Union to represent her, attended the union meeting in late April at Patterson's apartment, and solicited employees to sign cards authorizing the Union to represent them; important in that she regularly translated communications between the Hospital management and its predominantly Spanish-speaking work force and therefore was able to act as the Union's conduit in reaching those same Spanish-speaking employees for the purpose of securing their support, including the signing of cards authorizing the Union to represent them.

Prior to the time she was discharged, Powers rated Miranda an excellent and valued employee, and complimented her on her work. Yet the Hospital would have me believe she was summarily discharged for uttering a single comment, by a supervisor unfamiliar with her work performance, without a review of her previous performance and the complete absence of any warning, contending the absence of direct proof management was aware of her union role and the fact that two other known employee leaders of the Union (Barker and Patterson) were not discharged militates an acceptance of its position that her utterance of that comment was the sole motive of her discharge.

The Board and the courts have long accepted the premise that employer motivation may be established by inference drawn from facts and circumstances surrounding a discharge.[15] They also have rejected the defense that employer failure to discharge *all* the known activists in their employ supports the conclusion that the discharge of a lesser number is nondiscriminatory.[16]

Thus on a number of occasions the Board has inferred employer knowledge of an employee's union activities from facts and circumstances surrounding the discharge,[17] and held the discharge of less than the total number of known union activists violative of the Act.[18]

The record establishes that prior to Miranda's discharge Hospital management

1. Became aware of its employees' union authorization card solicitations, attendance at a union meeting, and the identity of some of the employees who were leading the Union's campaign.

2. Expressed its union animus and unlawfully sought to discourage its employees from seeking representation by the Union by implying their efforts would be futile.

3. Unlawfully questioned employees about their and other employees union activities and sympathies.

4. Unlawfully requested employees to keep a close watch on other employees' union activities.

5. Conducted an unlawful surveillance of its employees' union activities.

6. Voiced the suspicion that one of the employees leading the union campaign was fluent in the Spanish language.

From the foregoing, I find and conclude that, sometime before Miranda's discharge, Hospital mangagement's surveillance of its employees' union activities produced confirmation of Wright's suspicion—that one of the employee leaders of the union campaign was fluent in the Spanish language—identified Miranda as that person.

Miranda not only spoke Spanish fluently, she was an authority figure among the Spanish-speaking employees (by virtue of her role as the translator of management's instructions, requests, etc.). Thus her discharge, at the height of the preelection campaign, necessarily discouraged those employees, who signed union authorization cards and gave their support to the Union due to Miran-

[13] *NLRB v. Hasbro Industries*, 672 F.2d 978 (1st Cir. 1982); *Nueva Engineering*, 269 NLRB 999 (1984); *Amason, Inc.*, 269 NLRB 750 (1984); *Providence Hospital*, 251 NLRB 1071 (1980); *Industry Products*, 251 NLRB 1380 (1980); *Scott's Wood Products*, 242 NLRB 1193 (1979); *Wex-Tex of Headland*.

[14] *Champion Road Machinery Co.*, 264 NLRB 927 (1982); *Stoughton Trailers*, 234 NLRB 1203 (1978).

[15] *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Long Island Limo Service*, 468 F.2d 292 (2d Cir. 1972); *Famet, Inc. v. NLRB*, 490 F.2d 293 (9th Cir. 1973); *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir. 1980); *NLRB v. Proler International Corp.*, 635 F.2d 351 (5th Cir. 1981); *Golden Day Schools v. NLRB*, 644 F.2d 834 (9th Cir. 1981); *NLRB v. Midland Ross, Inc.*, 653 F.2d 239 (6th Cir. 1981); *Bill Johnson's Restaurant v. NLRB*, 103 S.Ct. 2161 (1983); *Artra Group v. NLRB*, 130 F.2d 586 (10th Cir. 1984).

[16] *Rust Engineering Co. v. NLRB*, 445 F.2d 172 (6th Cir. 1971); *NLRB v. Puerto Rico Telephone*, 357 F.2d 919 (1st Cir. 1968); *Nachman Corp. v. NLRB*, 337 F.2d 421 (7th Cir. 1964); *NLRB v. W. C. Nabors, Co.*, 196 F.2d 272 (5th Cir. 1952); *Holding Co.*, 231 NLRB 383 (1977).

[17] *Syracuse Dy-Dee Diaper Service*, 251 NLRB 963 (1980); *Bacchus Wine Cooperative*, 251 NLRB 1552 (1980); *Coral Gables Convalescent Home*, 234 NLRB 1198 (1978), and cases cited in fn. 16 above.

[18] See cases cited in fns. 15, 16, and 17, above.

da's solicitations and urging, from continuing their support of the Union.

In view of the foregoing, the timing of Miranda's discharge and the weak justification advanced therefor, the Hospital's established union animus, and its proclivity to violate the Act in its campaign to avoid dealing with the Union, I find and conclude that the Hospital discharged Miranda to discourage its employees from supporting the Union, particularly those employees (the majority) who were fluent only in Spanish and looked to Miranda for leadership and guidance, thereby violating Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. At all pertinent times the Hospital was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Powers, Johnson, Wright, and Hamilton were supervisors and agents of the Hospital acting on its behalf within the meaning of Section 2 of the Act.

3. The Hospital violated Section 8(a)(1) of the Act by

(a) Requesting employees to spy upon the union activities of its employees.

(b) Asking an employee to identify employees who support the Union.

(c) Conveying the impression that it was futile for the employees to seek union representation.

(d) Creating the impression the Hospital was keeping watch on union activities of its employees.

(e) Interrogating employees concerning the identity of the employees leading the union campaign.

(f) Maintaining a surveillance of its employees' union activities.

4. The Hospital violated Section 8(a)(1) and (3) of the Act by changing an employee's work shift in order to watch over her union activities.

5. The Hospital violated Section 8(a)(1) and (3) of the Act by discharging an employee to discourage her and other employees' support of the Union.

6. The above unfair labor practices affected and affect interstate commerce as defined in Section 2 of the Act.

THE REMEDY

Having found that the Hospital committed various unfair labor practices, I shall recommend it be directed to cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act.

Having found that the Hospital violated the Act by reducing Barker's workweek by 2 hours per week in order to spy on her union activities, I shall recommend the Hospital be ordered to make Barker whole for those losses by paying her for the hours lost for each week of such losses between the first week of her reduced work schedule and the week she resigned, with interest on the sums due computed in accordance with the formula set out in *Florida Steel Corp.*, 231 NLRB 651 (1977) and *Isis Plumbing Co.*, 138 NLRB 716 (1962).[19]

Having found that the Hospital violated the Act by discharging Miranda, I shall recommend the Hospital be directed to reinstate her to her former position with seniority and other rights and privileges restored, and to make her whole for any seniority, wage, and benefit losses she suffered by virtue of the discrimination against her, with the amount due calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon calculated in accordance with the formula set forth above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Glenoaks Convalescent Hospital, Glendale, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking employees to identify those employees who support union representation.

(c) Requesting employees to spy upon the union activities of its employees.

(d) Conveying the impression to employees that it is maintaining a surveillance of their union activities.

(e) Maintaining a surveillance of its employees' union activities.

(f) Creating the impression among its employees it was futile for them to seek union representation.

(g) Changing its employees' hours or shifts in order to spy on their union activities.

(h) Discharging employees in order to discourage them and other employees from seeking union representation.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

(a) Make Anna Barker whole for her wage losses resulting from the discrimination against her in the manner set forth in "The Remedy" section of this decision.

(b) Offer Melody Miranda reinstatement to her former position with all seniority and other rights and privileges restored, and make her whole for any seniority, wage, and benefit losses she may have suffered by virtue of the discrimination against her, in the manner set out in "The Remedy" section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its premises in Glendale, California, copies of the attached notice marked "Appendix."[21] Copies of

[19] Restoration of her former work shift is not being recommended, inasmuch as Barker voluntarily resigned when the Union lost the election.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment

Continued

the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial before the above Agency, the Agency issued a decision finding we committed unfair labor practices and directed that we post this notice advising you what we will do and what we will refrain from doing to remedy those unfair labor practices, to wit:

WE WILL NOT ask you to identify your fellow employees who support or supported Hospital and Service Employees Union, Local 399, SEIU, AFL–CIO or any other labor organization.

WE WILL NOT interrogate you concerning the identity of our employees who support or lead a campaign by Local 399, or any other labor organization, to secure the right to represent you for collective-bargaining purposes.

WE WILL NOT solicit or request that you spy on the activities of any of our employees on behalf of Local 399, or any other labor organization.

WE WILL NOT convey to you the impression we are maintaining a surveillance of your activities on behalf of Local 399, or any other labor organization.

WE WILL NOT maintain a surveillance of your activities on behalf of Local 399, or any other labor organization.

WE WILL NOT give you the impression it is futile for you to seek representation by Local 399, or any other labor organization.

WE WILL NOT change your work shifts or hours so we can spy on your activities on behalf of Local 399, or any other labor organization.

WE WILL NOT discharge you to discourage your and other employees' support of Local 399, or any other labor organization.

WE WILL make Anna Barker whole for her wage losses resulting from our changing her work shift so we could spy on her activities on behalf of Local 399.

WE WILL reinstate Melody Miranda to her former position and make her whole for any wage or other losses she suffered by virtue of our discharging her to discourage her and other employees' support of Local 399.

GLENOAKS CONVALESCENT HOSPITAL

Pagerly Detective and Security Agency, Inc. *and* Independent Union of Professional Technical and General Service Employees *and* Douglass A. Koyste. Cases 4–CA–13330, 4–CA–13384–2, and 4–CA–13330–5

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 October 1983 Administrative Law Judge William A. Gershuny issued the attached decision. The Union filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions but to substitute the attached Order and notice for that of the judge.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Pagerly Detective and Security Agency, Inc., Wernersville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Wernersville, Pennsylvania office copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

[1] At the hearing the judge excluded as inadmissible hearsay certain testimony of employee Chris Jarecki offered by the General Counsel. According to the General Counsel's offer of proof Jarecki would have testified that, shortly after a meeting in October 1982 between dischargee George Oister and the Respondent's president Thomas Pagerly, Oister said to Jarecki, "[C]an you believe it . . . Mr. Pagerly wants me to provide him with a list of employees in support of the union." We find merit in the Union's exception to the judge's ruling and find that Jarecki's testimony is a prior consistent statement admissible under Rule 801(d)(1)(B) of the Federal Rules of Evidence. The record reveals that the Respondent vigorously attacked the veracity of Oister's testimony at the hearing that Pagerly directed him to provide a list of union supporters prior to Oister's discharge. The judge should have permitted the General Counsel to rebut such a charge against Oister by evidence of the prior consistent statement. See *United States v. Parodi*, 703 F.2d 768, 784–787 (4th Cir. 1983); *United States v. Dominquez*, 604 F.2d 304, 311 (4th Cir. 1979), cert. denied 444 U.S. 1014 (1980). Nonetheless we find the judge's erroneous evidentiary ruling was not prejudicial and we adopt his finding that Oister's demotion and discharge did not violate the Act. Thus, Oister's testimony was totally discredited by the judge on the basis of demeanor and President Pagerly's testimony was totally credited. In such circumstances Jarecki's testimony concerning what Oister told Jarecki is insufficient to disturb the critical credibility resolutions concerning the conversations between Oister and Pagerly. We adopt the judge's evidentiary rulings in all other respects.

Chairman Dotson agrees that Oister's demotion and discharge did not violate the Act. The Chairman, however, would affirm the judge's exclusion of Jarecki's testimony as hearsay. Because there is no contention by any party that Oister's alleged statement to Jarecki was inconsistent with any other statement ever made by Oister concerning preparation of a list of union supporters, Jarecki's testimony was not offered to rebut a charge against Oister of recent fabrication or improper influence or motive as required by Rule 801 (d)(1)(B). Cf. *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 559 (6th Cir. 1978). In the Chairman's view the proffered testimony is therefore excludable under the general rule that an out-of-court prior consistent statement is inadmissible hearsay. 4 Wigmore, *Evidence* § 1124 at 255 (Chadbourn rev. 1972). See also *United States v. Check*, 582 F.2d 668, 677 fn. 27 (2d Cir. 1978).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Union asserts that the judge's decision is the product of bias, hostility, and misconduct against the General Counsel and her witness. We have carefully examined the record and find no basis to the Union's allegations.

In the absence of exceptions Chairman Dotson would adopt pro forma the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating employee Koyste.

[3] Relying on *Alleluia Cushion Co.*, 221 NLRB 999 (1975), the judge found that the Respondent violated Sec. 8(a)(1) when, following the receipt of an OSHA complaint against the Respondent, its president Thomas Pagerly remarked to an employee that he would like to get his hands on the "son of a bitch" who did that and "would drive him right through the ground." In *Meyers Industries*, 268 NLRB 493, 497 (1984), the Board overruled *Alleluia* and held that "[i]n general, to find an employee's activity to be 'concerted' we shall require that it be engaged in with or on the authority of other employees, and not by and solely on behalf of the employee himself." In the absence of evidence in this case demonstrating that Pagerly's remarks were directed toward the exercise of concerted activity, that portion of the judge's Order and notice pertaining to Pagerly's statement is at odds with our holding in *Meyers*. Accordingly we shall delete the pertinent portion of the judge's Order and notice and shall substitute a new Order and notice for that of the judge including an appropriate cease-and-desist provision inadvertently omitted by the judge.

For the reasons stated in Member Zimmerman's dissenting opinion in *Meyers*, he would remedy a threat against even one individual engaged in the implicitly concerted activity of contacting OSHA. In addition, he finds that the majority rule in *Meyers* does not control the threat at issue here because that threat was subject to the reasonable interpretation of forecasting harm not only to individual employees who contact OSHA but also to any groups of employees who make such contact. The latter activity is undisputedly "concerted" within the meaning of the Act and cannot be lawfully threatened. See Member Zimmerman's dissenting opinion in *D. A. Collins Refractories*, 272 NLRB 931, 933 (1984).

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations not found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

PAGERLY DETECTIVE AND SECURITY AGENCY, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was conducted in Reading, Pennsylvania, on August 17–18, 1983, on complaints alleging the demotion and discharge of a top-level supervisor and a number of violations of Section 8(a)(1) of the Act.

On the entire record, including my observation of the witnesses' demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaints allege, the answer admits, and I find that Respondent is an employer subject to the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

In August 1982, the Independent Union initiated a campaign to organize guards and supervisors employed at Respondent's security and armored car business. Admittedly, this Union was an ineligible labor organization under the Act and, subsequently, another union (the United Guards Union) organized and became the representative of Respondent's guards.

The table of organization of the Company includes Company President Thomas Pagerly, Company Vice Presidents David Pagerly and J. Sue Oberly, Personnel Manager Teri Oberly, a director of security, 2 lieutenants (one of whom is George Oister), and approximately 30 sergeants, corporals, and PFCs (all of whom are supervisors). There are approximately 125 guards employed by Respondent.

These cases, however, involve essentially three employees: Lieutenant Oister (Case 4–CA–13330), mechanic Donato (Case 4–CA–13384–2), and guard Koyste (Case 4–CA–13330–5).

B. *Case 4–CA–13330–5*

The evidence is undisputed that in early February 1983 Company Vice President Oberly asked guard Koyste if the Union sent him a letter and whether he returned "the card." The interrogation of an employee by management as to his union activity and sympathies is violative of Section 8(a)(1) of the Act.

C. *Case 4–CA–13384–2*

Paragraphs 5(a), (b), and (c) allege a number of violations of Section 8(a)(1) by Company President Pagerly: On November 15, 1982, by interrogating mechanic Donato concerning attendance and employee activity at a union gathering, by creating the impression of surveillance, and by asking him to ascertain and divulge information oncerning union activity and sympathies; on November 24, 1982, by threatening to harm an unidentified employee who lodged a safety complaint with OSHA; and on December 18, 1982, by threatening to deny a general wage increase if employees selected the Union as their representative.

In support of these allegations, only the testimony of mechanic Donato was offered. Based principally on my observation of his demeanor on the stand, I am compelled to reject his testimony in its entirety.

As a witness, Donato was heavily biased (he had been discharged for reasons unrelated to this case), evasive, and lacking in candor. His testimony was unconvincing (and, on cross-examination, vague) and the events he described were highly improbable (e.g., despite the fact that he was the principal union organizer, Donato testified that he readily turned over to Pagerly, at the latter's request, a list of employees who had attended a union function, with markings to indicate which employees Donato could trust). In addition, his testimony concerning events surrounding the production of the list was flatly contradicted by three coemployees who had no apparent interest in the case and whose testimony I credit.

I also credit the denials of Pagerly, who, based on my observation of his demeanor as a witness, was a forceful, convincing, and candid witness whose testimony throughout rang true.

Nevertheless, this case will not be dismissed in its entirety. As to the allegations of paragraph 5(b), Pagerly admitted that, after receiving an OSHA letter listing 11 violations in the garage, he went to the garage and instructed Donato to rectify the problems right away and added, "I'd like to get my hands on the SOB who did this, I'll drive him into the ground." Board law is clear that threats to an employee because of the filing of a safety complaint with the responsible government agency are unlawful under the Act. *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

D. *Case 4–CA–13330*

Paragraph 5 of this complaint alleges the unlawful demotion of Lieutenant Oister to corporal (supervisor) on November 8 and his unlawful discharge on the following day because of his refusal "to assist Respondent in securing a list of employees supporting the Union, so that Respondent could terminate said employees," based on *Parker-Robb Chevrolet*, 262 NLRB 402 (1982). The only supporting testimony offered was that of Lieutenant Oister. For reasons set forth below, his testimony, like that of Donato, is rejected in its entirety. Accordingly, this case is dismissed.

Based on my observation of his demeanor as a witness, I found Oister to be confused, untrustworthy, evasive, and totally lacking in candor. His testimony conflicted with his affidavit in that certain conversations as to his obtaining the list—certainly a most significant bit of evidence—were not given to the Board agent. His testimony as to what Pagerly asked him to do about a list was self-contradictory (spy on employees/listen to what they are saying/prepare a list based on what Pagerly and other supervisors already knew about employee sentiment). None of the several incidents which were the basis for his demotion to supervisory corporal were fabricated and, when called to explain them, Oister admitted their occurrence, but misstated his role (e.g., he neglected to testify on direct that he missed an important meeting with a bank client because he chose that morning to go hunting). He was discharged the following day when, admittedly, he insisted on bringing an hourly employee (mechanic Donato) to a management meeting at which there was absolutely no reason for him to believe discipline would be imposed; when he insisted that Donato remain as a witness, he was terminated because management would not be compelled to transact its business in the presence of an hourly mechanic. Oister also gave false testimony as to when he first saw his personnel file and saw that certain reprimands were omitted. In sum, I had the clear impression at the hearing that this young man completely failed to appreciate the sanctity of the oath taken by a witness and that his testimony was, in part, exaggerated and, in part, manufactured for purposes of this case.

[Recommended Order omitted from publication.]

J & H Rainwear, Inc. *and* **Amalgamated Ladies' Garment Cutters Union, Local 10, International Ladies' Garment Workers' Union.** Case 2-CA-17327

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 25 June 1981 Administrative Law Judge Edwin H. Bennett issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a brief opposing exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge for the reasons fully set out in the attached decision that deferral to the arbitration award is appropriate pursuant to the standards of *Spielberg*.[1] The Respondent's failure immediately to comply with the award is insufficient reason to decline to defer. *Malrite of Wisconsin, Inc.*, 198 NLRB 241 (1972), enfd. in relevant part 494 F.2d 1136 (D.C. Cir. 1974).

The Respondent refused to allow union business agent Jack Goldberg access to its plant as required by the bargaining agreement.[2] The Respondent did not otherwise refuse to deal with Goldberg, and the Respondent did not refuse access to any other agent of the Union. The Respondent's refusal of access to Goldberg was grieved and arbitrated. The arbitrator upheld the grievance, concluding, "The Union, as well as the Employer, has the contractual and, indeed, the statutory right, to designate its representatives for collective bargaining purposes." The arbitrator directed the Respondent to admit the Union's authorized representatives to its factory at all reasonable times. A week later Goldberg went to the plant to test the award and was not allowed to enter.

Contrary to the General Counsel's argument, the Respondent's failure to comply with the award is not grounds for the Board to decline to defer. In *Malrite*, above at 241-242, the Board stated:

> If the Board's deference to arbitration is to be meaningful it must encompass the entire arbitration process, including the enforcement of arbitral awards [through judicial procedures].

In *Electrical Workers IBEW Local 715 (Malrite) v. NLRB*, above, 494 F.2d at 1139, the court agreed:

> In this case, the arbitration process has foundered, but it has not proven inadequate. The union may yet obtain compliance with the award by means of a suit for its enforcement. As long as the remedy of judicial enforcement is available, the force of the *Spielberg* doctrine is not diminished by one party's disregard for the arbitral award.

We reaffirm the *Malrite* principle because it accords with the Board's deferral policy as established in *Spielberg* and as recently confirmed in *Olin Corp.*, 268 NLRB 573 (1984).[3] Therefore, we shall defer to the arbitrator's award and dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[2] The agreement states, "It is agreed that a representative of the Union shall have access to the shop of [the Respondent] at all reasonable times for the purpose of taking complaints and for the purpose of ascertaining whether the provisions of this agreement are being lived up to."

[3] Member Zimmerman adheres to the views set forth in his dissent in *Olin*, but agrees that in the circumstances of this case deferral is appropriate under *Spielberg*.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. The hearing in the above-captioned matter was conducted on March 23, 1981, in New York, New York. The charge was filed on June 19, 1980, by Amalgamated Ladies' Garment Cutters Union Local 10, International Ladies' Garment Workers' Union (the Union) and the complaint thereon issued July 31, 1980, alleging, inter alia, that J & H Rainwear, Inc. (the Respondent), in violation of both Section 8(a)(5) and (1) of the Act and the applicable collective-bargaining agreement, refused to permit Union Business Agent Jack Goldberg access to the plant for purposes of policing the bargaining agreement. The Respondent admits almost all of the operative facts but denies that it committed any violations of law.

On the entire record, including my observation of the demeanor of the witness (only Jack Goldberg testified), and after due consideration of oral argument and briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, maintains an office and plant in the city of New York where it is engaged in the manufacture and nonretail sale and distribution of rainwear and related products. Annually, the Respondent sells and ships such products valued in excess of $50,000 directly to customers outside the State

of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

At least since 1968 the Union has been recognized by the Respondent as the exclusive collective-bargaining representative for a unit composed of all cutters, markers, and graders, three in number at the time of the events here in issue. The parties also have had successive collective-bargaining contracts since that year, the most recent one of which is effective by its terms for the period June 1, 1979, to May 31, 1982. That agreement provides, inter alia, "it is agreed that a representative of the Union shall have access to the shop of [the employer] at all reasonable times for the purpose of taking complaints and for the purpose of ascertaining whether the provisions of this agreement are being lived up to."

In July 1978, Jack Goldberg became a union business agent, and pursuant to the contractual provision he made periodic and routine visits to the plant from that date until about November 1979. In the latter part of that month, Goldberg visited the plant as before. While there he noticed Henry Frankel, a principal officer of the Respondent and a brother of Jack Frankel, president, performing work at the cutting table. Goldberg told the Frankels this work had to be done by a union member and rejected the explanation that the regular cutter was on vacation. Goldberg advised the Frankels they should have requested a replacement from the union. At this point Henry Frankel angrily ordered Goldberg out of the plant.

On January 8, 1980, Goldberg was present at an arbitration hearing involving the Respondent, at the conclusion of which Jack Frankel again told Goldberg never to enter his shop or "I will spit in your face." Frankel said further he would "put a lock on the door before you can come into my shop." On March 13, 1980, Goldberg again made a routine visit to the Respondent's premises where upon entry he met Jack Frankel. Goldberg told Frankel he was there to see the cutters to which Frankel replied that "anybody else can come here but you."[1] On March 14, 1980, the Union filed a grievance alleging that the Respondent had violated the terms of the collective-bargaining agreement set forth above by refusing to permit Goldberg access to the plant. On June 9, 1980, a hearing on that grievance was conducted before the impartial chairman who rendered an award on June 10, 1980. In that award the arbitrator noted the Union's complaint and the Respondent's position that Goldberg was denied access because of an alleged "personality conflict,"[2] but that any other business agent would be permitted to enter the shop "for the purpose specified in the agreement." The impartial chairman stated: "[T]he Union, as well as the Employer, has the contractual and, indeed, the statutory right, to designate its representatives for collective bargaining purposes. Each party is required to deal with the representative of the other party in good faith." Therefore, he rejected the Respondent's suggestion that a pragmatic solution be reached by the Union assigning some other agent for entering the shop.

The impartial chairman rendered an award on June 10, 1980, directing the Respondent "to admit to its factory at all reasonable times any duly authorized representative of the Union for the purpose of taking up complaints and for the purpose of ascertaining whether the terms of the collective bargaining agreement are being lived up to." On June 17, 1980, Goldberg visited the plant to test the award and was denied entry. The instant charge was filed on June 19, 1980. The Union has not sought to enforce the arbitration award in court, although its only explanation for such refusal is its belief that an unfair labor practice has been committed requiring a Board Order. Both the Union and the General Counsel concede that the arbitrator considered the statutory issue, and that his award affords complete relief to the Union, and that the only additional substantive remedy forthcoming from the Board would be the posting of a notice.

There is no evidence that the Respondent has refused to recognize Goldberg's representative status in any way other than the refusal to allow him to enter the plant. Nor is there evidence that the Respondent has refused to meet and bargain with Goldberg outside of its premises and apparently did so on January 8, 1980, the occasion when Jack Frankel warned Goldberg not to enter the plant, as noted above. It also appears the real purpose for Goldberg's visits to this, or any other employer, is to determine contract compliance by speaking to employees. Thus, Goldberg testified that he looks at the "working cards" issued to employees by the Union on which is recorded the proper wage and checks with the employees to make certain such wage is being received. He also asks employees if they have grievances or knowledge of "violations in the shop." Although it could be assumed that Goldberg might, during these visits, resolve any grievances or violations by discussion with the employer, as apparently he attempted to do in November 1979 when he discovered Henry Frankel working as a cutter, this record does not clearly establish that his visitation rights accorded by the contract are for that purpose.

Further, the Union at no time has sought to test the Respondent's position that anyone else but Goldberg could enter the premises to police the contract. It is conceded that despite the refusal to permit Goldberg access to the plant the Union has had no difficulty in meeting with unit employees and, to the extent necessary, the Respondent has continued to meet with the Union to discuss and resolve contractual and other matters concerning terms and conditions of employment. Finally, there is absolutely no record evidence to support the allegation made in paragraph 12(b) of the complaint that the Respondent denied the Union (as distinguished from Goldberg) access to the plant on March 13, 1980 (or on any other date for that matter), "unless and until Jack Goldberg ceased to act as the Union's designated agent for the purpose of the adjustment of grievances." To the

[1] These events are based on Goldberg's undenied and credible testimony.

[2] The reasons for such conflict do not appear in the arbitrator's decision or this record.

contrary, as recited above, the evidence, which incidentally was adduced by the General Counsel through its witness Goldberg, undeniably establishes that on that date, and at all times, access was denied only to Goldberg and the Union was invited to send any other agent into the plant.

III. DISCUSSION AND CONCLUSIONS

The Respondent does not seriously dispute that, in contravention of the collective-bargaining agreement, Goldberg has been denied access to its plant. In its answer the Respondent concedes such refusal but asserts that the complaint should be dismissed on two grounds.

First, the Respondent assets that such contract violation is unrelated to grievance processing or other protected activity and therefore is not a statutory violation. This position is untenable for the clause on its face asserts that "a representative of the Union shall have access to the shop . . . for the purpose of ascertaining whether the provisions of this agreement are being lived up to." Plainly, this method of assuring contract compliance is closely related to every term and condition of employment bargained for and is an integral part of the grievance machinery even though the visit is not for the purpose of processing grievances directly with the Respondent. Therefore, the clause constitutes a mandatory subject of bargaining no less than any other term and condition of employment set forth in the agreement. *Granite City Steel Co.*, 167 NLRB 310 (1967).[3]

The desirability of such procedure is not in issue. The point is that it was frozen as a term and condition of employment for the duration of the contract. By giving a restrictive reading to the contract provision so as to exclude Goldberg as a union representative, the Respondent unilaterally modified a contractually established term and condition of employment and thus violated its bargaining obligation under the Act. See Section 8(d) of the Act; *Granite City Steel Co.*, supra. *Airport Limousine Service*, 231 NLRB 922 (1977).

Second, the Respondent urges deferral to the arbitration award on the ground that it adequately remedies any violation and that its noncompliance is not a basis for refusing to defer. In support of this position, the Respondent relies on *Malrite of Wisconsin*, 198 NLRB 241 (1972), enfd. 494 F.2d 1136 (D.C. Cir. 1974). I find merit to this argument.

The General Counsel and the Union take the position that *Malrite* is not applicable on the grounds that the violation alleged here involves both a contract right and a statutory right, thus rendering deferral inappropriate. This argument is erroneous for several reasons.

It is well settled that there is no absolute right of entry onto an employer's property by nonemployees. Rather, to bring such action within the Act's protection requires a showing of need that neither was alleged, nor litigated, nor argued here. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Indeed, the Union concedes, and the General Counsel does not seriously dispute, that but for the contract clause, the Union would not be entitled to insist on access to the plant for purposes of policing the collective-bargaining agreement. Moreover, the evidence demonstrates that the Union was fully capable of policing the agreement subsequent to Goldberg's exclusion from the plant. Accordingly, the Union's right under the Act to have access to the plant, under the circumstances of this case, is dependent solely on the collective-bargaining agreement.

But, argues the General Counsel, since the contract right here involved is a step in the grievance procedure, Goldberg's exclusion from the plant is akin to a "refusal to bargain with Goldberg" (G.C. Br. 7), and consequently interferes with employees' statutory rights to select their own bargaining representative. He further postulates that, when viewed in this light, the *Malrite* principal is inapplicable under the Board's holding in *Native Textiles*, 246 NLRB 228 (1978). In that case, the employer flatly refused to meet with a particular representative for the adjudication of grievances, on or off its premises. The union's grievance covered both the refusal to meet with that person and the refusal to allow that individual access to its premises. As to the latter refusal, the employer relied in part on certain provisions in the collective-bargaining agreement. The administrative law judge recommended deferral pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *Roy Robinson Chevrolet*, 228 NLRB 828 (1977). The Board rejected this recommendation holding that the right of employees to designate a representative of their own choosing for the processing of grievances does not turn on contract interpretation but is a fundamental statutory right.

The Respondent correctly points out that the *Native Textiles* decision is distinguishable. Initially, as discussed above, I am unable to find that Goldberg's visits to the plant were to meet or deal with the Respondent for the processing of grievances, rather than routinely to determine from employees if grievances existed. Even assuming arguendo that such grievance processing was one of Goldberg's functions in visiting the plant, the instant case still is factually inapposite. There is no dispute that here the Respondent only refused to meet Goldberg in its plant, unlike the total refusal present in *Native Textiles*. The consequence of that limited refusal merely was to deny the Union a right gained in bargaining, i.e., plant access, and not the abrogation of a separate basic statutory right. To the extent that such conduct also constitutes a unilateral modification of the contract, and therefore would violate Section 8(a)(5), the *Malrite* principle is directly in point and controls the disposition of this case. That is so because the General Counsel's position is reduced to a claim that, if there is a statutory violation as well as a breach of contract, the Board should not defer to an arbitration award, even one that remedies the

[3] The Respondent cites no contrary authority but states that Goldberg's visits were not to process grievances. While I have found that the record is ambiguous with respect to whether or not grievance processing is a function encompassed within the purview of the contract provision, the finding of a statutory violation is not dependent on a resolution of that question. Where there has been a unilateral modification of a contract provision relating to a mandatory (as opposed to a permissive) subject of bargaining, such as is the case here, an unfair labor practice will be said to have occurred. See *Allied Chemicals Local 10 v. Pittsburgh Glass Co.*, 404 U.S. 157, 188 (1971).

breach, where the employer refuses to abide by that award.

That position, however, was considered and rejected in *Malrite*. In that case the arbitrator upheld the union's claim that the employer breached the collective-bargaining agreement by changing the work assignments of the bargaining unit employees (radio engineers), requiring them to work as combination engineer-announcers. The employer refused to comply with the award. The Board majority dismissed the complaint (the administrative law judge had found a violation of Sec. 8(a)(5) and Sec. 8(d) of the Act premised on a unilateral modification of the bargaining agreement), holding in relevant part that: "It appears that the desirable objective of encouraging the voluntary settlement of labor disputes through the arbitration process will best be served by requiring that parties to a dispute, after electing to resort to arbitration, proceed to the usual conclusion of that process—judicial enforcement—rather than permitting them to invoke the intervention of the Board." *Malrite of Wisconsin*, 198 NLRB 241, 242 (1972). The Board further advised parties that judicial enforcement was preferable to Board action stating: "Surely immediate access to the court is to be preferred over this long administrative route, and this is the course we are here encouraging these and future disputants to follow." Id. at 242.

Here, as in *Malrite*, the condition of employment changed by the employer was one provided for by the collective-bargaining agreement, i.e., job duties in *Malrite*, and plant access to a nonemployee to police the collective-bargaining agreement (whether by investigation with employees or processing grievances in direct dealing with the employer). Thus, the statutory violation in both cases is the unilateral midterm contract violation. The union in *Malrite*, in seeking to have the court set aside the Board's Order, argued that the statutory issue could be resolved only by the Board. The court, in affirming the Board's deferral policy stated: "The Board has made it clear that, when deferral is appropriate, the arbitration award becomes the sole remedy for both contractual and statutory violations." *Electrical Workers IBEW Local 715 v. NLRB*, 494 F.2d 1136, 1138 (D.C. Cir. 1974).

A reading of the arbitration award indicates that the arbitration proceeding here was fair and regular, the arbitrator considered the statutory issue, and in all respects that award complies with the criteria for deferral under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Therefore, deferral ordinarily would be appropriate and neither the General Counsel nor the Union even suggest otherwise. Rather, as noted, they rely on authorities, which I have found factually inapposite, where the policy of deferral was held not applicable.[4] Bearing in mind that the Union has offered no reasonable explanation for its failure to enforce the arbitrator's award, which it candidly concedes affords it full relief, inasmuch as I do not find merit to the General Counsel's various arguements, and because I believe this case is controlled by the Board's *Malrite* principal, I recommend dismissal of the complaint in its entirety.[5]

CONCLUSIONS OF LAW

1. J & H Rainwear, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Ladies' Garment Cutters Union, Local 10, International Ladies' Garment Workers' Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act in any respect alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

---

[4] In addition to the *Native Textiles* case, the General Counsel also relies on *Electronic Reproduction Service Corp.*, 213 NLRB 758 (1974). There *Malrite* was considered inapplicable because the employer had repudiated the entire collective-bargaining process by refusing to execute an agreed-on contract. Similarly, in *AMF Inc.*, 219 NLRB 903 (1975), the *Collyer* doctrine was found indefensible to a series of violations resulting in "a complete breakdown in contract renewal negotiations, rather than a routine contract violation arising in the course of a bargaining relationship stabilized by an existing collective-bargaining agreement of fixed duration." Id. at 912. Clearly, these cases cannot reasonably be likened to the single contract violation involved in the instant matter.

[5] As noted above, the allegation that the Respondent refused access to its plant by any union representative unless Goldberg ceased acting as a union agency for the adjustment of grievances was not supported by any evidence at all, was not mentioned in the hearing, and was not argued in the brief. Indeed, it is contrary to the General Counsel's and the Union's candid and clear expression of the gravamen of the complaint. I therefore consider that allegation as having been abandoned.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Fred E. Fugazzi, Jr., Trustee in Bankruptcy for Eagle Express Company[1] and Buzzard Rentals, Inc. *and* Truckdrivers, Chauffeurs & Helpers Local Union No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* General Drivers, Warehousemen & Helpers Local 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases 9–CA–18451, 9–CA–18462, and 9–CA–18466–1

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 21 October 1983 Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions and a supporting brief, to which Respondent Buzzard Rentals filed an answering brief. Respondent Buzzard Rentals also filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

The judge found, inter alia, that Respondents Eagle Express Company and Buzzard Rentals, Inc. were engaged in substantially similar business operations and had ownership, employees, equipment, and customers in common. Based on these findings, the judge concluded that these companies were alter egos and thus jointly liable for the unfair labor practices found in this proceeding. Respondent Buzzard has excepted to this finding. We find merit in this exception.

The facts are summarized as follows. In June 1978, Long Investment Co., of which Paul Long was president and sole shareholder, purchased Eagle Express Company. This company, which possessed operating authority from the Interstate Commerce Commission and the Kentucky Department of Transportation, operated as an intrastate/-interstate motor carrier providing less than truckload service between its terminals located in Kentucky, Ohio, and Tennessee.[4] In October 1981, Long formed Buzzard Rentals, Inc. Long, who was also president of Buzzard Rentals, owned 35 percent of the shares of this company; the remaining shares were owned by various members of his family. The principal business of Buzzard Rentals, which was located in Lexington, Kentucky, was to provide equipment leasing and maintenance services to a number of motor carriers, including Eagle Express. In addition, Buzzard Rentals, which did not possess interstate operating authority, provided some local cartage service for Eagle Express and trip leasing services to other motor carriers.

In 1981, Eagle began experiencing financial difficulties attributable in part to Federal deregulation of the trucking industry. Its financial situation steadily deteriorated through 1982. On 17 December 1982, after having laid off drivers at its Louisville, Cincinnati, and Lexington terminals, Eagle ceased freight operations. Thereafter, its assets, including its operating authority and its equipment, were reassigned to its former owners. On 20 December 1982 Buzzard began operating in Lexington and Louisville as cartage agent for Express Serv-

[1] The complaint allegations pertain to incidents which occurred during January-December 1982. A petition for involuntary bankruptcy was filed against Eagle Express Company in February 1983. Eagle Express was adjudged a bankrupt corporation on 22 May 1983 and Fred E. Fugazzi Jr. was appointed a trustee in bankruptcy thereafter.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's conclusion that Respondent Eagle violated Sec. 8(a)(5) and (1) by failing to notify and bargain with the Union over the wage reduction in January 1982, we find it unnecessary to rely on his citation to *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978). Further, in adopting the judge's finding that the parties reached impasse and that the Respondent thereafter was free to implement its final offer, including a reduction in wages, we find this case distinguishable from *Bedford Farmers Cooperative*, 259 NLRB 1226 (1982). In that case, the Board found, inter alia, that the respondent violated Sec. 8(a)(5) and (1) when it implemented a unilateral reduction in employees' working hours. In so doing, the Board rejected the respondent's contention that the existence of an impasse excused this unilateral action, noting that the reduction in hours occurred several weeks prior to the parties' first negotiating session. The Board also found that respondent violated Sec. 8(a)(5) and (1) when, during negotiations, it unilaterally, and in a manner contrary to a procedure to which the parties had tentatively agreed in a previous negotiating session, changed the method of computing overtime. By contrast, although the Respondent herein was found to have violated Sec. 8(a)(5) when it unilaterally reduced wages in January 1982, the record shows that reduced wages subsequently were discussed in the parties' negotiating sessions and were set forth as part of the Respondent's final offer which was implemented only after the parties reached impasse. Finally, we correct the judge's inadvertent error in referring to an 8(a)(3) allegation at par. 1 of the portion of his decision entitled "Statement of the Case"; the complaint contains no such allegation.

In adopting the judge's finding that the parties reached impasse on 17 May 1982 and Respondent Eagle therefore did not violate the Act when it implemented its final offer, Member Dennis finds it unnecessary to rely on the judge's discussion of when the Union filed unfair labor practice charges.

[4] At the time of purchase, there were six terminals: Somerset, Louisville, Lexington, and London, Kentucky; Cincinnati, Ohio; and Knoxville, Tennessee. Terminals in London and Knoxville were subsequently sold at unspecified times in 1980 and 1981.

ice, Inc., an interstate trucking company which had been formed by the assignees of the defunct Eagle. In this capacity, Buzzard transported a portion of the freight previously handled by Eagle for a number of the same customers previously serviced by Eagle.

In considering the allegation that Eagle and Buzzard were alter egos, we note first that the record shows that Eagle ceased operations for economic reasons unrelated to the Union. The record also shows that Buzzard existed as a separate business entity at least 1 year prior to Eagle's demise. Further, there is no evidence that Buzzard was conceived or established as a "disguised continuance" for the purpose of evading Eagle's contractual obligations or in an effort to avoid dealing with the union representative of its employees. In these circumstances, the Board generally will find alter ego status only if the two enterprises in question have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision. See *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

In this case, it is clear that Eagle and Buzzard had substantially identical ownership by the Long family. Additionally, Paul Long as president of both companies was responsible for their overall management. However, although both companies were technically involved in hauling freight, there was little similarity in their business purposes or methods of operation. Prior to its demise, Eagle employed approximately 50 drivers, held interstate operating authority, and maintained four terminals in several States. By contrast, Buzzard, a leasing and maintenance company which provided some cartage service, employed three drivers and maintained one facility. Further, the record shows that Buzzard owned equipment previously owned by Eagle and that this equipment was obtained at fair market prices based on independent appraisals. Finally, the record reveals that after Eagle's demise Buzzard performed freight services for a reduced number of the same customers previously serviced by Eagle. The record, however, does not indicate what percentage of Express Service's business were former Eagle customers nor does it contain evidence regarding the way in which Buzzard and Eagle were organized with respect to their lower level management.

In light of these circumstances, we find that, although Eagle and Buzzard had substantially identical ownership and upper level management, their business purposes and methods of operation were dissimilar. We also find that the portion of Buzzard equipment previously owned by Eagle was obtained at fair market prices and that Buzzard performed freight services for only a portion of the same customers previously serviced by Eagle. Thus, we find, contrary to the judge, that the General Counsel has not established that these companies were alter egos[5] and that Buzzard is not liable for the unfair labor practices found in this proceeding.

The judge also dismissed a portion of the complaint alleging that Respondent Eagle violated Section 8(a)(5) and (1) by failing to bargain over driver layoffs and use of Buzzard employees. In so doing, the judge found that the layoff at the Louisville terminal coincided with a decision among Louisville employees to strike. The General Counsel has excepted to this finding, contending that the judge erred in construing the facts as the record shows that the Louisville strike vote occurred *subsequent* to the employees' layoff.

Undisputed testimony shows that in November 1982 Long began negotiating with a nonunion local cartage operator, Kentucky Transport, to provide cartage services at the Louisville terminal. Pursuant to these negotiations, these parties signed a contract on 10 December 1982, the day on which Eagle laid off city drivers and dockmen employed at its Louisville terminal. Thereafter, employees voted to strike and on 13 December 1982 began picketing at the terminal. Thus, we find in agreement with the General Counsel that the record clearly shows that the strike vote and picketing occurred subsequent to the closing of the Louisville terminal and layoff of its employees. However, notwithstanding these factual findings, we agree, for the reasons set forth, infra, with the judge's decision to dismiss the 8(a)(5) allegation pertaining to the layoff of Louisville employees.

The pertinent complaint allegations state:

> [9] (c) Since late December 1982, Respondent Eagle, at its [terminal] located at Louisville, Kentucky . . . laid off employees in the [unit] described above . . . utilizing the employees of Respondent Buzzard.
>
> (d) Respondents engaged in the acts and conduct described above . . . without the consent of, and without having afforded the Unions an opportunity to negotiate and bargain as the exclusive representative of the employees . . . with respect to such acts and conduct and without having bargained to a good faith impasse over such terms and conditions of employment.
>
> [10] By the acts and conduct described above . . . and by each of said acts, Respondents

[5] See, e.g., *Chippewa Motor Freight*, 261 NLRB 455 (1982).

have failed and refused, and are failing and refusing, to bargain collectively with the representative of its employees, and Respondents thereby have been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

The General Counsel's exclusive theory, as alleged in the complaint and advanced at the hearing, was that Eagle never ceased doing business but continued to operate through its alter ego Buzzard. Thus, the General Counsel contends that, in laying off its employees and using the employees of Buzzard without the consent of and without having afforded the Unions an opportunity to bargain over this conduct, Eagle/Buzzard effected an unlawful transfer of unit work. However, for reasons stated above, we have determined that Eagle and Buzzard are not alter egos. There is also no evidence that employees of Buzzard or, for that matter, Kentucky Transport were performing the work previously performed by unit employees of Eagle. We thus find that, in light of immediate events, what is involved here is not a work transfer, but rather a decision to close down operations.

It is clear that when an employer decides to terminate or close its entire operations, once that decision is made, it must afford the employees' collective-bargaining representative the opportunity to bargain over the impact and effect of that decision on employees.[6] However, in examining the complaint, we find no mention, even in the alternative, of a failure to bargain over the effects of Eagle's decision to close down its operations. We thus find the complaint defective as we find that, although the General Counsel is entitled to rely on alternative theories, the Respondent is also entitled to proper notice that this is being done. In this instance, we find that the lack of notice of a possible alternative theory has precluded full and fair litigation of this issue. Accordingly, we shall dismiss this portion of the complaint.[7]

AMENDED REMEDY[8]

Having found that Respondent Eagle has engaged in certain unfair labor practices within the meaning of the Act, we shall order it to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondent Eagle shall make employees whole for all losses suffered as a result of the Respondent's failure to pay contractual wage rates from 11 January 1982 when the Respondent implemented wage reductions until 17 May 1982 when the Respondent and the Union reached impasse during negotiations for a new contract. Employees shall also be made whole for losses suffered as a result of the Respondent's failure to pay contractual cost-of-living increases on 1 April 1982. Such sums shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Eagle Express Company, Somerset, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(a).

"(a) Make whole all employees for losses suffered as a result of the Respondent's failure to pay employees contractual wage rates from 11 January through 17 May 1982 and failure to pay employees contractual cost-of-living increases due 1 April 1982 as set forth in the 'Amended Remedy.'"

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT deal directly with our employees concerning matters pertaining to conditions of employment while failing to bargain in good faith with their established collective-bargaining agent, Truckdrivers, Chauffeurs, Warehousemen & Helpers Local 100, Teamsters Local 651, and General Drivers, Warehousemen & Helpers Local Union No. 89, all affiliated with International Brother-

[6] *Otis Elevator Co.*, 269 NLRB 891 (1984); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

[7] Member Dennis concurs in the dismissal of this complaint allegation on the grounds that Respondent Eagle's decision to lay off employees resulted from its decision to close down operations and that the issue whether Respondent Eagle violated the Act by failing to bargain about the effects of the decision was not fully litigated.

[8] The judge's remedy and recommended Order are modified to reflect our finding that Eagle Express and Buzzard Rentals are not alter egos and that Buzzard Rentals therefore is not liable for the unfair labor practices found. Also the amended remedy and Order correct the judge's failure to include a provision for the method of computation of backpay and interest which may be due discriminatees.

hood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT reduce the wages of any of our employees while failing to bargain in good faith with their established bargaining agent.

WE WILL NOT fail to pay our employees contractually guaranteed cost-of-living allowances while failing to bargain in good faith with their established collective-bargaining agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all employees whose wages were illegally reduced by paying to them all lost wages throughout the period from 11 January to 17 May 1982, with interest, and WE WILL make whole all employees to whom we illegally denied cost-of-living increases due 1 April 1982, with interest.

EAGLE EXPRESS COMPANY

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on July 3 and August 5, 1983, at Lexington, Kentucky, on complaint of the General Counsel against Fred E. Fugazzi, Jr., Trustee in Bankruptcy for Eagle Express Company and Buzzard Rentals, Inc., here in together called the Respondent. The complaint was issued on June 22, 1983, on separate charges filed on June 21 and June 24, 1982, by three separate locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Teamsters or the Union. The complaint alleges violations of Section 8(a)(1), (3), and (5) of the Act. An answer was filed only by Respondent Buzzard Rentals, Inc. Briefs were filed after the close of the hearing by the General Counsel and by Respondent Buzzard Rentals, Inc.

On the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

As set out below, Eagle Express Company and Buzzard Rentals, Inc. are one and the same, or alter egos, as alleged in the complaint. At all times material herein, Eagle Express, a Kentucky corporation with offices in several States, has been engaged in the interstate and intrastate transportation of freight by trucks. During the 12-month period ending in December 1982, it derived gross revenues in excess of $50,000 for the transportation of freight and commodities in interstate commerce from the State of Kentucky to points outside the State. Buzzard Rentals, Inc., is also engaged in the transportation of freight in interstate commerce; in December 1982 it became a disguised continuance of Eagle Express. I find that the Respondent, Eagle Express Company and Buzzard Rentals, Inc., is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Truckdrivers, Chauffeurs & Helpers Local Union No. 100, Teamsters Local 651, and General Drivers, Warehousemen & Helpers Local 89, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Case in Brief*

The complaint names two companies as Respondents, Eagle Express Company and Buzzard Rentals, Inc., both in existence and doing business before the start of the events which gave rise to this proceeding. The unfair labor practices alleged can best be understood if taken in three separate parts. In January 1982 Eagle Express, then party to a continuing contract in effect with the Teamsters Union, the Charging Party here, acting unilaterally reduced the wages of all its employees in direct violation of its collective-bargaining agreement, with no regard to the existence of the bargaining representative. The first question presented therefore is: Was such action a violation of Section 8(a)(5) of the Act? The contract with the Teamsters expired on March 31, 1982, and the parties met a number of times in negotiations. Despite four such sessions, Eagle Express Company was unable to persuade the Union to agree to its proposals, which in substance aimed at obtaining the Union's approval of the reduced wages it had put in effect earlier, in January. In May 1982, convinced that it could never persuade the Union to accept its economic demands, the Company put its last offer in effect, in reality, continuing the reduced wages it had started in January. The next question, therefore, is: Had an impasse in bargaining been reached such as to justify the Company's action in implementing the offer the Union had persistently refused to accept?

Buzzard Rentals, Inc., the other Respondent named here, came into the picture in December 1982. It had long been in the trucking business, not as a regular operator but as a leasing company, as explained below. It is owned and operated by the same man who owns Eagle Express. The property of Eagle Express was repossessed by a creditor on December 17, 1982, and Buzzard started taking over the business that Eagle use to do. The third question is: Is Buzzard Rentals an alter ego of Eagle Express so that it is today liable for any obligations under the statute incurred by Eagle Express?[1]

[1] Eagle Express Co., in its own name, did not file an answer to the complaint. In a sense, therefore, it could be said the unfair labor practices alleged as to it are admitted. But in truth, Paul Long, the owner of both Eagle Express Co. and Buzzard Rentals, Inc., was the principal witness against the complaint at the hearing, and he denied all the complaint allegations, speaking also in defense of Eagle Express. I shall therefore dis-

Continued

B. *Unilateral Action in January 1982 by Eagle Express*

The following facts are undisputed. Eagle Express operated out of three terminals, among others, in Lexington, Louisville, and Cincinnati. On January 9, 1982—3 months before the union contract was due to expire—Long, the owner of the Company, gathered his Lexington drivers and told them they would have to accept a reduction in pay—to $10 per hour and 25 cents per mile. He gave each of them a form to sign, where their signatures would indicate whether they accepted or rejected his offer. Long explained to them how times were hard, and that they had a choice either to agree to the reductions or resign, take a voluntary leave of absence, or face a layoff. He also promised that at a later date he would hold another meeting with them to consider things further. He held a similar meeting with the drivers at the Cincinnati terminal shortly thereafter. Long told all the employees the reduced rates would be put in effect regardless of whether they agreed or not. On January 11, 1982, the Respondent in fact put the reduced rates in effect throughout its terminals and continued to pay the lesser rates regularly thereafter.

All this was done by Long without a word to the Union either before taking the action or when he did it. The Union first learned about the decrease in pay from the employees. That this was unilateral action, direct dealing with employees in disregard of the established bargaining agent during the terms of an effective collective-bargaining agreement, and therefore a straight violation of Section 8(a)(5) of the Act, could not be clearer. *Friederich Truck Service*, 259 NLRB 1294 (1982). As the Board said in *Los Angeles Marine Hardware Co.*, 235 NLRB 720, 735 (1978):

> [N]otwithstanding the persuasiveness and validity of an employer's economic straits, an employer is not free, without union consent, to make midterm modifications in wage rates.

I find the affirmative defense urged against this part of the complaint insufficient. It rests entirely upon a letter written on behalf of a trucker group to the International Brotherhood of Teamsters in February 1981 requesting reopening of the National Master Freight Agreement, which Eagle Express had individually signed. The basis for the request was that the "Motor Carrier Act of 1980 has had a significantly adverse effect on the financial structure of the trucking industry." The International's response stated: Your mere assertion that the Motor Carrier Act has a significantly adverse effect on the financial structure of the trucking industry is not proof of such fact; and until such fact is proven there cannot be any reopening of the statement."

There is nothing to indicate that whoever had made that reopening request of the International thereafter came forth with any evidence that in fact the Motor Carrier Act justified any reopening of the National Agreement. In fact, in the fall of 1981 the International Union and the National Truckers Association met and started negotiations toward renewal of the National Agreement. Eagle Express chose to have no part of that. Instead, it withdrew from the Area Conference Truckers Association of which it had been a member, and decided to act alone vis-a-vis the Union.

In his brief, counsel for Eagle Express repeatedly refers to Long's testimony as proof that the Respondent did request bargaining about its intent to change the conditions of employment during the term of the contract then in effect. That testimony, in total, consists of the following:

> Q. (By Mr. Spurlock) . . . did you renew your efforts with Teamsters Union to have the Agreement reopened?
>
> A. Yes, sir, we did.
>
> Q. And was that some time during 1981?
>
> A. In July—I believe in July of 1981.

Such a general, conclusionary statement will not do to evade the most fundamental Board law that, when there is a contract in effect and the employer wishes to change any of its substantive terms, he is obligated to advise the union in advance, and to discuss his intentions fully and directly, before taking unilateral action. Just as proof of the commission of an unfair labor practice must be affirmative and clear, so must an asserted, affirmative defense be proved by direct and substantive evidence. On this aspect of the case there is none such.

I find that, by dealing with its employees directly, behind the Union's back, as it were, and by lowering their rate of pay in total disregard of the established bargaining agent, the Respondent Eagle Express violated Section 8(a)(1) and (5) of the Act.

C. *Failure to Abide by Contract Terms on April 1, 1982*

Among the provisions of the contract which expired on March 31, 1982, was included the following:

> Cost of living allowances shall be effective on October 1, 1979, April 1, 1980, October 1, 1980, April 1, 1981 and April 1, 1982, as set forth below:

On April 1, 1982, Eagle Express failed to pay this increase in cost-of-living to its employees. I find, as alleged in the complaint, that it thereby disregarded its contractual obligation without notice to the Union, changed another established condition of employment unilaterally, and thereby again violated Section 8(a)(5) of the Act.

The argument, in defense, that because the contract had expired by the first of April the employer could disregard it altogether does not hold water here. The language is perfectly clear, and shows the parties intended, without question, that the agreement was to hold over even after March 31 as to this particular benefit to the employees. *Heheman v. E. W. Scripps Co.*, 661 F.2d 1115 (6th Cir. 1981). There is no question of ambiguity in this

---

can the merits of the case in full, and not be distracted by what is no more than an attempt to separate the two companies artificially. The end result will be, of course, binding on the trustee in bankruptcy, who is no more than an agent tentatively of the Respondent.

case on that score, for the language of the clause could not be clearer.

Nor do the facts support the alternative contention in the Respondent's brief that by April 1 the parties had reached an impasse in the collective-bargaining process which justified total disregard of the old contract. This unilateral action was taken only 1 week after the first bargaining session, which took place on March 25. All that had happened was that the Union had received the Company's detailed renewal contract proposal and responded that it would consider it. Whatever was to come later was not known then. One meeting is not enough to support a finding of impasse, even in this case. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973).

D. *Impasse in Negotiations*

Representatives of Eagle Express and of the three Teamsters Locals which spoke for all this Company's employees met in regular bargaining sessions on March 25, April 15, and May 7 and 17. The Company put into the hands of the Union a full proposal for renewal of the expired contract. Among its terms were the exact wages it had started paying back on January 11. There were also minor changes, but the consistent position of the Employer was that due to its economic difficulties it had to have those economic concessions—a definite lowering of labor costs compared to the old expired agreement. As the talking went on, there were minor changes in positions on both sides, but as to the true bone of contention, the basic wage rates and financial costs to the Company, neither party yielded an iota. As stated above, right after the May 17 meeting the Company put in effect its final offer, which had been rejected by the Union. Could the Respondent, under Board law, take such defensive action to protect its down-going business without committing an unfair labor practice? Considering all of the related, and very significant, facts, I think yes.

As has long been said, where a question of this kind is involved no two cases are alike; no single precedent can fix the answer to the next. Each must be evaluated in the light of those facts which bear directly upon the rational state of mind of the participants. At what point can it be said that "further meeting would have been fruitless," as the General Counsel quotes from 283 F.2d 733 (5th Cir. 1960). After the Respondent put the rejected offer in effect, the parties continued to meet and attempt to reach agreement on June 8, on August 20, September 7, and October 15. They never succeeded, especially as to the principal economic issue which had separated them from the beginning—the basic wage rates. Should the Respondent have waited until after the fifth meeting, or the sixth, or the seventh, or the eighth before doing what its economic condition made necessary? Did it have a right to consider its needs of the moment? After all, by December of that year, its property was taken over by a creditor, and in 1983 it found itself in bankruptcy!

The expired contract which this Respondent had signed conformed precisely with the Teamsters National Master Freight. The Teamsters International and the National Trucking Association had completed their renewal negotiations in February, just before the first meeting between these parties. Ray Cash, who was present for the Union at those bargaining sessions, first said he did not hear Marion Winstead, the principal union spokesman, say he had no authority to agree to anything short of the National Master Freight Agreement; then he added he did not remember. Long, for the Respondent, testified, without contradiction, that at the first meeting, on March 25, Winstead offered the Company the Master Freight Agreement which the International had made the month before, and it is a fact he never made any other offer to the Company until after the Company had put its last offer in effect. Indeed, even at the June 8 meeting, Winstead asked Long, again as Long testified without contradiction: "Paul, I want you to find out how soon you can restore the wages of these employees to the National Master Freight level." At the hearing Winstead denied having said he had no authority to deviate from the National Agreement, but in light of other facts, plus the character of his testimony on other questions raised, I cannot believe him.

The clearest fact on this record is that the main issue between Eagle Express and the Union was the Company's insistence upon reducing the wage rates.[2] There is no need for discoursing at length upon the fact that the Company was in financial straits. Its financial reports, received in evidence, prove that, and the matter is not disputed by the General Counsel. And it is equally obvious the Union knew this to be so. Yet, while talking at all times, at length, it never offered a single counterproposal to whatever the Company asked for. This brings us to the real question of this case. How long may a union delay an employer's financial retrenchment by simply talking without end? The Union kept saying it would consider the Company's proposals, and it did keep on talking about them with Long, but it never agreed and it never offered a counterproposal. For one of the parties simply to say "it will consider" a proposal, if repeated again and again, is not really bargaining in any true sense. Even when, in October, long after the May events, the Union did make a counterproposal, it still held firm to its insistence on the old wage scale set out in the Teamsters National Agreement. Normally, an employer asks for economic concessions to improve its financial position or to arrest a deteriorating condition. The longer the talking goes on, the greater the hurt to such a company. Here, the situation was even worse. The Company had reduced the wages 3 months earlier—illegally, it is true—because it had no alternative in order to survive. Bargaining in good faith is one thing, but utilizing the talking technique of negotiations as a device

[2] As in most cases of this kind, the testimony of the witnesses is mixed with argument and vagaries as to exactly what was said at the various meetings. There were also received in evidence many documents exchanged which tend to confuse the total picture. But that the wage rate—as reduced by the Respondent earlier—was really what the bargaining was all about, is virtually conceded by the General Counsel in his brief. Long, the principal witness for the Respondent, said that at the second meeting the Company even was willing to accept all of the already negotiated Teamsters International contract if only the Local Union would accept his request for the reduced wages. From the General Counsel's brief: "Moreover, throughout the subsequent bargaining sessions in April and May of 1982, Long consistently insisted that the Union agree to the wage structure implemented on January 11, 1982."

for keeping an employer from the necessary steps towards survival is something else again.

Recognizing how perfectly this truism applies to the case at bar, the General Counsel makes an alternative argument in support of the complaint. He says there was no impasse because there was no real bargaining, and the reason the bargaining was not real is because the employer was in the act of committing a continuing unfair labor practice—paying the employees less than they were entitled to under the expired contract. He asks: How can a party be deemed to be carrying on good-faith bargaining while in the act of committing a statutory violation?

The argument jumps the gun. There was no unfair labor practice finding as of that time; indeed, no charge was filed at all until after the impasse had occurred. And when it was, a month later, it was essentially a charge that the Company had done things unilaterally before an impasse had been reached. It was only after reconsideration that a second charge was filed pinpointed to the January events. This indicates strongly that whatever had happened earlier was not in the mind of the union representatives when the bargaining was going on. But impasse, or realization by the parties that further bargaining would lead nowhere, is a state of mind. Moreover, in the industrial world collective bargaining between the employer and the union is concerned exclusively with the money or economic conditions of employment. It is not a milieu for evaluating conduct by either party that could, or could not, be deemed unlawful by the National Labor Relations Board.

All things considered, I find that the Respondent did not violate the statute when it put its last offer in effect on May 17. Accordingly, while it must make whole those employees for the reduction in pay imposed upon them from January 11, 1982, and thereafter, the cutoff date for such backpay liability becomes May 17, 1982. Similarly, while the Respondent must make whole the employees who were denied the cost-of-living increase on April 1, 1982, and thereafter, the cutoff date for such backpay liability also becomes May 17, 1982.

E. *Allegations of Illegal Discharges*

About December 13, 1982, the employees of Eagle Express went out on strike to compel the signing of a contract. At the same time Long, president and owner of Eagle Express, continued his trucking business by using what he called a cartage company, Buzzard Rentals. He was the president of that Company also, of which he owned 35 percent and his family members, wife and children, owned the rest. This is the Company called the alter ego of Eagle Express in the complaint. The complaint alleges that the Respondent "laid off" its old employees, and that such action was unlawful because the Respondent did not first talk to the Union about its intention to use its alter ego instead. But, in the light of all the evidence, what the General Counsel really contends is that by resorting to the cartage system, using another method to achieve its business demands, the Respondent in effect laid off the employees.[3]

There is no allegation in the complaint that such "layoffs" were discriminatorily motivated and therefore violations of Section 8(a)(3) of the Act. True, the employees may have been replaced by the employees of the cartage Company, but actually fired by their employer they were not. That the object of the strike was to force economic concessions by the Employer is not really disputed here. It is not claimed this was an unfair labor practice strike. If an employer faced with such a problem resorts to another company to carry on its business, even another company which is no more than a "disguised continuation" of his own business, he is simply replacing economic strikers.

At this point an interesting part of the testimony came from Gary Wainscott, president of the Teamsters Cincinnati Local. Long testified that on December 15 he did lay off six employees at his Cincinnati terminal because Wainscott had asked him, "can you lay these people off?" because he "was getting a lot of heat." Wainscott, as a witness, testified that on December 10 or 13, after learning of the planned strike action, he telephoned Long from a Teamsters meeting taking place in Chicago. The question was: Did he ask Long to lay off the people instead of having them go on strike? Wainscott testified:

> I says, "hey, I heard through the grapevine that they were going to lay them off" because the other—the other terminals had struck him then and my people didn't want to strike, you know, to be perfectly honest with you, you know, when there's $45 in it, you can get unemployment for $200 they're going to wait. . . . He said he was going to open up a cartage company on the 13th of December, in Louisville, Kentucky. This would put those people in Louisville, Kentucky out of work, you know, who worked for Eagle Express.
>
> Q. . . . when you talked with him, did you indicate to him that if he laid his people off at Cincinnati, that that would entitle him to unemployment versus if you struck them, they wouldn't get unemployment?
>
> A. That's just common sense. Anybody knows that who's been with this industry, you know?
>
> Q. And your testimony is that you told him at that point, that if he didn't lay them off, that you were going to strike him—at Cincinnati?
>
> A. Maybe not in those words like you said, but I, similar to that.

This was literal admission by the union agent that he asked the Employer to lay off his people because they were going to strike anyway and would be better off financially receiving unemployment compensation benefits than standing idle getting nothing as strikers. And that the Union called a strike at all the terminals is also proved by the affidavit of one of the members who at-

[3] From the transcript:

> Q. . . . Are you saying laying off those people that day was 8(a)(3) as to them?
>
> MR. HORNER: Yes, sir,
>
> JUDGE RICCI: What else is there alleged?
>
> MR. HORNER: That is about the size of it.

tended a meeting of all the employees at Lexington. The affidavit of Don Waddle, from the Louisville terminal, reads:

> I attended the union meeting on Saturday, December 11, 1982, at the offices of Teamsters Local 651 in Lexington, Kentucky. At this meeting we were informed by Ray Cash, Secretary Treasurer of Local 651 that Paul Long was not going to pay our medical insurance any more. The members of Local 651 who attended this meeting all voted to go on strike against Eagle Express.

As to the contention, articulated in the General Counsel's brief, that the Respondent violated Section 8(a)(5) by failing to discuss with the Union its intention to use the cartage system, it fails entirely in the light of the strike which came at that very time. I make no finding on this record that Eagle Express discharged anyone against his will.

F. *The Alter Ego Issue*

Whatever his reason, in December 1982 Long, the owner and day-to-day operator in charge of the business of Eagle Express, started to use Buzzard Rentals to do the trucking business for him. As stated, he was also, and had long been, president of that Company too, personally owning 35 percent and his family owning the rest. The witnesses kept referring to Buzzard Rentals as a cartage company. As best I understand it, this means that, instead of servicing shipping companies with its own trucks and trailers and with its own drivers, sometimes the trucking company has a cartage company do the trucking for it. Sometimes it leases trucks from the cartage company; sometimes it contracts for the cartage company to do the actual transportation using its own trucks. And when it does that, the cartage company sometimes uses drivers of the trucking company, like Eagle Express, and sometimes does the trucking with drivers on its own payroll.

Buzzard Rentals always conducted its business at Nardino Boulevard in Lexington. Before these events in 1982 it used to purchase vehicles from Eagle Express and lease them back to that same company. This is from Long's testimony. Apparently, as owner and operator of both companies, he did as he pleased, but that very arrangement bespeaks an absolute singleness of identity between the two companies or, as alleged, alter ego status between the two. Buzzard Rentals also serviced the vehicles at its own terminal, and transported freight from one Eagle Express terminal to another, as a service for Eagle.

Long testified that Eagle Express closed its Knoxville terminal on December 3 and its Sommerset and Louisville terminals on December 10 with the strike being imminent. He continued that, for a week at the Louisville terminal, he tried to use an outside cartage company to do his business there, but that arrangement did not work out. From then on, Long used Buzzard Rentals to do all the transportation for Eagle Express' customers. On December 20, Eagle's Lexington terminal, the "hub" of all its activities, according to the witnesses, was completely vacated, and all the equipment, including office and freight moving tools, plus all stored freight, was moved to the old central terminal of Buzzard Rentals in the same city. Long Investment Company, which Paul Long owns and which was the financial support at Eagle Express, continued to do the sales work for Buzzard Rentals as it had always done for Eagle Express.

That all this was simply a continuation of the same business under another name is rather clear from Long's testimony, despite his attempts at evasion at the hearing.

> Q. . . . is it not accurate to say that you resumed the freight operations using Buzzard Rental facilities on Nandino Boulevard the following Monday morning which would have been December 20, 1982?
>
> A. We were using Buzzard facilities if we moved on the 15th, the 16th.
>
> Q. Okay, for the transportation of freight?
>
> A. For Eagle Express.

Asked had not the arrangement continued without interruption, Long at first equivocated:

> Q. . . . And you continued using that Nandino Boulevard facility right up until the present?
>
> A. No, sir, approximately three or four weeks ago, the operation over there is just a garage again.

He then admitted directly that nothing changed between the time the move was made in December 1982 to June 1983. Buzzard Rentals just continued to do Eagle Express old business.

What is also clear is that Paul Long continued to control the operations of the new terminal on a day-to-day basis as he had done before. After several times avoiding direct answers on whether he hired and fired employees there, he finally said: "I had some direct influence on those people that may have been employed or let go, but not necessarily that I perform the hiring or the discharging of employees." Had he discharged an employee named Don Draper? "I could have." As a witness for the General Counsel Draper testified directly that in January 1983 Paul Long personally discharged him. Had the discharge of an employee named Don Buggs been discussed with him? "As President and Chief Executive of the Company, if I was there, I would think that that is normal." Asked had he been in charge of the new operation regularly, Long answered: "Okay, in the 30 days of January, I may have been there two or three days a week for the frequency of maybe at most, an hour. "Barry Dance, who was Eagle Express terminal manager in Lexington, continued as terminal manager for Buzzard Rentals at the same location. Asked did Dance's new rate of pay have to be cleared with him, Long twice simply refused to answer.

I find that Buzzard Rentals is in fact the alter ego of Eagle Express in Board language. It all centers on Paul Long. He is the owner of both; he runs the operations of Buzzard Rentals exactly as he did that of Eagle Express; the business being carried on is exactly the same kind; and even the customers, in major part, are the same as

before (some new customers were added, but that is no more than a normal occurrence in the trucking business). Sometimes supervisors were switched from the first company to the next. The employees were not the same, but that aspect of the business has nothing to do with the question here. For some time at least, the trucks continued to bear the name Eagle Express. The former employees are on strike, they are still the same company's employees, and the employer, by whatever name, is still obligated to bargain with their established representative.

In sum, it is an all-in-the-family situation. A man named Michael Whitaker was the terminal manager in charge of Eagle Express terminals all over the place. When Long first bought this business, he bought it from Whitaker's mother in 1978, paying in part with promissory notes. The creditor who sued and took over property belonging to Eagle Express in December 1982 was Whitaker's mother. But Whitaker himself remained as terminal manager at some of the trucking terminals. He, too, uses Buzzard Rentals as a cartage company agent, and was still using it at the time of the hearing in exactly the same fashion as Eagle Express, or Long, was doing. Again, some of the customers were the same old ones, with the normal coming and going of different customers in the trucking industry. The total picture shows a continuation of the same business, by the same people, but under a different name. See *Denzil S. Alkire*, 259 NLRB 1323 (1982); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

That the Union represented a majority of the employees of this Company in December 1982 when the strike started is not contradicted; the Respondent as then named did not even file an answer to the complaint. Indeed, the parties were actively engaged in direct negotiations. As the alter ego of Eagle Express Company, Buzzard Rentals is subject to the same obligation today.

THE REMEDY

The Respondent, meaning Eagle Express Company and Buzzard Rentals, Inc., must be ordered to undo the effects of the unfair labor practices found herein. All employees of Eagle Express as of January 11, 1982, whose wages were reduced at that time must be made whole for wages lost, the cutoff date being May 17, 1982, when an impasse was reached in negotiations towards a new contract. Similarly, all employees who were denied the cost-of-living raises called for in the contract as of April 1, 1982, must be made whole for such nonpayments, again up to May 17, 1982.

CONCLUSIONS OF LAW

1. By dealing directly with its employees while failing to bargain in good faith with the established collective-bargaining agent, the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act.

2. By reducing the wage scale of its employees during the effective term of a regular collective-bargaining agreement, and while failing to bargain with the established collective-bargaining agent, the Respondent has violated Section 8(a)(1) and (5) of the Act.

3. By withholding contractually binding payments due the employees on April 1, 1982, while failing to bargain in good faith with their established bargaining agent, the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Eagle Express Company and Buzzard Rentals, Inc., Somerset, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dealing directly with its employees while failing to bargain in good faith with their established collective-bargaining agent.

(b) Reducing the wage scale of its employees during the effective term of a regular collective-bargaining agreement while failing to bargain with their established bargaining agent.

(c) Withholding contractually binding payments due the employees pursuant to a regular contract in effect while failing to bargain in good faith with their established bargaining agent.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Make whole all employees whose wages were reduced illegally, as found herein, and who were denied contractually binding payments, by payment to them of such sums as would have been paid absent Respondent's unlawful unilateral reduction in pay and discontinuance of contractual payments until May 17, 1982.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at all its terminals copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Foam Fabricators of Minnesota, Inc. *and* District No. 165, International Association of Machinists and Aerospace Workers, AFL–CIO, Petitioner. Case 18–RC–13521

14 December 1984

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held 5 December 1983 and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows eight for and eight against the Petitioner, with one challenged ballot.

The Board has reviewed the record in light of the exceptions, has adopted the hearing officer's findings and recommendations only to the extent consistent herewith, and finds that a certification of results of election should be issued (hearing officer's report is attached). We find, contrary to the hearing officer, that as of the date of the election Wendell Ross did not have a reasonable expectancy of recall in the near future. Accordingly, we uphold the challenge to Ross' ballot.

The Employer is a fabricator of synthetic foam products and employs approximately 18 workers at its facility in Maple Lake, Minnesota. Its business in the past 8 years has followed a fairly regular pattern. Until October 1983 the Employer never laid off any of its employees. As a result of expansion in May 1983[1] the Employer opened a premold department to produce packaging foam molds fabricated from isocyanate foam.

Wendell Ross was hired on 9 May to help staff the new premold department. When hired Ross was told that he would be worked into other departments if premold work was low. In fact, he did work in various other departments of the Employer from time to time.

In early October the Company learned that its premold purchase order contract from Central Container Corporation was terminating and that no further orders from this major customer would be forthcoming. The Employer's president, Richard Somers, testified that upon learning this he decided a reduction in the work force of the premold department was necessary and that the reduction should be accomplished by laying off the least senior full-time employee.[2] On 13 October Somers explained the business situation to Ross. Somers told him that one part-time employee had less seniority and that Ross could take that position if he wanted to. Ross declined the offer. Somers then handed him a memo, of which the first paragraph read:

> We are experiencing a noticeable reduction in the volume of new orders. Unfortunately this necessitates a reduction in our work force. Your employment date . . . places you lowest in seniority in our work force. Therefore we are compelled to lay you off at this time. It is not possible to forecast the duration of this layoff.

At the time of Ross' layoff some premold work remained unfinished. This was completed by two other employees in early November.

The record indicates that the only information Ross received regarding the possible duration of his layoff was the notice itself. Between 13 October and 5 December, the date of the election, there was no further contact between Ross and the Company.

In mid-November the Company's sales representative Mark Somers was enthusiastic regarding a potential new premold contract from a large customer. President Somers' testimony indicated that if the contract had been approved the Company might have reopened the premold department in February 1984 at the earliest.[3] It is clear from the record that at no time was the news of this potential contract communicated by the Company to Ross. Nor was Ross contacted at any time to see if he would be interested in returning to work in February. Although there may have been an initial enthusiastic report concerning this potential customer, there is nothing to indicate that the Company took any further action other than waiting to see if its bid was going to be accepted. As of 9 December it knew that its bid would not be accepted.

It is well established that the entitlement of laid-off employees to vote in a representation election depends on whether such employees have a reasonable expectancy of recall in the near future. The determination of this expectancy in turn depends on objective factors including the past experience of the employer, the employer's future plans, and

[1] Unless otherwise indicated, all dates herein are in the calendar year 1983.

[2] Since the Employer had never laid anyone off before this was its first application of seniority.

[3] This potential contract was at best a hopeful expectation on the part of the Company:

> Q. Did he [the sales representative] have any firm commitments from whatever the customer—potential customer—was, for the work?
>
> A. No. Only a conversation. No purchase order or anything else.

the circumstances of the layoff, including what employees were told as to the likelihood of recall.[4] The appropriate time frame when determining expectancy of recall is the situation as it existed at the time of the election rather than subsequent developments.[5]

When the employer has had a past history of layoffs and recalls it is somewhat easier to determine exactly what would be a reasonable expectancy of reemployment in the near future. If the business pattern follows a cyclical or seasonal term and employees who are laid off are usually rehired, the prediction can be made with some accuracy.[6] However, here it is clear that the Employer has had no past history of layoffs and recall. The record indicates that the Employer's business has been more or less stable for the past 8 years. The recently created premold department was a business venture based on anticipated purchase orders requiring premold foam. Ross was informed that the department was new before he was hired. In fact the premold department was not operational until he was hired by the Employer. When the major purchase order to supply foam fabricated in the premold department was canceled Somers decided to complete the remaining small orders and close the department. Thus, for the first time in 8 years the Employer made a decision to lay off one of its employees.

Although Ross was informed when hired that the Company had never laid off any employees there was no way for the Company to foresee that it would lose its major purchase order for the product Ross was being hired to produce. There was also no way for the Company to accurately predict whether it would again reopen the premold department.

Absent any employer past experience or future plans, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, he will be recalled there is no reasonable expectancy. Vague statements by the employer as to the "chance" or "possibility" of the employee being rehired do not provide an adequate basis for concluding that the employee had a reasonable expectancy of reemployment. *Tomadur, Inc.*, supra. Here, the Employer's hope that it could reopen the premold department was never disclosed to Ross. He was informed only that it was not possible to forecast the duration of the layoff. We find that such a statement, without more, does not give rise to a reasonable expectancy of recall. The statement by the Employer, that it was "compelled to lay [Ross] off at this time," is nothing more than a vague implication that Ross may eventually be recalled and is insufficient to give rise to a reasonable expectation of recall in the near future.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that at a majority of the valid ballots have not been cast for District No. 165, International Association of Machinists and Aerospace Workers, AFL–CIO and that it is not the exclusive representative of these bargaining unit employees.

MEMBER ZIMMERMAN, dissenting.

Contrary to my collegues I find that there was a reasonable expectancy at the time of the election that laid-off employee Wendell Ross would be recalled in the near future. Accordingly, I would affirm the hearing officer's recommendation that the challenge to the ballot of Wendell Ross be overruled. My colleagues' arrival at the contrary result flows from a distorted application of precedent.

It is well settled, as my colleagues do not dispute, that a reasonable expectancy of recall in the near future entitles an employee on layoff to vote in a representation election. The existence of such an expectancy is evaluated on the basis of several objective factors, only one of which is given any effect by the majority. As the Board recently held in *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983), "the *objective* factors which the Board employs to determine whether an employee possesses such an expectancy include the employer's past experience, the employer's future plans, the circumstances of the layoff, and what the employee was told about the likelihood of recall" (emphasis added).

Application of these criteria to the instant case leads easily to the conclusion that at the time of the election Ross had a reasonable expectancy of recall in the near future. Nothing in the Company's past experience indicated that Ross' layoff would be particularly long or permanent. The Employer had never before laid off even a single employee in 8 years of operation prior to October 1983. Indeed, as recently as May 1983, the Employer had actually *expanded* its operations.[1] Therefore, the Employer's statement to Ross that "we are compelled to lay you off *at this time*" (emphasis added) is an

[4] *Precision Tumbling Co.*, 252 NLRB 1014 (1980); *High Energy Corp.*, 259 NLRB 747 (1981).
[5] *Tomadur, Inc.*, 196 NLRB 706 (1972).
[6] *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983).

[1] Thus, contrary to my colleagues' assertion that there is an "[absence of] any employer past experience," the record establishes that the Employer has a past experience of no layoffs within the last 8 years as well as a recent expansion of operations.

indication that the anticipated duration of the layoff would not be particularly long, and was reasonably likely to last only until the Employer's volume of new order increased. The Employer's next statement, "It is not possible to forecast the duration of this layoff," is no more than a simple statement of fact which in no way portends a long or short layoff; thus, unlike the preceding statement, it cannot be considered an objective indication of how long or short Ross' layoff would be.[2]

The test for determining expectancy of recall in the near future is based on the situation as it existed at the time of the election, rather than on subsequent developments.[3] Here, at the time of the election of 5 December 1983, the Employer's top management was "very enthusiastic"—and had been so since mid-November—about a potential contract which would necessitate the reestablishment of Ross' department. Award of that contract to the Employer would enable the recall of Ross (whom the Employer considered a good employee) about 2 months later.[4] On 9 December, 4 days *after* the election, the Employer's expectations of increased business were defeated. But the fact remains that, at the time of the election, there was a reasonable expectancy that as a result of the anticipated contract Ross would be recalled in the near future. That the anticipated contract was eventually lost in normal bidding does not post facto undermine the reasonableness of the Employer's expectations during the contract bidding period.

My colleagues hinge their decision solely on what Ross was told at the time of his layoff. They state that if there is no "estimate as to the duration of the layoff or any specific indication as to when, if at all, he will be recalled," there is no reasonable expectancy that an employee will be recalled. This absolute statement ignores the Board's longstanding practice of considering other applicable criteria in such cases. My colleagues also distort Board precedent by using a subjective analysis based on employee reaction to employer statements rather than the objective test that has consistently been applied by the Board. In so doing they establish that a laid-off employee's eligibility to vote depends solely on what he is told by the employer, rather than on the reasonable prospect that this employee will in the near future again be part of the work force which is electing whether or not to be represented. My colleagues' decision undermines the Act's objectives of protecting employee rights to participate in a secret-ballot election. I therefore dissent.

[2] *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983) (failure to provide employee with specific date on which to expect recall not an indication that employee had no reasonable expectancy of recall in near future).

[3] *Atlas Metal Spinning Co.*, supra; *High Energy Corp.*, 259 NLRB 747, 761 (1981); *Zatko Metal Products Co.*, 173 NLRB 27, 33 (1968).

[4] Again, contrary to what my colleagues perceive as an "[absence of] . . . future plans," the record establishes that the Employer had future plans which if realized would result in the reestablishment of Ross' department, and lead directly to his recall from layoff.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATION TO THE BOARD ON CHALLENGED BALLOT

Pursuant to a Stipulation For Certification Upon Consent Election Executed by the parties an approved by the Acting Regional Director for Region Eighteen of the National Labor Relations Board on November 11, 1983,[1] an election by secret ballot was conducted among certain employees of the Employer[2] on December 5. Upon the conclusion of the election a Tally of Ballots was served on the parties in accordance with the Board's Rules and Regulations. The Tally of Ballots disclosed that the challenged ballots were sufficient in number to affect the results of the election.[3] The Acting Regional Director issued and served on the parties on December 12, a Report on Challenged Ballot, Order Directing Hearing on Challenged Ballot and Notice of Hearing. Pursuant thereto, a hearing was held on December 22, before the undersigned Hearing Officer duly designated for the purpose of conducting such hearing. All parties were represented at the hearing and had full opportunity to call, examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to make statements in support of their respective positions.

Upon the entire record in this case, and from my careful observation of the demeanor and manner of the witnesses while testifying under oath, I make the following[4]

FINDINGS OF FACT AND CONCLUSIONS

As part of the Stipulation For Certification Upon Consent Election executed by the Employer and the Petitioner, the parties incorporated a written and signed eligibility list wherein it was agreed that the eligibility list would be final and binding upon the parties pursuant to the doctrine established in *Norris-Thermador Corporation*, 119 NLRB 1301 (1958). However, by the terms of this eligibility list, the parties expressly reserved "the right to

[1] Unless otherwise indicated, all dates herein are in the calendar year 1983.

[2] The appropriate collective bargaining unit to which the parties stipulated is defined as:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Maple Lake, Minnesota facility.

[3] Approximate number of eligible voters—18
Void ballots—0
Votes cast for Petitioner—8
Votes cast against Petitioner—8
Challenged ballots—1
Valid votes counted plus challenged ballots—17

[4] In the resolution of all issues for which the credibility or oral testimony becomes a factor, I have carefully considered the demeanor and conduct of the witnesses as well as their candor, their objectivity, their bias or their lack thereof and have carefully weighed the witnesses' understanding of the matters to which they testified, the plausibility, consistency and probability of their testimony, as well as whether parts of their testimony should be accepted when other parts are rejected.

challenge the voting eligibility (of Wendell Ross) as the employee is on layoff status."

During the election conducted on December 5, the Employer challenged the ballot of Wendell Ross, contending that he was no longer an employee of the Employer. At the hearing, the Employer maintained this position. The Petitioner's contention has been that Wendell Ross was temporarily laid off on October 13 and had a reasonable expectancy of reemployement at the time of the December 5 election. In the course of the December 22 hearing, Richard Somers, President and General Manager of Foam Fabricators of Minnesota, Inc. and Wendell Ross testified.

Wendell Ross was hired by Foam Fabricators of Minnesota, Inc., On May 9 to work as a premolder in the Company's newly reestablished premold department, wherein packaging molds are fabricated from isocyanate foam. Prior to the reopening of a premold department in May, the Company had such a department for a three-to-four month period in 1981. The occasion prompting the premold department's recreation in May was the acquisition of a major purchase order from Central Container Corporation; this purchase order comprisded 90–95% of the premold department's work orders. At the time the premold department was reopened, a Company employee, Steve Mooney, was transferred from the Company's cutting area to work with the newly hired Ross in premold. Additionally, a third employee was occasionally called in to assist Ross and Mooney when further labor was necessary. When the premold department equipment was for some reason inoperative, Ross and Mooney would work in other areas of the Company. Somers testified that Ross was, in fact, capable of working in any department. Ross' testimony was that he spent approximately 15–20% of the work time in departments other than premold. Ross also testified that at the time he was hired, he specifically asked Plant Superintendent John Provo about the permanency of the premolder position and that he was told that he would be worked into other departments if premold work was low. The fact that the Company had never had a layoff was used as an "enticement" during the interview, according to Ross.

In early October, the Company learned that the purchase order from Central Container Corporation was terminating and that no further orders from this major customer would be anticipated. Somers testified that, upon learning this, he decided that a reduction in the workforce, *i.e.*, the premold department, was necessary. On October 13, Somers handed to Ross a memo, of which the first paragraph reads:

> Dear Sir:
>
> We are experiencing a noticeable reduction in the volume of new orders. Unfortunately this necessitates a reduction in our work force. Your employment date of May 9, 1983, places you lowest in seniority in our work force. Therefore we are compelled to lay you off at this time. It is not possible to forecast the duration of this lay off.[5]

[5] Somers testified that this had been the only application of seniority in Foam Fabricators' history.

After receiving this memo and declining the offer of a parttime job at a reduced pay rate, Ross punched out and left the Company's facility. No conversation as to the nature or duration of the layoff occurred.

Somers testified that at the time of Ross' layoff, approximately $7200[6] volume of premold work remained to be completed, and that Mooney and employee Joan Greninger finished this in early November. After this, Mooney and Greninger were transferred to full-time positions in other departments of the Company. From about November 15–18, 1983, the premold department, staffed with Mooney and Greninger, completed a small order for another premold account.

In mid-November, 1983, Foam Fabricators sales representative Mark Somers (President Richard Somers' son) returned from Omaha, Nebraska, with what Richard Somers testified to as a "very enthusiastic" report regarding a potential contract with Control Data Corporation, which contract would necessitate the reestablishment of the premold department in approximately February, 1984.[7] Somers further testified that if the premold department were to reopen, he would hire Ross, whom he considers to have been a good employee. Somers' optimism that this premold contract, for which the Company had submitted a bid in August or September, would be obtained continued until December 9. Somers testified that Mark Somers learned on December 9 that the Control Data contract bid had fallen through and that he himself was so notified on December 12. The premold department has not been in operation since about November 18, and Somers states that "it's under investigation" whether the lease for the leased premold equipment can be broken, in view of the departments' shutdown.

Based on the foregoing and the record as a whole, I conclude that at the time of the representation election Wendell Ross enjoyed an expectancy of recall and that this expectancy was a reasonable one. I rely particularly on the fact that as of the date of the election, *i.e.*, December 5, it was anticipated that a sizable premold contract would be obtained which would result in reinstating both the premold department and according to Somers, Ross as an employee. "The test for determining the expectancy of recall is the situation *as it existed at the time of the election.*" *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983) (emphasis added), citing *Thomas Engine Corporation*, 196 NLRB 706 (1972). The fact that the Company learned on December 9 that this contract would not be obtained after all is inconclusive as to Ross' voting eligibility on December 5. Likewise, Somers' testimony that there were no prospects for premold orders at the time of the hearing has no bearing on Ross' voting rights at the time the election was conducted. *Atlas*

[6] According to Somers' testimony, the average monthly sales volume from the premold department was $8,018.

[7] Somers' testimony that, on the basis of the Control Data report, the premold department might reopen in February 1984 is consistent with an affidavit given to the Board during the investigation of Case No. 18-CA-8516, which affifavit was admitted into evidence at the December 22 hearing herein. However, my findings and conclusions are based solely on Somers' testimony at the hearing and were made without reference to or reliance upon this affidavit.

Metal Spinning Co., above. Further, nothing in the Company's past revealed to Ross that his layoff would be permanent; in fact, Ross' uncontradicted testimony indicated that the Company's no-layoff history was specifically emphasized during Ross' employment interview. Therefore, Somers' October 13 memo to Ross that he was compelled "to lay you off at this time" reasonably created an expectancy of recall. The facts that the duration of the layoff was not specifically stated or that the future personnel needs of Foam Fabricators were still unclear do not negate the reasonableness of this expectancy. *See, e.g., Atlas Metal Spinning Co., above; Jobbers' Supply Inc.*, 236 NLRB 112, 113 (1978), *enforced*, 625 F.2d 754 (6th Cir. 1980).

RECOMMENDATION

In accordance with the foregoing facts, I recommend that the challenge to the ballot of Wendell Ross be overruled, and that Ross' ballot be opened and counted in order that a Revised Tally of Ballots may be issued and served on the parties.

I further recommend that if the Revised Tally of Ballots reveals that the Petitioner has received a majority of the valid votes cast, a Certifiation of Representative issue. On the other hand, if the Revised Tally of Ballots reveals that the Petitioner has not received a majority of the valid votes cast, it is recommended that a Certification of Results issue.[8]

[8] As provided in Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8, amended, within 10 days from the date of issuance of this Report, any party may file with the Board in Washingion, D.C. an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director and a statement of service shall be made to the Board simultaneously therewith. If no exceptions are filed hereto, the Board will adopt the recommendations of the Hearing Officer.

Local 456, Teamsters and Chauffeurs Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Carvel Corporation. Case 2–CC–1541

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a charge duly filed on 17 March 1978 by Carvel Corporation, herein called Carvel, against Respondent Teamsters Local 456, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 2, issued a complaint on 14 April 1978, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the Respondent and the Charging Party. Thereafter, the Respondent filed a timely answer denying the commission of any unfair labor practices. A hearing before an administrative law judge was scheduled for 15 May 1978.

Meanwhile, pursuant to the provisions of Section 10(l) of the Act, a petition for an injunction was filed by the Acting Regional Director for Region 2 on behalf of the National Labor Relations Board in the United States District Court for the Southern District of New York. In lieu of a hearing on the petition for an injunction, the parties agreed to submit to the court, as the official record, the testimony and exhibits adduced at the hearing before an administrative law judge.

A hearing was held on 15 May 1978, before Administrative Law Judge George F. McInerny at which time certain exhibits were received into evidence and certain stipulations were entered into on the record. At the close of the hearing, the judge granted the General Counsel's motion to transfer the proceeding to the Board for decision. By order dated 3 August 1978, the Board granted the General Counsel's motion, transferred the proceeding to itself, and set a date for the filing of briefs. Thereafter, briefs were filed by the General Counsel and the Respondent.

On 10 October 1978, the United States District Court for the Southern District of New York granted the Board's petition for a preliminary injunction.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record herein, including the briefs, and makes the following findings.

I. JURISDICTION

Carvel Corporation is a Delaware corporation with its principal office and place of business in Yonkers, New York, where it maintains its offices and warehouse facilities. Carvel is primarily engaged in the licensing of individuals to operate retail ice cream stores and in the servicing of those ice cream stores. The complaint alleges, and the Respondent admits, that during the calendar year ending 31 December 1977, a representative period, Carvel, in the course and conduct of its business, purchased and received goods and services valued in excess of $50,000 from outside the State of New York. The answer also admits, and we find, that Carvel is an employer within the meaning of Section 2(2) of the Act and that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint further alleges, and the Respondent admits, that Barbara Grossman, herein Grossman, is an individual proprietor engaged in operating a retail ice cream store in Elmsford, New York, pursuant to a licensing agreement with Carvel. The Respondent also admits, and we find, that Grossman is a person within the meaning of Section 2(1) of the Act. In the absence of facts either in the pleadings or elsewhere in the record sufficient to prove that Grossman is, in fact, engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and since jurisdiction is otherwise established to our satisfaction, we need not make any findings regarding the "commerce" status of Grossman.

II. THE LABOR ORGANIZATION INVOLVED

Local 456, Teamsters and Chauffeurs Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

In March 1978,[2] the Respondent began a campaign to organize a unit of drivers, dispatchers, and

[1] *Bennett v. Teamsters Local 456*, 459 F.Supp. 223.

[2] All dates are in 1978 unless otherwise indicated.

warehousemen employed by Carvel at its warehouse in Yonkers, New York. On 8 March the Respondent requested that Carvel recognize and bargain with it as the representative of those employees, which request Carvel refused. The Respondent then commenced picketing at the warehouse location in order to obtain recognition. On or about 25 March the Respondent sent a letter to independently operated Carvel licensees indicating its intention to set up picket lines at selected Carvel ice cream stores. On 1 April the Respondent picketed the store owned and operated by Grossman with picket signs saying, "Local 456 International Brotherhood of Teamsters to the Public Do Not Buy Carvel Corp. Products." The parties stipulated that the Respondent has no labor dispute with Grossman or other Carvel licensees, its dispute being only with Carvel Corporation.

As noted, Carvel is in the business of licensing individuals, such as Grossman, to operate stores which sell Carvel ice cream products. Pursuant to a license agreement drawn up by Carvel, the licensee obtains the right to operate the store under the Carvel name and to sell, at retail, Carvel products. Although Carvel Corporation does not manufacture its own products, it licenses independently owned and operated dairies to prepare the ice cream mix according to a recipe originated by Carvel. Carvel also licenses independent companies to manufacture the various paper and service goods such as napkins, plastic serving dishes, etc., utilized by the stores. Such items are required to have the Carvel name and trademark imprinted on them.

Carvel receives revenues from two major sources: store operations and trademarks. The former includes the sale of goods and services, such as ice cream mix, commissary items, and equipment and machinery, to store owners. The latter includes trademark license fees for the continuous "rental" of the use of the Carvel name and trademark.[3] It also includes a royalty fee, currently set at 59 cents a gallon, attached to each gallon of ice cream mix purchased by a store owner.

Carvel Corporation has assumed the responsibility of arranging for national advertising of Carvel products. To this end, it has established a "fair share" advertising program pursuant to which a majority of store owners contribute a sum of money, added on to each gallon of ice cream purchased by them, to help defray advertising costs. Until recently, a store owner was not required to participate in this advertising program. However, present licensing agreements require that advertising payments be made, even though a store owner may also advertise on his own.

In order to apply for a license agreement, a prospective licensee must, after certain preliminaries, submit to a credit review and advance a good-faith deposit of $1000. Generally, a prospective licensee will suggest a general geographic area for the location of his store, and Carvel will search its files to determine if the requested area previously had been surveyed by it and found to be suitable. If so, this information is presented to a prospective licensee who must give final approval of any suggested site. If the location is considered to be inadequate or if Carvel had not done a prior market survey, Carvel would look for and survey a new location.

After the applicant has approved the location for the store, the real estate subsidiary of Carvel negotiates with the owner of the property to obtain a lease. Carvel is involved in these negotiations for a variety of reasons, not the least of which is the fact that Carvel has bargaining power not available to the average licensee. Utilizing Carvel's real estate knowledge will usually result in a better deal for the licensee. The real estate subsidiary signs the lease which contains a provision allowing Carvel to assign the lease. After the lease is, in fact, assigned to the licensee, he pays rent directly to the owner of the property, not to Carvel. The actual licensing agreement is issued to the licensee simultaneously with the lease for the premises.

The actual construction of the ice cream store is the responsibility of the licensee although Carvel, because of its knowledge of the business, provides plans and specifications for the licensee to submit to his contractor. However, the licensee may make changes in those plans, the most common of which is the addition of more equipment. In most instances, a licensee purchases his equipment and machinery directly from Carvel. Except for certain items available only from Carvel, the licensee remains free to purchase most other equipment and machinery from sources other than Carvel, although Carvel must approve that outside source. As a practical matter, most licensees do purchase their equipment from Carvel, since Carvel can provide them more cheaply because it buys these items in large quantities. Furthermore, since most licensees must finance these major purchases, they turn to Carvel who will finance only equipment purchased from it, not from other sources. However, a licensee is not obligated to obtain financing from Carvel and, in fact, is encouraged to seek financing elsewhere.

Two items which Carvel requires the licensees to have are leased, rather than sold, by Carvel: the front gate plate assembly, which is an attachment

[3] Barbara Grossman's initial license fee was $15,000.

to the ice cream machine, and the Carvel sign on the exterior of the store. Carvel and the licensee enter into a separate, sign-equipment lease to cover these two items, which are patented by Carvel.

The license agreement governs the rights and obligations of the parties thereto. The licensee is also required to adhere to the provisions of the Standard Operating Procedure manual which contains, inter alia, trade secrets relating to the manufacture of Carvel ice cream. Failure to abide by the terms of the license agreement or the SOP Manual is considered a breach of the agreement.

The licensee is, for the most part, free to operate his store as he sees fit. Pursuant to the terms of the license agreement, the licensee is required to operate the store 11 months of the year and the hours of the day as specified in the manual. Additionally, Carvel suggests that the store remain open 7 days a week. In actual practice, a licensee is free to determine his own hours and days of operation without prior consulation with or approval from Carvel. Carvel also suggests the price at which a particular product may be sold, although a licensee may sell his products at any price he wants. Carvel retains the right to inspect the store at any time. Most problems found either in the appearance or operation of the store are of a minor nature and the owner is asked to correct them and to certify that they have been remedied. The most flagrant violation of the license agreement is the sale of non-Carvel products, which constitutes a breach of a primary provision in the agreement by which a licensee agrees to sell *only* Carvel products. Such a breach could lead to the termination, by Carvel, of the agreement. Grossman testified that she sells only ice cream products, although it appears that Carvel does supply pretzels to some stores. While a licensee may sell such items as coffee and soft drinks, these items account for only a negligible percentage of sales. While only Carvel products may be sold as a general rule, the licensee is not required to sell *all* the items in the Carvel products line; he may choose from among those items.

The licensee agrees to purchase from Carvel, or some other source approved by Carvel, "all special formula mixes, toppings, flavorings, and other ingredients, cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser"; certain items of machinery, as noted infra, and commissary items (spoons, dishes, etc.). While the majority of ingredients used in the preparation of ice cream products are purchased from Carvel, the licensee is free to purchase such items as coffee, fruit, and milk from sources which do not require Carvel's approval. Should a licensee wish to purchase printed items, such as napkins, from a source other than Carvel, he must obtain written approval from Carvel which will then enter into a license arrangement with the outside source to have the required name and trademarks printed on the requested items.

A licensee is not required to pay to Carvel any percentage of his gross profits. A licensee may advertise on his own and, even if he does contribute to the national advertising program managed by Carvel, he is not required to participate in the sale of advertised specials.

Carvel has no involvement in the labor relations policies set by the licensee who may hire and fire employees as he sees fit and who may determine salaries, benefits, and other terms and conditions of employment. The license agreement requires only that the licensee undergo a period of training and staff his store with properly trained personnel. Carvel may inform a licensee that an employee has not been trained properly and that it expects that corrective action will be taken. However, that is as far as Carvel could pursue the matter inasmuch as it has not reserved the right to tell a licensee to terminate an employee.

All ice cream products sold at retail by an individual store are manufactured in that store. As noted previously, Carvel does not manufacture any products. Each store owner has been trained to manufacture his own ice cream products using the machinery in his own store. When in need of ice cream mix, a store owner contacts Carvel which transmits an order to the appropriately licensed dairy which in turn makes delivery directly to the store. Packaging and service items, while not manufactured by Carvel, are warehoused by Carvel and delivered to the stores on request. The majority of these items are delivered by Carvel trucks.

B. *Contentions of the Parties*

The General Counsel contends that the Respondent's threat to picket licensees and its actual picketing of Grossman's store was conduct directed toward secondary persons in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. According to the General Counsel, an object of the Respondent's conduct was to force or require Grossman and other licensees to cease doing business with Carvel. The General Counsel disputes the Respondent's claim that the licensees are, in effect, allied with Carvel and thus not entitled to the Act's protection of neutral parties. The General Counsel further argues that this case is distinguishable from *Tree Fruits*.[4] Thus, the General Counsel notes that li-

[4] *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 337 U.S. 588 (1964).

censees buy from Carvel the components necessary to make the final product which is sold to the public, and that those components are integrated into that product in such a manner that the consumer cannot boycott Carvel Corporation without boycotting the entire operation of the licensee, thus forcing the licensee out of business.

The Respondent initially contends that Carvel and its licensees are so closely related in an interdependent straight line operation as to negate their status as neutrals in this dispute. In support of this argument, the Respondent urges that the provisions of the license agreement reveal that the integration of operations between Carvel and its licensees is all pervasive. The Respondent claims that its argument is particularly telling where, as here, the sole purpose for the existence of the licensee is to distribute and sell the products of Carvel Corporation. Contrary to the General Counsel, the Respondent argues that *Tree Fruits* does, in fact, apply to the instant case.

C. *Analysis and Conclusions*

Section 8(b)(4)(B) of the Act permits a union to exert economic pressure on an employer with which it has a primary labor dispute. At the same time, it prohibits activity aimed at an employer with which a union does not directly have a labor dispute in order to disrupt that employer's relations with the primary employer. Thus, this section of the Act was designed to insulate neutral third parties from labor disputes in which they are not involved. However, the protection of the Act is not afforded to a third party employer which is so closely identified or allied with the primary employer that it ceases to be a neutral to the dispute.

With these considerations in mind, our initial inquiry herein is whether Grossman, the licensee, is a neutral party and thus subject to protection by the Act from secondary picketing. The answer to that question "can be resolved only by considering on a case-by-case basis the factual relationship which the secondary employer bears to the primary employer up against the intent of the Congress as expressed in the Act to protect employers who are 'wholly unconcerned' and not involved in the labor dispute between the primary employer and the union."[5] In resolving this question, the Board traditionally looks to such factors as the degree of common ownership; common control of daily activities, including labor relations policies; the extent of integration of business operations; and the dependence of one employer on the other for a substantial portion of its business.[6] No one of these factors is, in and of itself, sufficient to either confirm or deny the alleged neutral status of a party to a dispute. Rather, *all* factors must be weighed in order to assess accurately the nature of the parties' relationship. Applying these principles to the facts of the instant case, we find that Grossman and Carvel are neutral parties in their relationship to one another.

Thus, at the outset, there is no common ownership between the parties here; neither party owns stock in the other and there are no interlocking directorates. Neither party shares the other's premises; there is no exchange of employees; and there is no interchange of functions. The store and its contents, save for the two leased items, are owned by the licensee. Additionally, the licensee operates his business on a daily basis with a high degree of autonomy, notwithstanding the provisions of the license agreement. There is no active or actual control by Carvel in the daily management of the licensee's business. In this regard, the licensee makes his own marketing decisions, as he decides which products to sell and at what price. A licensee may advertise on his own in addition to participating in Carvel's national advertising program. Furthermore, the licensee decides where his store is to be located, how it is to be set up, and what hours it will remain open. Moreover, the licensee decides how and with whom his store will be staffed and what the labor relations policies pertaining to that staff will be, all without the involvement of Carvel.

On the other hand, there are certain critical areas in which the licensee is heavily dependent on Carvel. The most obvious is the total reliance on Carvel as the exclusive supplier of the liquid ice cream mix used by a licensee to manufacture the ice cream products sold in his store. There is no other source for this secret mix which is critical to the operation of a licensee's store as a Carvel franchise. In addition, Carvel is the sole supplier of the front gate plate assembly of the ice cream machine. The assembly apparently is not necessary to the operation of the machine, but every licensee has one.[7] Carvel also supplies a sign for the exterior of the store; the store could clearly operate without it, although it is good advertising and the licensee is required to have it.

It is in the area of integration of operations and economic interdependency where the licensee is linked most closely to Carvel. Such mutual interde-

[5] *Vulcan Materials Co. v. Steelworkers of America*, 430 F.2d 446, 451 (5th Cir. 1970).

[6] *Graphic Arts Local 262 (London Press)*, 208 NLRB 37, 39 (1973).

[7] The franchisee is much more dependent on Carvel than is Carvel on any one franchisee. This factor, among others, persuaded the district court that Grossman was a neutral party in the Respondent's dispute with Carvel. See *Bennett v. Teamsters Local 456*, fn. 1 above.

pendence, necessary for the economic survival of both parties, is characteristic of franchise operations. However, the level of economic interdependence and functional integration here does not lead to the conclusion that the licensee has, in fact, lost its neutral status, for there are other factors to consider in assessing the parties' relationship.

Again, we note that there is neither common ownership nor common managerial control. Furthermore, the factor of most significance is control of labor relations policies: Grossman and other licensees operate their businesses almost entirely independent of Carvel, the provisions of the license agreement to the contrary notwithstanding. They are free to hire and fire employees, and set their salaries, benefits, and other terms and conditions of employment without Carvel's approval or interference.

Accordingly and considering all the circumstances, it is our opinion that Grossman is, in fact, just the type of neutral third party which the Act was intended to protect from disputes not her own.

We turn now to a determination of the legality of the Respondent's picketing of this neutral third party. In finding that the Respondent has violated Section 8(b)(4)(ii)(B) of the Act, we rely on the Supreme Court's decision in *NLRB v. Retail Store Employees Local 1001 (Safeco Title Insurance Co.)*.[8]

Safeco underwrote real estate title insurance through the Land Title Company, which has five local subsidiaries engaged in issuing title insurance policies, the majority of which are underwritten by Safeco. Safeco owned from 12 percent to 53 percent of the outstanding stock in each of the five subsidiaries. An officer of Safeco had always served as an officer and member of the board of directors of each land title company. Local 1001 represented certain Safeco employees. When contract negotiations reached an impasse, the union picketed not only Safeco's office, but also picketed each of the five Land Title Company locations. Picket signs read as follows: "Safeco Nonunion—Does not Employ Members of or have Contract With Retail Store Employees Local 1001."

The issue before the Supreme Court was whether the Act prohibited the above-described picketing where "such picketing predictably encourages consumers to boycott a neutral party's business."[9]

At the outset, the Court reviewed the applicability to *Safeco* of its *Tree Fruits*[10] decision. In that case, a union engaged in secondary picketing of a retail store in order to persuade customers of that store not to buy apples from a company with which the union had a primary dispute. The retail store sold numerous other products in addition to apples, the struck product. The Supreme Court determined that it was not the plan of Congress to proscribe all consumer picketing at secondary sites; such picketing would be deemed unlawful when it was used to "persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer."[11] It was the opinion of the Court that this reflects the critical distinction between picketing at the secondary site which is directed toward the nonpurchase of *only* the struck product and picketing at the secondary site which is directed toward requesting the consumer *not to trade at all* with the secondary employer. In *Tree Fruits*, the product of the primary employer, apples, was the struck product and was clearly distinguishable from other products sold by the secondary. The Court held, therefore, that the union could, and did, lawfully picket the secondary since it confined its public appeal to the struck product.

In *Safeco*, the Court went on to note that there was a "critical difference" between the picketing there and that in *Tree Fruits*. In *Tree Fruits*, the struck product was but one of many items offered for sale by the supermarket and any successful consumer appeal against that product would result in a decline in sales or in the supermarket dropping the item. The Court was careful to point out that "marginal injury to the neutral retailer [supermarket] is purely incidental to the product boycott."[12]

However, the Court observed that the *Tree Fruits* situation contrasted starkly with the *Safeco* facts in that the title companies sell only *one* product, i.e., the primary employer's product. The result that predictably follows from picketing of the neutral secondary party is described by the Court:

> Secondary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether. If the appeal succeeds, each company "stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on [its] business generally." Thus, "the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." . . .

[8] 447 U.S. 607 (1980).

[9] Id. at 609. The Court expressly noted, at fn. 5 of its decision, that there was no challenge to an underlying finding that the title companies are neutral parties in the dispute. Id. at 611.

[10] 377 U.S. 58.

[11] Id. at 63.

[12] *Safeco*, supra at 613.

> Such an expansion of labor discord was one of the evils that Congress intended § 8(b)(4)(ii)(B) to prevent. [Citations omitted.][13]

The Court summarized its holding in *Safeco* by noting that "[a]s long as secondary picketing only discourages consumption of a struck product, incidental injury to the neutral is a natural consequence of an effective primary boycott."[14] However, Local 1001's appeal in *Safeco* was

> . . . "reasonably calculated to induce customers not to patronize the neutrals at all." The resulting injury to their businesses is distinctly different from the injury that the Court considered in *Tree Fruits*. Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B). [Citations omitted.][15]

Accordingly, the Court concluded that Local 1001's picketing of the secondary employers in *Safeco* "violates the statutory ban on the coercion of neutrals"[16] under Section 8(b)(4)(ii)(B).

The Supreme Court did not limit its discussion to the facts presented in *Safeco*. Nonetheless, the Court exhibited its awareness of the extent to which factual situations differ:

> The picketing in *Tree Fruits* and the picketing in this case [*Safeco*] are relatively extreme examples of the spectrum of conduct that the Board and the courts will encounter in complaints charging violations of § 8(b)(4)(ii)(B). If secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither *Tree Fruits* nor today's decision necessarily would control. The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss. Resolution of the question in each case will be entrusted to the Board's expertise.[17]

In our opinion, the facts of the instant case fall squarely within the Court's discussion in *Safeco*, for here, as in that case, the neutral secondary has only *one* significant product for sale, i.e., the primary employer's product, which is Carvel ice cream.[18] The Union's appeal here, as in that case, was directed towards that one product. A successful consumer boycott of that product would inescapably lead to the total collapse of Grossman's business, for she has no goods to sell other than the struck product. Obviously, then, the Union is requesting that the public cease dealing with Grossman, that the public not trade at all with her. To reiterate what the Court stated in *Safeco*: "Product picketing that reasonably can be expected to threaten neutral parties with ruin . . . simply does not square with the language or the purpose of § 8(b)(4)(ii)(B)."[19]

Accordingly, we find that the Union violated the Act by its picketing of Grossman.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Carvel Corporation is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 456, Teamsters and Chauffeurs Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By its picketing at the premises of Barbara Grossman in furtherance of a dispute with Carvel Corporation, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist thereform and to take certain affirmative action designed to effectuate the policies of the Act.

[13] Id. at 613–614.
[14] Id. at 614.
[15] Id. at 614–615
[16] Id. at 615.
[17] Id. at 615–616 fn. 11.

[18] The fact that the ice cream is offered for sale in a variety of forms and the fact that items such as coffee and pretzels may be sold does not detract from our decision.
[19] *Safeco*, supra at 614–615.

ORDER

The National Labor Relations Board orders that the Respondent, Local 456, Teamsters and Chauffeurs Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Elmsford, New York, its officers, agents, and representatives, shall

1. Cease and desist from threatening, coercing, or restraining Barbara Grossman, or any other person, where an object thereof is to force or require any of them to cease using, selling, handling, transporting, or otherwise dealing in the products of Carvel Corporation, or to cease doing business with Carvel Corporation.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director copies of the aforementioned notice for posting by Barbara Grossman, if willing, at her picketed ice cream store.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[20] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT, by picketing her premises, threaten, coerce, or restrain Barbara Grossman, or any other person, where an object thereof is to force or require any of them to cease using, selling, handling, transporting, or otherwise dealing in the products of Carvel Corporation, or to cease doing business with Carvel Corporation.

LOCAL 456, TEAMSTERS AND CHAUFFEURS UNION, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Local Union No. 85, affiliated with the Sheet Metal Workers International Association, AFL–CIO (Suburban Sheet Metal Co. Inc.) *and* Lee McFarland, Jr. Case 10–CB–4305

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 13 August 1984 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local Union No. 85, affiliated with the Sheet Metal Workers International Association, AFL–CIO, Atlanta, Georgia, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraph.

"(a) Restraining or coercing Suburban Sheet Metal Co., Inc., in the selection and retention of its representative for the purpose of collective bargaining or the adjustment of grievances by preferring charges, fining, suspending from membership, or attempting otherwise to cause the removal of such representative from performing supervisory, executive, or managerial functions for said employer."

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify par. 1(a) of the recommended the order to conform with the standard language used in cases of this sort.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

To all members of Local Union No. 85, affiliated with the Sheet Metal Workers International Association, AFL–CIO.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce Suburban Sheet Metal Co., Inc., in the selection and retention of its representative for the purposes of collective bargaining or the adjustment of grievances by preferring charges, fining, suspending from membership, or attempting otherwise to cause the removal of such representative from performing supervisory, executive, or managerial functions for said employer.

WE WILL NOT engage in any like or related conduct constituting such restraint and coercion.

WE WILL rescind the fine levied against Lee McFarland Jr., and expunge from our records all references to the charges against him and the imposition of said fine.

WE WILL restore Lee McFarland Jr., upon his tendering regular membership dues, to a member in good standing with all attendant rights as necessary.

WE WILL notify Lee McFarland Jr., in writing, that the fine has been rescinded, that all records of the charge and fine have been expunged, and that he will be restored to a member in good standing with all attendant rights as necessary.

LOCAL UNION NO. 85, AFFILIATED WITH THE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL–CIO

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case was tried before me on June 5, 1984. The original charge in the instant case was filed on March 23, 1984, by Lee McFarland Jr., an individual (McFarland). Thereafter, on April 18, 1984, McFarland amended the charge he filed against Local Union No. 85, affiliated with the Sheet Metal Workers International Association, AFL–CIO (Respondent), and a complaint and an amended complaint issued on May 1 and May 8, 1984, respectively, by the General Counsel of the National Labor Relations Board (Board) alleging violations of the Na-

tional Labor Relations Act (the Act). In substance, the amended complaint alleges that Respondent, by disciplining McFarland, an alleged supervisor employed by Suburban Sheet Metal Co., Inc. (Suburban) has restrained and coerced and is restraining and coercing Suburban, an employer, in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act. Respondent's answer denies the commission of the unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses and after due consideration of briefs filed by the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER INVOLVED

Suburban, a Georgia corporation, with an office and place of business located at Austell, Georgia, is engaged in the fabrication and installation of sheet metal pipes and duct work. During the 12 months preceding the issuance of the complaint herein, Suburban purchased and received at its Georgia place of business goods valued in excess of $50,000 from suppliers located in the State of Georgia, who in turn purchased the goods and supplies directly from manufacturers outside the State of Georgia. The amended complaint alleges, Respondent admits, and I find that Suburban is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Respondent is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

This case presents certain issues which have been thoroughly litigated. The issues generally summarized are as follows:

1. Whether at all times material herein McFarland was a supervisor within the meaning of Section 2(11) of the Act and an employer representative within the meaning of Section 8(b)(1)(B) of the Act.

2. Whether Respondent restrained and coerced Suburban in the selection of its supervisor and employer representative by requiring McFarland to plead on charges filed against him by an agent of Respondent and by fining McFarland and suspending him from membership in Respondent because he performed supervisory duties for a nonsignatory employer.

3. Whether Respondent's lack of knowledge of McFarland's supervisory status constitutes a lawful defense to its actions.

B. *Chronology of Events*

The following facts are either established beyond question, admitted, undisputed, or not contradicted. McFarland commenced work for Suburban as a field foreman in approximately mid-July 1983.[1] He worked at various jobsites in Georgia where Suburban was the subcontractor installing sheet metal pipes and duct work. Suburban employs roughly 80 employees. Prior to McFarland's suspension from membership in Respondent, he had been a member of Respondent for approximately 9 years.

On September 14, 1983, McFarland telephoned Respondent regarding the employment situation in the local area.[2] McFarland spoke with Respondent Business Agent Mike Cannon. Cannon asked McFarland if he was making a lot of money for himself and for Suburban. Cannon told McFarland he was in a position to help Respondent and stated, "[T]he [Respondent] was going to try and organize Suburban Sheet Metal again, and . . . asked . . . if [he] could help." McFarland told Cannon he could not help Respondent because he felt an obligation to the president of Suburban. McFarland then asked Cannon if Respondent was going to bring charges against him. Cannon told McFarland he did not know but that Business Representative Hankins had observed him working for Suburban on September 7, 1983.[3]

In a letter dated September 21, 1983, Business Representative Hankins notified McFarland that he was charged with violating certain provisions of the constitution and ritual of Respondent. Hankins' letter to McFarland stated:

> You are hereby charged by the undersigned with violation of the Constitution and Ritual of the Sheet Metal Workers International Association, Article 17, Section 1(b) 1(e) and 1(m) which states as follows:
>
> Article 17, Section 1(b)
>
> Refusal or failure to perform any duty or obligation imposed by this Constitution the policies of this Association, the valid decision of any officer or officers thereof or the valid decision of the General Executive Counsel or Convention or the valid rules and regulations of any local union or counsel.
>
> Article 17, Section 1(e)
>
> Violating the established union collective bargaining agreements and rules and regulations of

[1] McFarland's authority and duties are discussed elsewhere in this decision inasmuch as an issue exists regarding whether he, at material times herein, was a supervisor within the meaning of Sec. 2(11) of the Act.

[2] It appears Respondent had been unsuccessful in obtaining employment for McFarland. It likewise appears that McFarland had ceased working as a field foreman for one area contractor, Metro Sheet Metal, after being told by Respondent Business Representative Ronnie Hankins that he could not work for Metro because Metro was a nonunion contractor and that if he continued to work for the nonunion contractor he would press charges against him.

[3] It is admitted that at all times material herein Cannon and Hankins were agents of Respondent within the meaning of the Act.

any local union relating to rates of pay, rules and working conditions.

Article 17, Section 1(m)

Engaging in any conduct which is detrimental to the best interests of this Association or any subordinate unit thereof or which will bring said unions into disrepute.

I observed you working on the second floor at Perimeter 400 on Wednesday, the 7th of September, 1983. The contractor doing the duct work on this project is Suburban Sheet Metal, a nonsignatory contractor with Sheet Metal Workers International Association and Local 85 [G.C. Exh. 2].

McFarland was notified in writing on or about November 2, 1983, that a trial on the charges against him would be held on December 6, 1983 (G.C. Exh. 3). A trial on the charges was held as scheduled. Respondent trial committee found McFarland guilty and levied a $7500 fine against him. Thereafter, Respondent's membership approved the trial committee's findings, and on December 30, 1983, McFarland was so notified in writing (G.C. Exh. 4). McFarland has never paid the fine levied against him. On or about April 4, 1984, McFarland was notified in writing that he had been suspended from membership in Respondent for nonpayment of dues (G.C. Exh. 5).[4]

Respondent did not at any time notify Suburban of the charges involving McFarland. Respondent never at any time took any action against Suburban in support of its charges or actions against McFarland. There is no collective-bargaining relationship between Respondent and Suburban.

C. *McFarland's Supervisory Status*

1. The facts

Respondent called no witnesses of its own on the issue of McFarland's supervisory status. All evidence in the record relating to the supervisory status of McFarland is contained in the testimony given by Suburban President James Harris and McFarland. Respondent contends no credence should be given to McFarland's testimony on the supervisory issue because he has a pecuniary interest in whether or not he is found to be a statutory supervisor. Respondent also contends McFarland and Harris gave inconsistent testimony regarding McFarland's authority and duties. While there were some inconsistencies in their testimony, my findings and conclusions on the supervisory issue would be the same if I considered either Harris' or McFarland's testimony standing alone. Therefore, I find it unnecessary to dwell on any inconsistencies that may exist between their testimony regarding McFarland's supervisory authority. I shall, however, consider McFarland's testimony with respect to his authority and duties because I am persuaded his testimony was based on more firsthand knowledge of what his exact authority and duties were than was Harris'.[5]

McFarland stated he was responsible for seeing that the sheet metal work on any particular project that Suburban was working on was installed correctly and in a safe manner. In accomplishing that task McFarland stated he assigned employees to whatever work he felt needed to be done at the time. McFarland stated he served as Suburban's liaison with the general contractor on any project he was on and that he also served as Suburban's liaison with other subcontractors at the various projects he worked on.

McFarland testified he hired employee William Ervin to work for Suburban. McFarland stated he did not consult with anyone in management at Suburban prior to hiring Ervin.[6] McFarland testified he hired Ervin because he was increasing the size of his work crew.

McFarland testified he discharged employees Jerry McDaniels and Herman Dean. McFarland stated he had difficulty with McDaniels because he came to work late and on certain occasions did not show up for work at all. McFarland stated he discussed McDaniels' attendance problems with Superintendent Mallory and Mallory told him to counsel McDaniels and then use his own judgment on whether to fire him or not. According to McFarland, McDaniels' attendance did not improve and he discharged him. McFarland testified he terminated employee Dean because of Dean's inability to perform sheet metal work. McFarland stated he did not speak with anyone in management at Suburban about Dean before he terminated him.

McFarland testified he recommended that employees Kevin Jones and Bill Barnett be given pay raises. Both thereafter were granted wage increases. McFarland testified he granted time off to employees Dennis Barnett and Kevin Jones without consulting with anyone. McFarland testified he performs no hands-on work and that he is paid a higher wage rate than the rank-and-file employees who work with him.

2. Analysis and conclusion

Section 2(11) of the Act reads as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[4] Respondent's constitution and ritual precludes the receipt of membership dues from any member until all fines owed to Respondent by that member are paid in full (R. Exh. 1).

[5] McFarland testified in a straightforward and detailed manner and he responded to questions in a sincere and believable manner without hesitation. I credit McFarland's testimony as it relates to his authority and job duties.

[6] McFarland testified that Superintendent Mallory gave him W-2 forms to keep in his toolbox and told him, "if you hire someone, have them fill out these W-2 forms and notify us as soon as possible."

It is clear from the statute as well as case law that possession of any one of the powers enumerated is sufficient to confer supervisory status. See, e.g., *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 at 576 (6th Cir. 1948), cert. denied sub nom. *Foremans Assn. v. Edward G. Budd Mfg. Co.*, 355 U.S. 908 (1949). Also actual existence of supervisory authority rather than its exercise is determinative. See, e.g., *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84 at 88 (6th Cir. 1964).

In the instant case it is clear from the facts outlined above that McFarland had and exercised a number of the powers set forth in Section 2(11) of the Act. It is not necessary to repeat the facts relating to all the powers exercised by McFarland; however, I specifically note that he had and exercised with independent judgment the authority to hire and discharge employees. Accordingly, I find McFarland was a Section 2(11) supervisor at all times material to the instant case.

D. *McFarland's Status as an Employer Representative Within the Purview of Section 8(b)(1)(B) of the Act*

It is an established Board principle commonly referred to as the "reservoir doctrine" that all persons who are found to be supervisors within the meaning of Section 2(11) of the Act are also employer representatives within the intent of Section 8(b)(1)(B) of the Act. See, e.g., *Sheet Metal Workers Local 141 (Glenway Investments)*, 270 NLRB 1350 (1984), and *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn. 6 (1982).

In the instant case it is not necessary to rely solely on the reservoir doctrine referred to above inasmuch as the record provides an evidentiary basis for finding McFarland to be an employer representative for the adjustment of grievances. Both McFarland and Harris testified McFarland was authorized to resolve employee disputes or problems.

Accordingly, I find that McFarland, at all times material herein, was a representative of Suburban within the meaning of Section 8(b)(1)(B) of the Act.

E. *The Alleged Unlawful Restraint and Coercion*

In agreement with the General Counsel, I find Respondent restrained and coerced Suburban in the selection and retention of its representative for the purposes of collective bargaining and the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.[7] Respondent required McFarland to plead on charges, imposed a fine on him, and suspended his membership in Respondent because he worked as a statutory supervisor for an employer which did not have a contract with Respondent.[8] McFarland only performed customary supervisory duties for Suburban. Therefore, for McFarland to have honored Respondent's request not to work for a nonsignatory contractor he would have had to quit his job with Suburban and in doing so Suburban would have been deprived of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances. It is clear and I find that the actions of Respondent violated Section 8(b)(1)(B) of the Act. *Electrical Workers IBEW Local 73 (Chewelah Contractors)*, 231 NLRB 809 (1977), enf. denied 621 F.2d 1035 (9th Cir. 1980).[9]

F. *The Lack of Knowledge by Respondent of McFarland's Supervisory Status*

I have considered and reject Respondent's contention that its lack of knowledge of McFarland's supervisory status serves as a defense to any unfair labor practice finding in the instant case. There is nothing in the language of Section 8(b)(1)(B) of the Act that suggests scienter is an element of that unfair labor practice. *Carpenters Wisconsin River Valley Council (Skippy Enterprises)*, 211 NLRB 222 at 227 (1974). As noted by Administrative Law Judge Leff with Board approval in *Carpenters Wisconsin River Valley Council*, supra, a respondent's good faith is not involved because the test of restraint and coercion under Section 8(b)(1)(B) of the Act does not turn on a union's motive but on whether the conduct engaged in reasonably tends to restrain or coerce employers within the meaning of that Section of the Act.

Accordingly, on all of the evidence and for the reasons I have stated, I conclude and find Respondent engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act when it required McFarland to plead on charges, fined him $7500, and suspended him from membership in the Respondent.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Suburban is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. McFarland is, and has been at all times material herein, a supervisor within the meaning of Section 2(11) of the Act selected by Suburban for the purpose, among others, of the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.
4. By requiring McFarland to plead on charges, fining him $7500, and suspending him from membership in Respondent, Respondent restrained and coerced Suburban in the selection and retention of its representatives for the purposes of collective bargaining and the adjustment of grievances, and thereby has engaged in and is engag-

[7] Sec. 8(b)(1)(B) states: "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

[8] It is recognized that McFarland's membership in Respondent was actually suspended because of a failure to pay dues; however, Respondent would not accept McFarland's dues because he had not paid the fine levied against him. I consider the suspension to be an inseparable part of the action Respondent took against McFarland because he worked as a statutory supervisor for Suburban.

[9] The court of appeals denied enforcement of the Board's order in *Chewelah*, supra, because there was no evidence the union in that case sought to represent that employer's employees. The instant case is distinguishable in that Respondent, through its agent Cannon, sought to have McFarland assist Respondent in an attempt to organize Suburban's employees. Cannon's comments to McFarland demonstrate Respondent intended to organize Suburban's employees if it could have obtained the assistance of McFarland.

ing in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent required McFarland to plead on charges, fined him $7500, and suspended him from membership in Respondent. I have found such actions of Respondent to violate the Act. Accordingly, I shall recommend that the fine be rescinded and that McFarland, upon tendering regular membership dues, be restored to a member in good standing in Respondent with all attendant rights, and that Respondent notify him in writing that the above action has been taken. I also recommend that Respondent post the attached notice marked "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Local Union No. 85, affiliated with the Sheet Metal Workers International Association, AFL-CIO, Atlanta, Georgia, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing Suburban in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances by charging, fining, suspending from membership, or otherwise disciplining McFarland or any other representative of Suburban when Respondent is engaged in a labor dispute with that Employer.

(b) Engaging in any like or related conduct constituting such restraint or coercion.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

(a) Rescind and expunge from its records the fine and membership suspension imposed on McFarland because of his employment by Suburban.

(b) Restore McFarland, on his tendering regular membership dues, to a member in good standing in Respondent with all attendant rights as necessary.

(c) Notify McFarland in writing that the fine has been rescinded, that records of the charges and fine against him have been expunged, and that he will be restored to a member in good standing with all attendant rights as necessary on his tendering regular membership dues.

(d) Post at its business office and meeting hall copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Furnish the Regional Director signed copies of the notice for posting by Suburban, if Suburban is willing, where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mariposa Press *and* Western Graphic Arts Union, No. 14, International Printing and Graphic Communications Union, AFL–CIO. Cases 32–CA–3135, 32–CA–3262, and 32–RC–1175

14 December 1984

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 20 May 1982 Administrative Law Judge Earldean V. S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an exception and a supporting brief, and the Respondent filed an opposition to the General Counsel's exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances and implying that it would correct them. The Respondent excepts to this finding contending that the statements made by its president Goldman and vice president Homes were merely expressions of their opinions and a reiteration of company policy, both of which are privileged under Section 8(c) of the Act. We find merit in this exception.

The judge found that in a 3 October 1980[3] letter and at employee meetings held 17 October and 24 November Goldman and Homes crossed the line of permissible speech by stating that "[their] door was always open and employees could bargain directly with [them] without going through a third party" and that "[they] would be happy to discuss any matter concerning [the employees'] jobs or anything else the employees cared to discuss at any time." In various meetings this statement drew a response from employee Dorene Gonderman as to why she had not received a raise that was promised her by a former supervisor named Schultes. Homes answered that "she should not have been promised the increase, that he had just become aware of it, that other promises had been made and they were working on it." Also, in these meetings another employee made a suggestion regarding changes to the annual raises. Although Goldman repeatedly told employees that "he was prohibited from promising or granting wage increases outside [the Respondent's] stated policy," the judge found that the Respondent solicited grievances and implied that it would remedy them by asking for comments and by its response to these comments or questions. The judge further found that the Respondent, in response to an employee's question, promised a dental plan by commenting that "it was not easy to set up one and that later on, as there were more employees, they could all get together and join a dental plan but as far as the company being able to handle a dental plan, it could not do that"; that "he hoped in the future there would be one"; and that "he might consider [a dental plan] in the future if the company became profitable."

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court established that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of re-

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, we specifically find no merit in the General Counsel's exception to the judge's finding that the Respondent did not violate Sec. 8(a)(1) of the Act when its supervisor Kathy Smith questioned employee Dorene Gonderman regarding the Union. Concerning this allegation the judge credited Smith's testimony over Gonderman's because she found that Smith's testimony was "honest and reliable" whereas Gonderman's was characterized as vague and confusing. Moreover, we agree with the judge's findings that this incident was isolated and occurred before the inception of the Union's campaign, and we can find no evidence of any further conversations between Smith and Gonderman that could be characterized as interrogation. Contrary to the Respondent's exceptions, however, we also find that in all other respects Gonderman gave credible testimony regarding the Respondent's unlawful behavior.

[2] We adopt the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by providing its employees with free coffee and doughnuts, by discussing its profit-sharing plan, by promoting certain of its employees to full-time status during the preelection period, or by granting wage increases to some of its employees; and that the Respondent did not violate Sec. 8(a)(3) of the Act by its discharge of employees Funseth, Sterling, Campbell, Schwarz, and Rodrigues. We note that the complaint was withdrawn with regard to Funseth, Sterling, and Campbell.

We also adopt the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by threatening employees with loss of employment if they selected the Union as their collective-bargaining representative, by promoting employees to full-time status outside its established criteria in order to induce them to withdraw or withhold their support for the Union, and by granting employees wage increases in order to persuade them to give up their support for the Union.

Chairman Dotson would dismiss the allegation that the Respondent threatened its employees with discharge, finding instead that the Respondent's comments were noncoercive and permissible under Sec. 8(c) of the Act.

Chairman Dotson also finds the evidence insufficient to establish a causal connection between the transfer of employee Murphee and an unlawful motive on the part of the Respondent nor would the Chairman find the subsequent increase in wages to be lawful.

[3] All dates are in 1980 unless specified otherwise.

prisal or force or promise of benefit.'" Further, an employer may attempt to influence the outcome of an election by presenting facts and even making predictions based on fact, as long as the employer avoids using its influence to interfere with employee rights of free association.[4] It is also well established that employers are free to hold meetings with their employees in response to a union campaign regardless of whether a past practice existed or not. It is equally well established that a solicitation of grievances is not, per se, a violation. It is only when there is a promise to remedy those grievances that the violation occurs.[5]

Although the Respondent's "door is always open" comments may be viewed as an implied solicitation of grievances, we are persuaded that these comments and the Respondent's subsequent comments do not rise to the level of unlawful conduct anticipated by *Gissel*, supra, for the following reasons. Unlike the judge, we find it significant that the Respondent repeatedly told its employees during its discussions that "it could not make any promises regarding resolution of their problems." Thus, any possible inference of a promise of benefits was specifically negated by the express "no promise" responses to employees' comments. *Uarco Inc.*, supra. Additionally, the Respondent's specific reply to a question about a raise that the employee "should not have been promised the increase" shows clearly a disavowal by the Respondent of any unauthorized promises. Moreover, the Respondent's comment that "they were working on it," when assessed in the context of the Respondent's overall statement, appears ambiguous and susceptible to meanings other than the discriminatory one ascribed to it by the judge. Further, in considering the Respondent's comments regarding a dental plan, we find that the Respondent was very candid with its employees by stating "it could not handle a dental plan," and that its further explanation that "if it became profitable it would consider it, if it was something everyone wanted" was nothing more than an expression of the Respondent's opinion that it hoped to be in a position at some unspecified time in the future to offer more to its employees in terms of wages and working conditions, a statement which is privileged under Section 8(c) of the Act. See, e.g., *Allied Business Systems*, 169 NLRB 514, 517 (1968). Furthermore, viewing these statements in the context of the employee meetings, we are not persuaded that they are sufficient to support or reinforce any employee's anticipation of improved conditions of employment which would warrant withdrawal of support from the Union.[6] Moreover, there is no evidence in the record tending to establish any coercion in fact from these comments. Accordingly, we shall dismiss these allegations of the complaint.[7]

2. The judge found that the Respondent violated Section 8(a)(1) of the Act by urging employees to revoke their authorization cards. The Respondent excepts to this finding contending that its conduct in this regard was not violative of the Act. We find merit in this exception.

In a letter dated 17 October and during a meeting with employees on that same date, the Respondent's president Goldman explained the procedures to employees of how they could have their authorization cards returned to them. The judge found that Goldman's remarks violated Section 8(a)(1) because they were made gratuitously as the Respondent had begun the preparation of the letter before any employee had inquired about the revocation procedures. Acknowledging that providing information to employees regarding revocation of their authorization cards is not, per se, a violation, the judge nevertheless found a violation based on her finding that the Respondent gave its advice in a coercive and threatening atmosphere. We disagree. An employer may lawfully inform employees of their right to revoke their authorization cards even if employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such revocation. *R. L. White Co.*, 262 NLRB 575 (1982). Here, the Respondent did not attempt to monitor whether employees would actually revoke their authorization cards and there is no evidence that the Respondent requested or gave assistance to any employee. This is unlike the cases relied on by the

[4] *Gissel* at 618.

[5] *Uarco Inc.*, 216 NLRB 1, 2 (1974).

[6] *NLRB v. Quick Find Co.*, 698 F.2d 355 (8th Cir. 1983).

[7] Member Zimmerman dissents from the dismissal of these allegations. He agrees with the judge that the Respondent unlawfully solicited grievances from employees by implicitly promising to correct them and unlawfully promised to consider establishing a dental plan. Contrary to his colleagues, he finds that the Respondent's mere recitation of the stock "no promises" phrase did not negate these implied promises. Under similar circumstances, the Board in *Raley's, Inc.*, 236 NLRB 971, 972 (1978), stated:

> [T]he structure of such preelection meetings provides a "compelling inference" that the employer by its conduct at such meetings impliedly promises that the grievances raised would be corrected. Were we to conclude that Respondent, by merely reciting a "no promises" formula, had clearly discharged its duty to avoid giving the employees the impression that their complaints would be remedied, we would be forced to conclude that the parties at these meetings were engaged in a largely meaningless exchange concerning the employees' grievances and complaints.

Further, he notes that the disputed statements were made in a context not free of union animus, inasmuch as it has been found that the Respondent at the same meeting unlawfully threatened employees with the loss of employment if they voted for the Union.

judge, for in *Kut Rate Kid & Shop Kwik*, 246 NLRB 106 (1979), the respondent specifically requested revocation letters from its employees and threatened them with plant closure. See also *L'Eggs Products*, 236 NLRB 354 (1978), in which the respondent interrogated and threatened its employees and requested that employees revoke their authorization cards. Furthermore, it is undisputed that the Respondent, in the employee meetings discussed supra, assured its employees that it was their right to support a union and that it would not discriminate against anyone who wanted "to vote for or talk up a union and if the union won [the Respondent] would bargain with the Union." From the neutral tone of the Respondent's letter, we are persuaded that no employee could have reasonably felt any peril in refraining from revoking his card, nor do we find any evidence that any employee was threatened, coerced, or prompted into revoking his card. Under these circumstances, we do not find that the Respondent's conduct constituted unlawful encouragement or solicitation of employees to revoke their authorization cards. Accordingly, we shall dismiss this allegation of the complaint.[8]

3. The judge found that the Respondent violated Section 8(a)(5) of the Act by its refusal to recognize and bargain with the Union based on the Union's card majority and recommended a bargaining order to remedy the Respondent's unfair labor practices. The Respondent contends, inter alia, that there was no showing that its unfair labor practices interfered with employee free choice in the election held 26 November 1980, nor would they preclude the possibility of a fair rerun election. We find merit in the Respondent's latter position.

The essential justification for a bargaining order in this type of case, as stated by the Supreme Court in *Gissel*, supra, depends on findings (1) that the union once had a majority status, (2) that such status had been dissipated by pervasive misconduct on the part of the employer, (3) "that the possibility of erasing the effects of [these] past [pervasive] practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight," and (4) "that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."[9]

The judge, in her recommendation of a bargaining order, based her conclusion on her assessment that the acts of the Respondent "were pervasive and egregious" unfair labor practices which had "undermined the Union's majority and rendered doubtful or impossible the holding of a free and fair second election." However, the judge also found that the alleged discharges were not violative of the Act and based her findings of "pervasiveness" solely on 8(a)(1) conduct. We have herein reversed two of the judge's 8(a)(1) findings—that the Respondent unlawfully solicited grievances and implied that they would be remedied and that the Respondent unlawfully induced revocation of employees' union authorization cards. This leaves five incidents of 8(a)(1) conduct involving two threats of loss of employment and three incidents of granting wage increases, one of which involves transferring an employee to full-time status. These are hardly the kinds of "hallmark" violations, such as discharges, threats of plant closure, or reprisals, contemplated by the Court in *Gissel*, supra, nor is this the type of case marked by substantial employer misconduct which has a "tendency to undermine [the Union's] majority strength and impede the election processes." 395 U.S. at 614. We find that these 8(a)(1) violations do not provide an adequate basis for a bargaining order in the absence of any credible finding that there is any "likelihood" that the Respondent's misconduct will recur or that the residual impact of these practices is sufficient to make the likelihood of a fair election slim, if not impossible, despite the salutary effect of a cease-and-desist order.[10] We are not unmindful that the Respondent's conduct was directed at a small unit of employees and that its threats of loss of employment were disseminated to all of its employees in various meetings. Although the 8(a)(1) violations did interfere with the employees' free choice, they did not, in our opinion, have a permanent impact on employee voting sentiments. Moreover, any initial impact will have dissipated prior to the next election, especially since our cease-and-desist order and the posting of the Order finding the Respondent guilty of unfair labor practices will provide added protection against the likelihood of the recurrence of misconduct.[11] Therefore, we also find that the Respondent has not violated Section 8(a)(5) by its refusal to recognize and bargain with the Union.[12] Accord-

[8] Member Zimmerman would adopt the judge's finding that the Respondent unlawfully induced employees to revoke their authorization cards when it proffered unsolicited advice about the procedures for revoking their cards and passed out written instructions to that effect. He notes that the Respondent committed other unfair labor practices at the same meeting in which the advice was given. *Kut Rate Kid & Shop Kwik*, supra at 119; and *L'Eggs Products*, supra at 389.

[9] 395 U.S. at 614–615.

[10] *First Lakewood Associates v. NLRB*, 582 F.2d 416, 424 (7th Cir. 1978); *Shulman's Inc. v. NLRB*, 519 F.2d 498, 502 (4th Cir. 1975).

[11] *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).

[12] The judge, in finding that employees Steiner and Vaught should be excluded from the unit found appropriate herein, analyzed their status from the criteria applicable to students. While we agree that they should be excluded, we do so based on our finding that they are casual employees because they work on a sporadic, irregular basis, at their conven-

Continued

ingly, we dismiss this allegation of the complaint and we shall direct a second election.[13]

CONCLUSIONS OF LAW

1. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular part-time and full-time production and maintenance employees of the Respondent at its Concord, California facility, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. By threatening employees with loss of employment if they selected the Union as their collective-bargaining representative and by transferring an employee to full-time status with the accompanying benefits and wage increase and granting certain other employees wage increases in order to induce them to withdraw or withhold their support from the Union, the Respondent has violated Section 8(a)(1) of the Act.

3. The Respondent has not engaged in the other unfair labor practices alleged in the amended consolidated complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Mariposa Press, Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of employment if they select Western Graphic Arts Union, No. 14, International Printing and Graphic Communication Union, AFL–CIO as their collective-bargaining representative.

(b) Granting employees wage increases and transferring employees to full-time status with the accompanying grant of benefits and wage increases in order to induce them to withdraw or withhold their support from the above-named Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Concord, California, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by

ience, and they receive a special oncall pay rate which is different from the pay received by the Respondent's other regular part-time and full-time employees. Moreover, there is no evidence in the record showing that Steiner and Vaught have any reasonable expectation of continued employment with the Respondent. Accordingly, we find that these factors are sufficient to sever any community of interest they may have had with the Respondent's regular part-time employees. *Maietta Contracting*, 251 NLRB 177 (1980); *Muncie Newspapers*, 246 NLRB 1088 (1979); *Quick-Lahmann Express*, 262 NLRB 220 (1982). In sustaining the Union's Objection VII alleging that the Respondent made material misrepresentations regarding wage rates secured by the Union for employees at other companies, the judge analyzed the evidence under the principles of *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), and *General Knit of California*, 239 NLRB 619 (1978). However, since the issuance of her decision, the Board has established a new standard regarding misrepresentations. In *Midland Life Insurance Co.*, 263 NLRB 127 (1982), a Board majority stated that misrepresentations made during an election campaign are not grounds for setting aside an election. Therefore, in light of *Midland Life* we have reviewed the alleged misrepresentation and find that it is not objectionable. The judge, in her discussion of this objection, inadvertently referred to it as Objection VIII rather than Objection VII. We have made the corrections where it is appropriate.

In view of their denial of a bargaining order, Chairman Dotson and Member Hunter find it unnecessary to pass on the issue of the validity of certain union authorization cards and the Respondent's exceptions thereto. They also deny the Respondent's motion to reopen the record for the same reasons.

Member Zimmerman would find the authorization cards signed by employees Lowe, Thorsen, David Gonderman, and Foltz to be valid, inasmuch as the record does not support the Respondent's contention that the Union misrepresented the purpose of the cards or stated that they were solely to get an election.

Because they have found that the Respondent did not solicit grievances or imply that it would remedy them or induce employees to revoke their union authorization cards in violation of Sec. 8(a)(1), Chairman Dotson and Member Hunter overrule the Union's Objections III and V which allege the same conduct.

[13] Member Zimmerman agrees with Member Hunter that the Respondent's alleged objectionable conduct which parallels the unfair labor practices that the Respondent was found to have committed warrants the direction of a second election. Member Zimmerman, however, dissents from the majority's failure to issue a bargaining order. He agrees with the judge that the Respondent's unfair labor practices were sufficiently widespread and serious to warrant a bargaining order. He notes that threats of loss of employment, solicitation of grievances, granting of raises, and inducing of employees to revoke their authorization cards are likely to have a lasting inhibitive effect on a substantial percentage of the small work force, and therefore are considered "hallmark" violations which support the issuance of a bargaining order, unless some significant mitigating circumstances exist. See *Patsy Bee, Inc.*, 249 NLRB 976 (1980). No such circumstances exist here. Although the Respondent has apparently experienced substantial employee turnover, he finds that such turnover would not warrant withholding a bargaining order. *Jamaica Towing*, 247 NLRB 353 (1980), and *Glomac Plastics*, 241 NLRB 348 (1979). Accordingly, he would deny the Respondent's motion to reopen the record on this issue. Finally, having validated, above, the authorization cards of employees Lowe, Thorsen, David Gonderman, and Foltz, Member Zimmerman concludes that the Union achieved majority status on 1 October 1980.

Although Chairman Dotson agrees with Member Hunter that a bargaining order is not appropriate, he would not direct a second election because he would have dismissed the complaint. Therefore, he would certify the results of the election.

[14] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all allegations of the complaint not sustained are dismissed.

IT IS FURTHER ORDERED that the election held 26 November 1980 is set aside, the petition in Case 32–RC–1175 is reinstated, and this case is remanded to the Regional Director for Region 32 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with these rights. More specifically,I11WE WILL NOT threaten employees with loss of employment if they select Western Graphic Arts Union, No. 14, International Printing and Graphic Communications Union, AFL–CIO as their collective-bargaining representative.

WE WILL NOT grant employees wage increases and transfer employees to full-time status with the accompanying grant of benefits and wage increases in order to induce them to withdraw or withhold their support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MARIPOSA PRESS

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge. This matter was heard before me in Oakland, California, on June 16–24, 1981. The charge in Case 32–CA–3135 was filed by Western Graphic Arts Union, No. 14, International Printing and Graphic Communications Union, AFL–CIO (the Union) and served on Mariposa Press (Respondent), on October 16, 1980; and a first amended charge therein was filed by the Union and served on Respondent on November 19, 1980. A complaint issued in that matter on December 3, 1980, alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act. The charge in Case 32–CA–3262 was filed by the Union on December 11, 1980, and served on Respondent on December 15, 1980; and a first amended charge therein was filed by the Union and served on Respondent on January 14, 1981. The amended consolidated complaint in Case 32–CA–3135 and 32–CA–3262 issued on January 16, 1981, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act.

The petition in Case 32–RC–1175 was filed by the Union on October 6, 1980. Pursuant to a Stipulation for Certification Upon Consent Election approved on November 5, 1980, an election by secret ballot was conducted on November 26, 1980, which resulted in 7 ballots for and 13 ballots against the Petitioner, with 7 challenged ballots, which are sufficient in number to affect the results of the election. On December 2, 1980, the Petitioner filed timely objections to the election, certain of which were later withdrawn. On January 21, 1981, the Regional Director determined that the objections to the election and the challenged ballots in Case 32–RC–1175 and the matters alleged as unfair labor practices in Case 32–CA–3135 and 32–CA–3262 constitute a single overall controversy and ordered that Case 32–RC–1175 be consolidated with Cases 32–CA–3135 and 32–CA–3262 for purposes of hearing, ruling, and recommended decision.

The basic issues are:

1. Whether Respondent unlawfully discharged Robert Sterling, Clifford Funseth, Gary Campbell, Allen Schwarz, and Ed Rodrigues.

2. Whether Respondent unlawfully induced employees to revoke authorization cards designating the Union as their collective-bargaining representative.

3. Whether Respondent promised and/or granted employees wage increases and/or other benefits in order to discourage them from joining or supporting the Union and/or designating the Union as their collective-bargaining representative.

4. Whether Respondent unlawfully solicited grievances from employees regarding their working conditions.

5. Whether Respondent interrogated employees regarding their union activities and/or threatened employ-

ees with loss employment if they selected the Union as their collective-bargaining representative.

6. Whether Becky Stein and Karrie Vaught are casual employees, as the Petitioner contends, or regular part-time employees, as the Employer contends.

7. Whether Respondent has engaged in conduct which interferes with the exercise of a free and untrammeled choice of the employees in the election held on November 26, 1980.

8. Whether a bargaining order is appropriate herein.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein Respondent, a California corporation with an office and place of business in Concord, California, has been engaged in the nonretail business of printing books and other materials. During the calendar year 1980, Respondent, in the course and conduct of its business operations, sold and shipped goods or services valued in excess of $50,000 directly to customers located outside the State of California.

The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Organizational Campaign*

Allen Schwarz and Robert Sterling were hired by Respondent on September 10, 1980.[1] Shortly thereafter, they began discussing the possibility of obtaining union representation for Respondent's employees. Schwarz contacted the Union and obtained union authorization cards to be distributed to Respondent's employees. Sterling and Schwarz signed cards authorizing the Union as their collective-bargaining representative on September 19. By the end of September a number of Respondent's employees had signed authorization cards for the Union. On September 25, by mailgram, union organizer James Ziolkowski notified Respondent that Schwarz, Sterling, and Clifford Funseth were on the employees volunteer organizing committee for the Union.

On October 6, the Union filed a petition in Case 32–RC-1175 seeking to represent all regular part-time and full-time production and maintenance employees employed by Respondent at its Concord, California location, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act. On that same day, by certified mail, the Union notified Respondent that a majority of the employees in said unit had designated the Union as their collective-bargaining representative, and demanded recognition as such. This letter was received by Respondent on October 7.

B. *Respondent's Election Campaign*

On October 3 Respondent distributed a letter to employees signed by Respondent President Earl M. Goldman. The letter acknowledged that Respondent had heard that a union was requesting them to sign union authorization cards. The letter further explains the purpose of authorization cards and the various ways in which one can be used by a union. The letter then states that "we feel that we can talk over whatever problems you might have directly with us, and that you have no need for a third party to represent you. My door is always open to you and I will be most happy to discuss any matter concerning your job, or anything else you care to discuss at any time."

1. The October 17 meetings

Respondent held two meetings of employees during its preelection campaign—on October 17 and November 24. Each meeting was held in two sessions, with Goldman as the principal speaker. It is undisputed that the meetings were held for the purpose of apprising the employees of Respondent's position in opposition to union representation. Thus Goldman admits that he said that Respondent would prefer remaining nonunion and would like for the employees to vote no in the election. He further said that he did not feel there was a need to have a union because they were a small company, management was there every day and they knew most of the employees on a first-name basis, there was good communication and there really was no reason for a third party to be interjected between management and the employees. He said he felt strongly that, in a company of Respondent's size, with its general attitude and benefits, there was just no need for a third party between the employees and management; they had always been able to communicate in the past and should be able to continue to do so in the future without putting someone between them, that his door had always been open. However, according to Goldman, he also said that, as far as the Company was concerned, they believed in democracy and in the event an election was held and the Union won, Respondent would recognize the Union and bargain with them in a fair manner. He further said that Respondent would not discriminate against anyone who wanted to vote for or advocate a union, that they would be treated no differently from anyone who voted against the Union.

Homes testified in essential agreement with Goldman. Employee Edward Rodrigues testified that Goldman said he would bargain with the Union and the other employee witnesses do not deny that Goldman said Respondent would recognize and bargain with the Union if the Union won the election. Employee Dorene Gonderman admits that Goldman said something to the effect that it was all right with him if the employees wanted a union. She further testified that he said they should be able to

[1] All dates hereinafter in September through December will be in 1980 and in January will be in 1981.

work without a union, that his door was always open and they were welcome to bring up any suggestions that they might have. Homes testified that, in response to Goldman's statement, his door was always open and employees could bargain directly with Respondent without going through a third party. Gonderman said she had been trying to get a raise for some time. Employee Annie Llamas testified that either Goldman or Homes said that Respondent would provide a suggestion box if the employees wanted one. Rodrigues also testified that Goldman said there was no suggestion box, but he would provide one. Holmes denies that Goldman made any mention of a suggestion box, however Goldman does not deny it.

It is undisputed that Goldman mentioned union authorization cards. However, the witnesses are in disagreement as to whether he discussed the revocation of these cards. Dorene Gonderman testified that Goldman said several people had received authorization cards. He then proceeded to tell them the procedure that could be used to have the authorization cards revoked. She does not recall any employee asking for such information. Employee Isaac Camp testified that Goldman said if the employees wanted to rescind their union authorization cards there was a mechanism that they could use. He explained what the procedure was, but Camp does not recall exactly what he said in this regard. No employee at the meeting had inquired as to what they should do in order to rescind their authorization cards. Rodrigues testified that Goldman further said that he encouraged the employees to withdraw their cards, that there were procedures for doing this and, if they were unfamiliar with the procedures, he would explain them so that their rights could be protected. Rodrigues does not recall him elaborating on that.

Homes testified that Goldman said an authorization card was not just to get an election, that it authorized the Union to become the collective-bargaining agent of the person who signed the card. He also explained that, in the event there was an NLRB hearing, an employee's authorization card could possibly be disclosed to them. As Goldman was discussing authorization cards, he was referring to a brochure from the U.S. Chamber of Commerce. An employee, whose name Homes does not recall, asked whether it was possible to revoke an authorization card. Goldman said that he did not know, but that he would find out. Homes denied that Goldman said he thought employees should, or hoped they would, revoke the authorization cards.

Goldman testified that he said the union had been passing out authorization cards, he explained what the authorization cards were and said, contrary to what they might have heard, the cards were not simply a means to have an election in which they could vote no; that they should understand that, in reality, the cards authorize the Union to become their bargaining agent. Goldman further testified that, when he mentioned authorization cards, one of the employees gave the impression that, now he understood it, he should not have signed the card and asked if it would be possible to rescind it. Goldman said he did not know but he would find out. The employee said he thought signing an authorization card would cause an election to take place and that he could vote no at the election, much like signing a petition for a state constitutional amendment. He said he did not realize he was authorizing the Union to represent him for collective bargaining. Goldman denies that he told the employees they should revoke their cards, or that he wished they would. Goldman testified that he thinks it was Michael Foltz who asked whether he could revoke his union authorization card, but he is not absolutely sure.

The consolidated complaint alleges that Respondent made an implied promise to implement a profit-sharing plan and a dental plan if employees voted against the Union. In support thereof, Gonderman testified that at the October 17 meeting Goldman briefly mentioned a profit-sharing plan. He said all full-time employees were part of the plan, but Respondent had not had a profitable year yet, so they had not received a share. According to Gonderman, this was the first time she had heard anything about being a part of a profit-sharing plan.

Gonderman further testified that someone asked why Respondent did not have a dental plan. Goldman explained that it was not that easy to set up one and that later on, as there were more employees, they could all get together and join a dental plan, but as far as the Company being able to handle a dental plan, it could not do that. Rodrigues testified that Goldman mentioned profit sharing at both the meetings. At the October 17 meeting he discussed the profit-sharing plan, but Rodrigues does not recall exactly what was said as to who would participate in the plan. Goldman also said something to the effect that the profit-sharing plan would not work unless the Company made a profit. Rodrigues further testified that Goldman said there was a health plan, he regretted there was no dental plan, and hoped in the future there would be one. This is the first time Rodrigues had heard a dental plan mentioned.

Neither Camp nor Llamas included in their account of this meeting any mention of a dental plan. However, Camp testified that Goldman mentioned profit sharing. He does not recall whether Goldman said that the Company already had a profit-sharing plan. Goldman did not say that if, within the next year or so, Respondent started showing a profit, the employees could get involved in profit sharing. According to Camp, he had never been told previously that he was part of a profit-sharing plan. He does not recall whether Goldman said the profit-sharing plan was already in effect as to full-time employees. Llamas testified that Goldman said Respondent had a good profit-sharing plan.

Homes testified that Goldman explained the benefits that were available for full-time employees. He said Respondent had a good medical plan with a $100 deductible which had been waived. He covered the life insurance, long-term disability, vacation, holiday, and paid holiday benefits. He said Respondent had a profit-sharing plan and that, in 1 year, up to 15 percent of a person's annual wages can be contributed to that plan. However, he also said, to have a profit-sharing plan, Respondent had to be profitable. The question as to the dental plan came up at the afternoon meeting. Someone asked why

Respondent had no dental plan. Goldman said that would be something, along with other benefits, he might consider in the future if the Company became profitable.

According to Goldman, someone asked about the benefits offered by Respondent. Goldman then went over the various benefits including the medical insurance with no deductible, long-term disability insurance, group life insurance, profit-sharing plan, paid vacation, sick leave, and lunchroom facility. He explained these in as much detail as he thought the employees were interested. One of the employees asked why there was no dental plan. Goldman replied because they had all those other benefits which he thought was a good package. Someone asked if they would have a dental plan in the future. Goldman said that it was entirely possible, that it was something Respondent could consider in the future if Respondent became profitable and it was something everyone wanted. It is undisputed that during the meeting Goldman also stated that he could not make any promises. According to Goldman and Homes, he repeated this several times.

As to the allegation that, at the October 17 meeting, Respondent threatened employees with loss of employment if they selected the Union as their collective-bargaining representative, Gonderman testified that Goldman said all the contracts, that he had looked over, required a ratio of so many journeymen to so many apprentices. He said, since the employees were all fairly new at what they were doing, they would be considered apprentices and there would not be sufficient journeymen to cover them, and therefore some of them might have to be laid off to make way for journeymen. According to Gonderman, he mentioned this also at the second meeting.

According to Camp, Goldman gave a comparison as to what it would be like if a union was in the shop compared to the way it was at that time. Goldman said that if the Union got in, more than likely, Respondent would have to lay off employees because they would have to pay a journeyman over at the other end of the shop union wages which would probably take away from the less skilled workers. Goldman referred to other situations where the Union was involved and said that, in order to have a certain ratio of journeymen to apprentices, Respondent would have to hire more journeymen and, as a result, some employees would have to be discharged.

Employee Annie Llamas testified that she attended both the October 17 and the November 24 meetings but, as to the statements she recollects, she is unable to distinguish which were made at each meeting. At one of the meetings, Goldman had charts setting forth wage rates. He said, based on contracts that he had seen, they would have to have a certain number of journeymen working there so Respondent would have to get rid of some of the pressmen. According to Llamas, she does not recall very much about the first meeting. The main thing that stands out in her mind is that one of the employees asked whether she could return to her job if the Union got in and she did not want to join the Union. McCain spoke up and said that he had been in the Union before when he worked for a different employer, that there was no open shop in California and she would not be able to work there, she would have to join the Union or leave. Goldman said that McCain was right, there was no open shop in California and she would no longer be able to work there unless she joined the Union.

Homes testified that someone asked whether everyone would have to be member of the Union if the union was voted in. Goldman started to say that he did not know, but he was interrupted by McCain. McCain said that in his union experience, as far as he knew, there were no open shop in California, that everyone would have to be a member of the Union. Goldman said that he did not know because he did not have any experience with the Union.

According to Homes, Goldman further said that one had to be a journeyman to receive journeyman rates and, according to the copies of Local 14 contracts that Respondent had acquired, employees who are trainees or apprentices receive a percentage of the journeyman wages. He also mentioned that there was a ratio of three journeymen to every one apprentice or trainee. Goldman said, although it would be subject to bargaining with the Union, if that kind of ratio was important, Respondent would not be able to have as many trainees as it currently had. Goldman said that he could not promise anything, that the wage rates would be part of the bargaining issue with the Union, and the rates posted on the bulletin board would not be necessarily relevant to anything.[2] He said there was no guarantee that they would receive that rate or anything like it, that it appeared to be a journeyman's rate and a trainee would receive only a percentage of that. Homes denies that anything was said to the effect that, if the Union won the election, people would have to be laid off. Goldman did say he was not in favor of a union, and he felt Respondent paid competitive wages for the area. On cross-examination, Homes denied that the ratio between journeyman and apprentice was discussed at the October 17 meeting.

Homes also testified that soft drinks and coffee were available free at one of the afternoon meetings. Doughnuts were available free at the morning sessions on October 17 and November 24. Coffee was available at all sessions of the meetings because coffee is available free to employees at all times.

The only reference to journeymen and trainees contained in Goldman's account of the meeting was his statement that Respondent had a great many trainees and it was a good opportunity for people to work their way up to become journeymen. Goldman denies he said anything to the effect that employees would lose their jobs if the Union won the election. Employees Trina Stupp and Sonja Vaught asked whether employees would be required to join the Union if the Union won the election. Goldman testified that he responded that to his knowledge they would have to belong to the Union, that there would probably be a closed shop, that the union contracts he had seen had that provision in them. McCain said, from his experience, closed shops were the rule in

[2] Someone other than Respondent had posted on the bulletin board a list of job classifications and wage rates which appeared on its face to have been taken from a collective-bargaining agreement.

California and you had to be in the Union if you were working there.

Goldman also mentioned wage increases. Thus the text of his prepared speech, which he read, states that although Respondent is prohibited from promising or granting wage increases outside its stated policy to review employees and consider merit and cost-of-living wage increases on an annual basis at the end of each calendar year, "We would welcome the opportunity to personally discuss your wage rate and current wage range with you. To arrange such a meeting contact your immediate Foreman/Supervisor."

2. Respondent's campaign letters

On October 17 Respondent distributed a letter to employees, both by mail and with their paychecks. The letter stated, inter alia:

> We have heard that some of you who signed the Union authorization cards would now like to withdraw those cards, but don't know how to go about it. If you want to withdraw, you should send a letter addressed jointly to the union and the National Labor Relations Board, telling them you wish to withdraw.

Respondent's letter then sets forth a sample statement which the employees could copy and send to the Union and the Board agent handling the representation case herein, stating that the employee hereby withdrew and revoked the authorization card previously signed for the Union and no longer wanted the Union to represent the employee. The letter then advised the employees to telephone the Board agent, to tell her that the card had been revoked. The letter also states:

> If either the union or the Board agent tells you that you can't withdraw, if the Board agent tries to talk you out of it, please tell me immediately so we can take steps to protect your rights. You have the legal right to sign a card if you want, but you also have the same right to withdraw. Don't let anyone tell you different.

Homes testified that the October 17 letter was prepared in response to the question asked at one of the meetings that day and a question asked of McCain by employee Mike Foltz. McCain testified that within 10 to 15 minutes after the conclusion of the morning session of the October 17 meeting,[3] Foltz approached him and said he did not know what the authorization card was and asked if there was any way he could get out of it. Foltz further said that he thought he should revoke the card. McCain said that he did not know, he would ask. According to McCain, about 15 or 20 minutes later, he went to Homes and told him that one of the binder employees wanted to know if there was any way they could revoke an authorization card. Homes said that he would check on it. McCain then returned to Foltz and told him that the front office was checking to see what, if anything, had to be done.

[3] The meeting was scheduled for 8 a.m.

Homes testified that McCain told him that Foltz had just asked how he could revoke his union authorization card. McCain then asked, "Have we done anything on that yet?" Homes said no, but they were working on it and would let McCain know as soon as they found out anything. Homes testified that following the meeting, and prior to speaking with McCain, he sought the advice of Respondent's counsel. Respondent's counsel drafted the letter. Homes had it prepared and it was distributed to the employees by mail that evening and placed in their paychecks the next payday. The parties stipulated that the letter was included with the paychecks which were distributed to employees on October 17.

Employee Ken Thorsen did attempt to revoke his authorization card. In accordance with the instructions contained in the October 17 letter, he sent a letter to the union representative and the Board agent on October 20, the body of which reads:

> After much thought and consideration I withdraw and revoke my previously signed card for Local 14 to represent me at Mariposa Press. I do no longer want to have any union represent me in any manner.

According to Thorsen, he never requested from any supervisor or management official at Respondent any information regarding the procedure for revoking his union authorization card.

In addition to the October 17 letter, Respondent distributed campaign letters to the employees on November 14, 19, and 20. The November 14 letter informed the employees of the time and place of the election and urged them to vote. It further stated that Respondent strongly opposed the Union and outlined the collective-bargaining procedure, explaining that the Union's promises would not automatically become reality if the Union won the election. The November 19 letter was devoted to the expenses concomitant to the union representation and membership. The November 20 letter reiterated that wages do not automatically increase when a union comes in. Attached to the letter was a schedule of wage rates, which the letter described as a sheet "containing wage rates apparently used in a contract that Local 14 had with an unnamed printing company" which was posted on the bulletin board by "someone apparently connected with the union." The letter refers to the sheet as an indication that one cannot rely on any promise by the Union that they will gain wage increases. The letter further states that, in one Local 14 contract, untrained employees began at a wage rate 55 percent of the contract rate and did not obtain the full contract wage rate until after 4 years of employment and training. The letter then proceeds to apply that graduated percentage scale to the contract rates posted on the bulletin board and concludes that Respondent's employees make more money than they would under the union rates posted on the bulletin board. Also attached to each individual letter was a specific comparison of the individual employee's present wage rate to the one Respondent contends the employee would earn under such a graduated scale.

3. The October 24 meetings

On October 24 Respondent had another meeting of employees. On this date Goldman and Homes had two sessions of the meeting and also met with the press crew alone. Goldman and Homes testified that Goldman read a prepared speech; however, they do not dispute that some additional comments were made. Employee Wayne Lowe testified that, at the press crew meeting, Goldman asked for suggestions. Employee Dave Gonderman testifies that he does not recall who brought up the topic of suggestions, but that certain suggestions were made. According to Lowe, he suggested changing to a quarterly review, even if it did not necessarily include a wage increase. Gonderman testified that someone suggested a change in the policy of reviews. Apparently, this is a reference to quarterly reviews. According to Gonderman, neither Goldman nor Homes promised to adopt this suggestion. Rather, they said it would be something they would look into after the election was over, that it was a good suggestion, but they could not say one way or the other. Gonderman also testified that, at the beginning of the meeting, Homes and/or Goldman said that they could not promise anything or give raises or anything like that because of the election.

Goldman admits that this was the first formal meeting he had had with the press crew. According to him, he had a separate meeting with them on that day because they wanted to talk to each group separately to make it as informal as possible and to be sure that everyone had a chance to communicate. Homes testified that they met with the press crew separately because they had a heavy press schedule and it would have been nonproductive to interrupt the running of the press for the meeting, so they decided to meet with the press crew prior to the beginning of their shift. Goldman testified that he read his prepared speech verbatim at the press crew meeting. He further testified that at his meeting with the press crew, when he outlined the various benefits, he covered the profit-sharing plan. According to him, he said Respondent had had a profit-sharing plan since the inception of the Company and that although Respondent had never made contributions to the profit-sharing plan because it was in the startup phase and had not yet become profitable, Respondent's other affiliated companies in previous years had made such contributions. He also stated that it was Respondent's intention in profitable years to contribute to the profit-sharing plan and that contributions could run as high as 15 percent of the payroll. Homes testified that Goldman asked for comments and, in response, there was some general discussion regarding productivity on the press, work quality, and minimizing paper waste. He corroborates that Wayne Lowe suggested quarterly reviews rather than the annual wage and performance reviews. According to him, Goldman responded that this was something he would consider but he could not promise anything.

As to the other meetings on November 24, it is undisputed that Goldman used charts to illustrate that the union wage rate which had been posted on the bulletin board was less than Respondent's wage rate if one applied the graduated percentage scale for apprentices and trainees to the contractual wage rates. As a further illustration, according to employee Barbara Murphee, Goldman said that Dave Gonderman had worked for Respondent for about a year but he would not automatically become a journeyman, he would not automatically get journeyman wages and, if Respondent had to pay him journeyman wages, they would just get a journeyman to do the job. Murphee said she had just received the Respondent's November 20 letter which stated that she would be making only $2.94 an hour and asked how could that be true inasmuch as it was below minimum wage. Homes said, in her case it was different and indicated that it was obvious that she would not be making less than minimum wage.

Dorene Gonderman testified that Homes explained wage increases were based on annual reviews, which would start again in January. Gonderman said other employees would be getting raises in October. Homes said those raises were scheduled, that trainees get scheduled wage increases and people who become full time get wage increases. Gonderman asked why some employees were receiving increases and others who had been promised increases were not. She said when she started on a machine she had been promised a wage increase and a review 3 months later but had never received it. Homes said she should not have been promised the increase, that he had just become aware of it, that other promises had been made and they were working on it. It is undisputed that Goldman again mentioned the ratio of journeymen to apprentices required by union contracts. Murphee testified that someone asked about profit sharing and Goldman said they did have plans for profit sharing, something similar to what Earl Goldman Insurance had, but not at this time.[4]

Homes testified that the statements as to a dental plan were in the November 24 meeting, rather than the October 17 meeting. He also testified that the subject of profit sharing came up at the November 24 meeting. According to him, when Goldman was itemizing various benefits he made a statement that Respondent did not have a profit-sharing plan or that Respondent had not been making a profit, that such opportunity certainly existed down the road, but at this point in time there could be no profit-sharing contribution because Respondent was not making a profit. He recalls that Dorene Gonderman made the comment that the wage rates quoted to employees were below minimum wage. According to him, he responded that it was not meant to imply that anyone would be paid wages below minimum but, rather, it was meant to illustrate what happens if one was to take a trainee and training rates and apply the percentage on the bulletin board. He said it was not meant to be a representation of fact, but an exercise in illustrating the percentage rates paid under the two union contracts available to Respondent.

As to the journeyman-apprentice ratio, Homes testified that Goldman said that the union contracts available to Respondent called for a ratio of three journeymen to one apprentice and, if that clause became part of the contract

[4] According to Homes' schedule, Murphee and Gonderman attended different sessions of the October 24 meeting.

between Respondent and the Union, Respondent would not be able to have as many trainees as they currently had. Goldman further said, according to Homes, that Respondent had recently found posted on the bulletin board a wage schedule which appeared to be from a Local 14 contract. He said those appeared to be journeyman rates, there was no guarantee that if a union won an election and Respondent bargained with the union that the employees would receive these rates or any other posted rates, that this would be an item that would have to be negotiated. He also discussed the minimum number of years it takes to become a journeyman and the percentage of journeyman pay one would receive based on the amount of time one had been working, using charts to illustrate these points.

Murphee testified that something was mentioned at the meeting regarding a suggestion box. However, Homes denied that, at either of the meetings, Goldman asked employees for complaints or suggestions or made any promises regarding a dental plan. He also denies that Goldman referred to Dave Gonderman at either meeting.

Goldman testified that in his speech he said the contracts they had seen had ratios between trainees and apprentices and journeymen and that the ratio was usually three journeymen for each apprentice or trainee. He further said it would be difficult to know what would happen if the Union won and there was a contract, that Respondent might not be able to have as many trainees and apprentices. However, the text of the speech sets for the recommendation ratio of 3-to-1, and then states:

> Once again this issue would be subject to negotiations. However, the contracts we have seen, if applied to Mariposa Press, would severely limit our ability to offer training programs.

As to any discussion aside from his prepared speech, Goldman testified that he more or less responded when someone said something or asked a question. He recalled some discussion about the journeyman rates and testified that his tendency was to go back to his prepared speech in making any response. McCain pointed out that trainees did not make journeyman wages, that they started at a lower wage and worked their way up over a period of years from trainee to apprentice to journeyman. McCain also said that it had been his experience with unions that there was a ratio of journeymen to apprentices and trainees, that it was normally 3-to-1; in the event Respondent had a union contract, Respondent might not be able to have as many trainees. Goldman further testified that he reiterated he was unable to make any promises and would not make them, that Respondent felt it was the employees' right to have a union if they wanted one and that Respondent would recognize and bargain with the Union if the Union won the election. McCain also said it took several years to become a journeyman, that Respondent did not really have any journeymen and very few of the employees could hold a job as a journeyman. Goldman testified that he does not recall making any reference to Dave Gonderman. He also denies making any promise to remedy employee complaints or grievances.

4. Conclusions

a. *Credibility*

A number of the alleged violations of Section 8(a)(1) of the Act involve the October 17 and November 24 meetings. Much of the testimony as to these meetings is uncontradicted. However, other testimony is in dispute, mainly that adduced by the General Counsel in support of the complaint. Goldman and Homes testified that Goldman read a prepared speech at the November 24 meeting. I credit this testimony which is corroborated by some of the employee witnesses. However, it is undisputed that Goldman also made additional statements. The testimony of the employee witnesses, while not as detailed as that of Goldman and Homes, tended to be mutually corroborative in some critical aspects and was given without written texts to refresh recollection. On the other hand, both Goldman and Homes had prepared for their testimony by referring to the prepared text and outline of Goldman's speech. Nevertheless, their testimony was contradictory in some respects and appeared in some regards to be slanted in a manner favorable to Respondent's position.

Homes testified that Goldman read a prepared speech at each meeting. Yet when confronted with the "text" of the October 17 meeting, which was not a speech but a list of points to cover, Goldman admitted that he could not have read the document verbatim as a speech. Homes testified that when someone asked if everyone would have to be a member of the Union, Goldman said he did not know because he did not have any experience with the Union. Goldman testified that he said to his knowledge they would have to belong to the Union, that there would probably be a closed shop, that the union contracts he had seen had such a provision. Homes testified that they met with the press crew separately because of a heavy press schedule. Goldman testified they had a separate meeting with the press crew because they wanted to speak to each group separately for informality and to facilitate communication. Both Goldman and Homes deny that Goldman mentioned suggestion boxes. Yet more than one employee witness testified that Goldman mentioned a suggestion box.

Also, Homes testified that Goldman never mentioned Dave Gonderman. Goldman testified only that he does not recall making any reference to Dave Gonderman. Yet Murphee testified that Goldman mentioned Gonderman, who is her nephew, as an illustration of an employee who would be replaced with a journeyman. On direct examination, Homes testified that on October 17 Goldman made statements regarding a ratio of journeymen to apprentices. On cross-examination, he denied that the ratio between journeymen to apprentices was discussed at that meeting. Goldman testified that, during the October 17 meeting, his discussion of the various benefits was in response to a question asked by someone as to what benefits were offered by Respondent. Yet the outline of his speech, which he claims he followed faithfully at the beginning of each session, states, "Explain to employees all the benefits they presently enjoy." Homes and Goldman both testified that, during the October 17 meeting,

the issue of the revocation of authorization cards was initiated by an employee inquiry as to the procedure for revoking an authorization card. However, I note that Homes could not recall the identity of the employee who allegedly made an inquiry in his presence. Yet he does not recall the identity of the employees who spoke to McCain. Goldman also testified that he cannot recall the identity of this employee. He thinks however that it was Foltz. Neither McCain nor Smith was questioned in this regard. I find it incredible that Goldman and Homes, who Goldman claimed were on a first name basis with the employees, would consider this inquiry important enough to furnish all employees with the requested information and yet not recall the employee who made the inquiry.

I also note that McCain testified that Foltz told him he did not understand the significance of the card and asked if there was any way he could get out of it. According to McCain, he told Homes one of the binder employees wanted to know if there was any way he could revoke an authorization card. Homes said he would check on it. Homes also testified that McCain told him about the inquiry. However, his testimony differs from McCain as to what was said after McCain relayed the substance of the inquiry. Homes' account is very neatly phrased to buttress his version of what occurred at the meeting. Thus Homes testified that McCain asked, "Have we done anything on that yet," to which he replied that they were working on it.

On the other hand, Gonderman and Camp both testified that, during the October 17 meeting, Goldman told them the procedure to follow to revoke their authorization cards and that no employee at the meeting requested such information. Rodrigues does not recall Goldman actually explaining the procedure, but testified that Goldman said there were such procedures which he would explain to them if they were unfamiliar with the procedures.

In all the circumstances, including a consideration of the contradictions set forth above, in light of the totality of the testimonial and documentary evidence and my observation of the demeanor of the witnesses, I find that, as to their testimony regarding the meetings, Homes and Goldman were not reliable witnesses and I do not credit them to the extent that their testimony is contradicted by that of Murphee, Gonderman, Camp, and Rodrigues, whom I credit in this regard.

b. *The free coffee and doughnuts*

The complaint alleges that Respondent provided the employees with free coffee and doughnuts at the October 17 meeting in order to discourage them from supporting the Union and/or designating the Union as their collective-bargaining representative. Murphee and Goldman testified that coffee and doughtnuts were provided during the morning meeting. Llamas testified that soft drinks were provided during the meeting she attended. Goldman testified, without contradiction, that Respondent regularly provides employees with free coffee, tea, and hot chocolate and that it subsidizes a lunchroom which serves sandwiches and a light lunch at a cost to employees of about 50 percent of the prevailing rate in the area. In these circumstances, I find that Respondent did not violate Section 8(a)(1) of the Act by providing free beverages and doughnuts to employees.

c. *The implied promise of a profit-sharing plan*

The complaint also alleges that Respondent made an implied promise to implement a profit-sharing plan for employees if the employees voted against the Union. However, the evidence establishes that Respondent's employees are covered under the same plan which has been in effect for several years for companies affiliated with Respondent. Goldman simply informed employees that such a plan was one of the employee benefits, that no contributions had ever been made under the plan for Respondent's employees and would not be made until Respondent showed a profit. Accordingly, I find that Respondent has not violated Section 8(a)(1) of the Act by Goldman's statements regarding the profit-sharing plan.

d. *The solicitation of grievances and the implied promise of a dental plan*

The complaint alleges that Respondent solicited grievances from employees concerning their working conditions and made an implied promise to implement a dental plan for employees if they voted against the Union. It is well established that an employer's solicitation of grievances at preelection meetings carries with it an inference that the employer is implicitly promising to correct the inequities it discovers as a result of its inquiries. It is equally as well established that it is the implied promise to correct grievances, rather than the solicitation, that constitutes unlawful interference with employee rights and that the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer. *Uarco Inc.*, 216 NLRB 1 (1974); *Merle Lindsey Chevrolet*, 231 NLRB 478 (1977).

Here Respondent contends that it did not solicit grievances. I disagree. Thus Goldman stated in his October 3 letter that employees could discuss directly with Respondent any problems they might have without any need for a third party to represent them, that his door was always open to employees and he would be happy to discuss any matter concerning their jobs or anything else the employees cared to discuss at any time. He reiterated this idea of dealing directly with employees and maintaining an open-door policy at the October 17 meeting and continued to proffer the idea of direct dealings at the November 24 meeting.

Homes admits that Goldman asked for comments at his meeting with the press crew. I find that in the context of a speech where Goldman was comparing Respondent's wage program with that which could be expected under a collective-bargaining agreement and was listing the benefits offered by Respondent to employees, a solicitation of comments would reasonably be assumed by employees to be a solicitation of their views regarding their wages and working conditions. The employees certainly took it as such since they proceeded to make certain suggestions, including one with regard to changing from an annual review to a quarterly one. Also, in

response to Goldman's statements with regard to his open-door policy, Dorene Gonderman complained that she had been attempting unsucessfully to secure a wage increase and she continued to complain in this regard at the November 24 meeting. At this time, while stating that she should not have been promised the wage increase, Goldman said he had become aware that this and other promises had been made and they were working on it. Further in his prepared speech, he stated that, even though Respondent was prohibited from promising or granting wage increases outside its stated policy, they would welcome the opportunity to personally discuss with each employee his wage rate and current wage range. The employees were invited to contact their immediate supervisors to arrange such a meeting. Additionally, Goldman said he would provide a suggestion box.

I further find that Respondent has failed to rebut the inference of an implied promise to correct the inequities it discovered as a a result of its inquiries. In this regard, I note that the record does not reflect that Respondent has previously announced an open-door policy or encouraged its employees to discuss their problems with its president. Further, this invitation was extended during speeches and in letters which were clearly in response to the Union's organizational campaign and part of Respondent's campaign to persuade its employees to deal directly with it and to reject union representation. In these circumstances, the mere recitation of a "no promises" formula does not negate the implied promise. *Raley's, Inc.*, 236 NLRB 971 (1978). Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by soliciting grievances from employees and by implicitly promising to correct any inequities found, including a promise to consider establishing a dental plan in the future. *Uarco Inc.*, supra; *Merle Lindsey Chevrolet*, supra; *Cutting, Inc.*, 255 NLRB 534 (1981); *Permanent Label Corp.*, 248 NLRB 118, 130 (1980); *Raley's, Inc.*, supra.

e. *The threat of loss of employment*

According to the credited testimony, in his October 17 speech,[5] Goldman said that the union contracts he had seen required a ratio of so many journeymen to apprentices, that most of Respondent's employees would be considered apprentices or trainees, and in order to maintain the required ratio Respondent would have to lay off some of the employees and hire journeymen. In one of the November 24 sessions, he specifically mentioned employee David Gonderman and said if Respondent had to pay him journeyman wages, they would just get a journeyman to do the job. I find this to be a threat of loss of employment if the employees selected the Union as their collective-bargaining representative. Accordingly, I find that Respondent thereby violated Section 8(a)(1) of the Act. *Delco-Remy Division*, 234 NLRB 995 (1978); *Durango Boot*, 247 NLRB 361, 364 (1980).

The General Counsel also argues that Respondent unlawfully threatened its employees during one of the sessions of the October 17 meetings by Goldman's and McCain's statements that there was no "open shop" in California and, if the Union won the election, employees would have to join the Union or leave Respondent's employ. This was in the context of a speech where Goldman had pointed out the "disadvantages of union membership such as the obligation to abide by union rules, punishable union offenses, fines and assessments." He thereby conveyed an erroneous impression that the mere selection of the Union as their bargaining representative would inevitably result in either the financial and other obligations of union membership or loss of employment. I find this to be a threat of loss of employment which is violative of Section 8(a)(1) of the Act.

f. *The inducement of employees to revoke union authorization cards*

The complaint alleges that Respondent induced employees to revoke the authorization cards they had signed designating the Union as their collective-bargaining representative. Respondent did, in fact, provide employees with information as to a procedure for revoking the cards. Respondent contends that it merely did so in response to an inquiry from an employee as to the procedure for revoking his authorization card. However, the evidence does not support this contention. No employee inquired regarding the revocation of authorization cards prior to Goldman's statements at the October 17 meeting and Homes admits that he had commenced the process of preparing the October 17 letter prior to McCain informing him of Foltz' inquiry. Thus, the idea of the revocation of union authorization cards was, in fact, initiated by Respondent.

Where employees in a noncoercive atmosphere request their employer to advise or assist them in revoking union authorization cards, an employer may lawfully do so if the employee has the opportunity to continue or halt the revocation process without the interference or knowledge of the employer. *KDI Precision Products*, 176 NLRB 135 (1969); *Payless Drugstore of Port Angeles*, 210 NLRB 134, 136 (1974); *Jimmy-Richard Co.*, 210 NLRB 802 (1974); *Aircraft Hydro-Forming, Inc.*, 221 NLRB 581, 583 (1975). Further, advising employees that they can revoke union authorization cards and furnishing information as to the procedure for doing so is not a per se violation of Section 8(a)(1) of the Act, even though such advice may not have been requested by any employee. *Aircraft Hydro-Forming, Inc.*, 221 NLRB 581, 582 (1975). However, such conduct has been found coercive where the employer has also attempted to elicit information as to whether employees availed themselves of this advice. *Hatteras Yachts, AMF*, 207 NLRB 1043 fn. 3 (1973); where unrequested advice has been accompanied by employer assistance in the actual mechanics of the revocation, *Deutsch Co.*, 180 NLRB 8, 20 (1969), and where the advice was given in the context of other unfair labor practices, *Kut Rate Kid & Shop Kwik*, 246 NLRB 106,

[5] Respondent argues that the testimony of Gonderman and Camp is not reliable as to their placing the discussion on journeyman-apprentice ratio during the October 17 meeting. I find no merit in this argument. Camp testified that he attended a meeting but does not recall whether it was in October or November. However, he also testified that revocation of authorization cards was discussed at this meeting and it is undisputed that revocation of authorization cards was mentioned at the October 17 meeting, not at the November 24 meeting. Moreover, Homes initially testified that these ratio were discussed at the October 17 meeting.

119 (1979); *L'Eggs Products Inc.*, 236 NLRB 354, 389 (1978).

Here Respondent proferred its unsolicited advice which was later elaborated on in the October 17 letter in the same meeting where it threatened its employees with loss of employment if they selected the Union as their collective-bargaining representative and implicitly promised that, if they rejected union representation, and dealt directly with Respondent, it would correct any inequities. In these circumstances, I find that Respondent violated Section 8(a)(1) of the Act by inducing employees to revoke their authorization cards.

5. The alleged unlawful interrogation

Dorene Gonderman testified that she and Supervisor Kathy Smith had been personal friends for about 4 years and that, at one time during this period, they were next door neighbors. According to Gonderman, she had approximately 10 conversations with Smith concerning the union during the months of September, October, and November. They were casual conversations and never very long. Most of the conversations were indistinguishable as to what was said in which conversation. However, she does recall that, in October during a break, Smith asked her how the union drive was going, if she had heard whether supervisors would be allowed to vote, and if there were very many people at work involved. Gonderman replied that things were going fine and she did not think supervisors could vote because they have the authority to hire and fire. She also told her when the next meeting was scheduled but did not tell her who was involved with the Union. Gonderman also testified that, sometime in October, Smith asked her who was involved in the Union. It is unclear whether she was referring to another conversation or whether she was changing her testimony as to this conversation. After being shown her prehearing affidavit which states that her first conversation with Smith about the Union was around the beginning of July, and denied that this first conversation was in reference to the organizing campaign of a previous union. According to her, this other union was organizing in June; however, the parties stipulated that the organizing campaign of the Union at Mariposa Press began during the first week of September and that, if Ziolkowski was called to testify that to the best of his knowledge, prior to September, there was no contact made directly between the Union and Dorene Gonderman.

Smith testified that during the summer, around June, when the other union was organizing she asked Gonderman if she could be included in the union activity. Gonderman said no, because Smith could hire and fire. Thereafter, during the summer, Homes told Smith she was not allowed to ask any employees about union matters and, if employees asked her questions, she could answer them and could express her own opinion but she was not to ask employees anything. Following that discussion with Homes, according to Smith, she did not ask Gonderman any further questions. However, she did eat lunch with Gonderman frequently, as did other employees, and union matters were discussed in her presence. Smith denies that during any of these discussions she ever asked Gonderman if she had gone to a union meeting.

Respondent attacks Gonderman's credibility on the basis of her confusion as to the time the Union's organizational campaign commenced. Unquestionably, her testimony was completely unreliable in that regard and I credit Smith, whom I found to be an honest and reliable witness who was endeavoring to tell the truth, that this conversation occurred around June. I also credit Smith that she did not ask who was involved in the Union nor when any union meeting would be held. Gonderman admits that her recollection is vague as to any conversation which occurred after the initial one. I credit Smith that, following this June conversation, Homes told her she was not to question employees and she did not do so. In this regard, I note that, even though Smith admits that the Union was frequently discussed in her presence and does not deny that she participated in these discussions, there is no other evidence that Smith interrogated employees. In the circumstances, including the absence of any evidence as to any other unfair labor practices around June or at any time prior to October, and the absence of any evidence of other incidents of interrogation during Respondent's rather active campaign against the Union, I find that Smith's asking Gonderman, in June, whether many employees were involved was an isolated instance of interrogation which did not violate Section 8(a)(1) of the Act.

C. *Granting of Benefits*

1. The transfers to full-time status

All of Respondent's unit employees are classified as either full time or part-time. It is undisputed that part time employees sometimes work a 40-hour week and that full-time employees work less than a 40-hour week if no work is available. A part-time employee does not become full-time simply by regularly working a 40-hour workweek over a period of time. Rather, some affirmative action has to be taken by Respondent to transfer an employee from part-time to full-time. The principal difference between part-time and full-time employees is the benefits they receive. Full-time employees receive a full complement of benefits, including medical and life insurance, paid holidays, and paid vacations. On the other hand, part-time employees receive, in lieu of all other benefits, one paid vacation day every 110 regular hours worked. During October five employees were transferred from part-time to full-time status. They were Mel Pacheco, Wayne Lowe, Ron Murphee, Gary Marin, and Annie Llamas.

Homes testified that employees are transferred from part-time to full-time status as the work load demands. With the possible exception of the press crew there are no guidelines by which a supervisor can determine when an employee is to be transferred to full-time. Further, all such decisions are made by Homes. However, after a part-time employee continues to work 40-hour weeks over a period of time, the supervisor will normally recommend that the person be transferred to full-time status. Then, assuming that the workload demands are favor-

able, Homes will consider, as to an individual employee, facts such as seniority, skills or aptitude for the particular job, training, and background.

In 1980, prior to the union organizational campaign, five employees were transferred to full-time status. They were Kirsten Carpenter and Sonja Vaught in April; Catrina Stupp and Dorene Gonderman in May; and Jennifer Rossi on September 1. Carpenter and Gonderman worked in the bindery, Vaught in the warehouse, and Stupp and Rossi in the press department. Of the five employees who were transferred to full-time in October, Pacheco worked in the warehouse, Lowe in the press department, and Marin, Murphee, and Llamas worked in the bindery. Homes testified that the transfers to full-time status in 1980 reflected an increase in Respondent's business which stemmed from a change in its operations. According to Homes, Respondent was initially engaged as a warehouse and shipping operation of Nitty Gritty Productions, one of Respondent's affiliated companies. A warehouse was opened in Concord in September 1977. At that point, Respondent's sole customer was Nitty Gritty and its work complement was one full-time warehouse and shipping supervisor and four to five part-time employees who were on-call. In early 1978, Respondent commenced the construction of a new facility with the intention of expanding Respondent's operation into printing and binding. When Respondent moved into that facility in May 1979 and commenced its printing and binding operation, it was still working exclusively for Nitty Gritty as the delays occasioned by the move into the new facility had resulted in a tremendous backlog of printing and binding work for Nitty Gritty. At that point in time, Respondent had about five or six full-time employees and about six part-time employees.

In January Respondent began to aggressively seek outside commercial printing and binding work. Its success in this regard was somewhat erratic. During the summer there was a significant decrease in its bindery and warehouse operations and July and August were particularly dissatrous for the bindery. There was a dramatic increase in the printing operation in September and October and there were also substantial increases in the bindery department and in the warehouse. Respondent's records indicate that its income by departments for 1980 was as follows:

	BINDERY	*PRINTING*	*WAREHOUSE*
Jan.	-------	--------	---------
Feb.	$34,455	$60.326	$14,592
March	39,248	71,935	18,113
April	21,600	66,347	17,896
May	19,127	67,012	13,059
June	14,905	56,881	9,304
July	8,442	68,135	9,680
Aug.	5,901	60,636	9,828
Sept.	17,650	106,355	13,838
Oct.	37,323	127,543	16,518
Nov.	28,151	74,249	20,298
Dec.	37,036	94,156	10,814

Pacheco was hired on July 7 primarily as a driver in the warehouse department and was promoted to full-time status on October 2 at the end of his 90-day probationary period. According to Homes, at the time Pacheco was hired he was told that when Respondent's business increased to the point where a majority of his time was spent driving he would be transferred to full time status. By the end of his probationary period he was spending 80 percent of his time driving a truck making deliveries and pickups. The remainder of his time was spent working in the warehouse.

Lowe was hired as a part-time employee in the warehouse on July 2. On July 29 he was transferred to the press department and began training as a "jogger." By the end of his 90-day probationary period he was working a 40-hour week. At that time, on October 2, he was transferred to full-time status. Homes testified that in the normal course of business the press is run full time and that it is necessary for someone to occupy each position on the press at all times. Thus the four press crew positions—first and second pressmen, feeder, and jogger—are all full time positions. Accordingly, Lowe was transferred to full-time status at the completion of his probationary period.

Murphee was hired in October 1979 to work in the warehouse. He also worked sometimes in the bindery. In July he began training as an operator on the Perfect binder. The Perfect binder, the primary machine used in Respondent's bindery operation, is a large machine which requires several persons to man it in addition to an operator who is responsible for the overall operation of the machine. McCain was the principal operator of the Perfect binder; however, according to him, he needed to have another operator available to relieve him to perform other duties. Since Murphee had been satisfactorily training for that position and was the only employee besides McCain who could operate the Perfect binder, according to Homes, he was transferred to full-time status. At the time, Murphee was attending school and was working only about 32 hours a week.

Homes testified that in October, on receiving a payroll change notice from McCain recommending Murphee for a wage increase, he called McCain in to discuss the matter. He queried McCain as to his immediate and short-term need for a bindery trainee and asked if someone on a part-time basis was really what McCain needed or did he feel at this point that he needed a full-time employee in that position to relieve him to carry out his other duties. McCain said he had been in a hurry, that he wanted to get his paperwork done and had not really thought it through, and that he had meant to indicate on the payroll change notice that Murphee should be full-time with benefits. McCain also said that Murphee was available to work up to 32 hours per week. McCain further said he understood that Murphee had decided to leave school at the end of the year and would be available to work a full-time schedule.[6]

[6] Prior to this, according to McCain, Murphee had been working 20 to 30 hours on a regular basis. According to Murphee, in November he was working 30–32 hours a week.

McCain testified that Murphee had been training on the binder and was performing satisfactorily but was not working sufficient hours to permit McCain to perform his other responsibilities properly. Therefore, according to McCain, the work load actually caused him to recommend that Murphee be transferred to full-time status. McCain admits, however, that after Murphee was given full-time status his hours continued to vary through the end of the year from 22 to 36 hours. It was sometime around the first of the year that he began working 40 hours a week on a regular basis. According to McCain, when he transferred Murphee to full-time status, he spoke to him regarding the number of hours he wanted him to work. He asked if Murphee could put in 40 hours. Murphee said he was still going to school. McCain asked how many hours could he work. Murphee said he did not know and McCain said the more hours Murphee worked the better it would be for McCain insofar as relieving him for his other duties. McCain admits he had no subsequent conversations with Murphee concerning the number of hours he was working.

Murphee denies that McCain told him he was going to be transferred to full-time status. He admits he knew Respondent's policy was that an employee received the full complement of benefits upon being transferred to full-time status. However, according to him, he did not tell McCain that he was going to be quitting school the first of the year nor did anyone tell him to begin working 40 hours a week. Rather, he just began to show up at 8 a.m. and ever since has worked a full-time schedule.

Llamas was hired on September 27, 1979, as a part-time bindery worker. Marin was hired on March 11 as a part-time worker in the warehouse and was later transferred to the bindery. In August, both Marin and Llamas commenced training on the saddle stitcher machine. In late August or September, Respondent started operating the sadle stitcher on a two-shift basis. Kirsten Carpenter, a full-time employee, and Marin were assigned to operate the machine on the day shift; and Dorene Gonderman, a full-time employee, and Llamas were assigned to operate the machine on the night shift. Marin was transferred to full-time status on October 15 and Llamas was transferred to full-time on October 17. McCain testified that these transfers were made because of the increase in work load, because Marin and Llamas had been performing satisfactorily on the saddle stitcher and because of their seniority.[7] With a few exceptions, Llamas has regularly worked a 40-hour week since at least the time she began working on the saddle stitcher.[8] When McCain asked her to work nights on the saddle stitcher, he told her she would get a night wage differential and that he would try to get her a raise. He further said that all of the employees working on the saddle stitcher would be transferred to full-time status.

[7] According to Homes, Marin was more proficient on the saddle stitcher than Llamas.

[8] Llamas signed a union authorization card on September 10. According to her, she began working on the saddle stitcher about a month earlier.

2. The wage increases

Respondent granted wage increases to the 14 employees during the period between the commencement of the Union's organizational campaign and the election—10 in October and 4 in November. Homes, who has to approve all wage increases, testified that all these wage increases were granted in accordance with Respondent's normal practice. According to him, wage increases are granted as merit increases on the recommendation of the supervisor, to accompany a promotion, as a length of service increase which might be after 80 hours of employment, or at the conclusion of the probationary period, and as a result of their annual wage review which occurs in January.[9] Five of the wage increases involved here accompanied the promotions to full-time status discussed above. It is undisputed that it is Respondent's practice to grant a wage increase to employees when they are transferred to full-time status, and the timing of four of these five increases is consistent with this practice. However, Lowe was transferred to full-time status on October 7 but did not receive the increase in his paycheck until November 21.[10]

Lowe testified that after he began working as a jogger he asked Kerry Orton, the first pressman,[11] if his transfer to the press entailed a wage increase. Orton said Lowe was still "sort of on a temporary basis." Lowe further testified that he also should have been issued a uniform but had to wait about a month for the uniform. For 2 or 3 weeks after he began working on the press, he asked Orton about his uniforms and his pay increase and Orton said, "We'll wait and see how you work out." However, the parties stipulated that Lowe received a $1 wage increase on July 29, and Lowe testified that he began working as a jogger around the end of July. Lowe's November 21 paycheck reflected a wage increase retroactive to October 2. When Lowe received the check it was considerably more than he expected so he asked Orton to check to see if there was a mistake. The following week, according to Lowe, Orton told him that about a month after he had been transferred to the press he had been granted a wage increase, but it had not been logged into the computer so the money he received on his November 21 check was his wage increase retroactive to the date it had been granted.

Homes testified that he approved Orton's recommendation that Lowe be transferred to full-time status and given a wage increase. However, inadvertently the information did not get placed into the computer. Around mid-November, Orton told him Lowe had complained that he had never received the wage increase promised him by Orton. Homes researched the matter and, after he discovered the error, instructed the payroll clerk to rectify the problem. Homes then explained to Lowe what had happened and, according to him, told Lowe that his next paycheck would reflect the raise retroactive to October 2.

[9] In 1980, this increase was delayed until April.

[10] Respondent's payroll system involved a 1-week time lag between payroll period and paycheck.

[11] Orton is an admitted supervisor.

Orton testified that Lowe was not transferred to full-time status at the time he began working on the press because he had no prior experience on a web press and Orton wanted to be sure that he could perform satisfactorily before making him full time. He further testified that, at the time he asked Lowe to work as a jogger, they had no discussion about a wage increase. However, according to him, they did have such a discussion in October when he told Lowe that he was satisfied with his work performance and was going to speak to Homes about granting him a wage increase. He then recommended to Homes that Lowe be given an increase. Homes agreed, so Orton told Lowe he had the raise. On the following payday Lowe asked Orton why his wage increase was not reflected on his paycheck. Orton said he would look into it. He then spoke to the payroll clerk who said she would take care of it. When Lowe received the check which contained the retroactive pay, according to Orton, he asked Orton what the extra pay was for and Orton reminded him that it was backpay because he had not received his pay increase at the proper time. Orton also testified that he does not believe he had any conversation with Homes about Lowe not receiving his wage increase. However, he admits he does not remember how he learned that the problem had been caused because the increase had not been placed in the computer. He thinks that the payroll clerk mentioned it to him.

Of the remaining nine wage increases involved herein, Respondent contends seven were given in accordance with its general wage policy for new hires. Respondent's rules and procedures for employees, dated April 1, 1980, provide:

> COMPENSATION
>
> As a general rule, all employees will receive a compensation/performance review annually. Additional reviews may be conducted during the year.

Certain additions to and clarification of procedures and rules are contained in a memo from Homes to the plant manager dated April 14, 1980. This memo provides:

> NEW HIRES-FULL OR PART TIME
>
> New hires and wage rates other than replacements for part time employees must be approved by the office in advance. The following wage policy will apply to part time new hires.
>
> NEW HIRES—PART TIME PAY POLICY
>
> Until further notice new hires—part time will be paid at the maximum rate of $3.50 per hour. After 2 weeks or 80 hours worked, increase to $3.75 (or 25¢ an hour), after review. After an additional 2 weeks, or 80 hours, review with increase of 25¢ an hour to a maximum of $4.00. At 6 months performance review increase 25¢ an hour. Maximum wage for part time employees is $4.25 per hour.

Homes admits this is merely a guideline and that the increase is actually at the discretion of the supervisor. Generally the supervisors review such increases with Homes. Homes also admits that a review and wage increase does not necessarily have to be timed after 2 weeks, 4 weeks, and 6 months of employment. Rather, Respondent's policy is very flexible in an attempt to try to motivate, attract, maintain, and compensate good part-time people. In accordance with this policy Barbara Murphee, Issac Camp, Michael Flotz, Derrex Nash, Andy Navarro, Sherrill Orr, and Debbie Shipherd all received 25 cent raises at intervals ranging from 2-1/2 weeks to 1 month after their hire.

The other two wage increases, given to Kathy Seybolt and Edward Rodrigues, do not fit into any specific guideline for granting wage increases. Rather, according to Respondent, they are covered by the statement in the rules and procedures which states "additional reviews may be conducted during the year." Seybolt was given a 25-cent-an-hour increase on her first year anniversary date, October 17. Homes admits there is no written policy that an employee must be reviewed after 1 year of employment. However, according to him, Seybolt is a part-time employee who does not desire to work full time. At the time she was one of only two part-time employees who had worked for Respondent for as long as 1 year. The other was Llamas who was promoted to full-time. Seybolt's last raise had been in April.

Rodrigues' wage increase was the only one not based on length of service and merit. The increase was granted 2 months short of the time for a possible 6 months increase for new hires, and both Homes and Smith, his supervisor, contend that they had problems with him as to his job performance. However, they also contend, he had been requesting a wage increase and he was granted one in the hope that it would serve as an incentive to increase the quality of his work performance.

3. Conclusion

It is settled that increases and benefits to induce employees to vote against the union is violative of the Act for, as stated by the Supreme Court:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. [*NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).]

The crucial question, of course, is motivation, because granting employee benefits during a union organizational campaign is not a per se violation of the Act. However, in determining whether a grant of benefits which coincides with a union organizational and election campaign is unlawful, absent an affirmative showing by the employer of some legitimate business reason for such timing, the Board will draw an inference of improper motivation and interference with employee rights under the Act. *Litton Dental Products*, 221 NLRB 700, 701 (1975); *Somerset Shirt & Pajama Co.*, 232 NLRB 1103, 1111 (1977); see also *Essex International, Inc.*, 216 NLRB 575 (1975).

As to the transfers to full-time status, the General Counsel argues that the circumstances under which each

of these employees was made full time were suspicious and inadequately explained. On the other hand, Respondent argues that these transfers to full-time status were for legitimate business reasons and within Respondent's flexible policy and practice on such matters. Respondent has no definite objective policy guidelines as to when an employee will be transferred. However, I find that Respondent has met its burden as to Pacheco and Lowe.

Homes testified without contradiction that Pacheco was told at the time of his hire that he would be made full time as soon as the workload for a driver increased to the point where it constituted a majority of his work. When he was transferred to full-time status at the end of his 90-day probationary period, he was driving 80 percent of the time. Lowe was hired on July 2. On July 29, he began training as a jogger on the press. Homes and Orton testified, without contradiction, that all press positions are full-time positions since the press runs full time and the four positions must be occupied at all times. Lowe was made full time at the end of his probationary period.

A determination as to the motivation for the transfer of the three bindery workers to full time status is somewhat more involved. Whether they are transferred to full time seems to depend, at least partially, upon a determination as to whether the work load justifies such a transfer. The principal evidence as to general workload came from Respondent's summary of its 1980 income by departments. The increase in the income of the bindery department in October does not appear to corroborate Respondent's contention that there was an increase in work load in that department in October. However, there is no specific showing of any factors which would indicate that, in early October, Respondent had reason to believe this would be a sustained increase. The income of the bindery department had been comparable in February and March but steadily declined for several months thereafter. Yet during this decline, two bindery employees were transferred to full-time status—Kirsten Carpenter on April 1 and Dorene Gonderman on May 19. In all the circumstances, I find that overall department income does not, by itself, establish the sort of increase in workload which would cause Respondent to transfer employees to full-time status. Rather, it appears to be only generally corroborative of other evidence as to increased work load.

Respondent contends that Marin and Llamas were transferred to full-time status essentially because they were assigned to operate the newly acquired saddle stitcher machine. It is undisputed that, for at least several months commencing in the first week of September, the work load for that machine was sufficient to require operating it on a double shift. Llamas testified that during the latter part of August when she was assigned to begin training on the saddle sticher, McCain told her that everyone assigned to the saddle stitcher would become full time with benefits. In response to her request for a wage increase, he said he would try to get her an increase. However, when questioned as to why Marin and Llamas were not immediately transferred, McCain testified that he was not sure whether there would be sufficient work to keep the machine busy and that it took 3 weeks to a month to make that determination.

In the circumstances, I conclude that a delay of 3 or 4 weeks in effectuating the promise that the operators of the saddle stitcher would be transferred to full-time status was not so unreasonable as to support an inference that the transfers were motivated by the union organizational campaign. Thus, as with Pacheco, the transfer of Marin and Llamas was effectuated in accordance with promises to do so which were made prior to the Union's organizational campaign. Respondent had an obligation to effectuate this change in status as if the Union were not in the picture. Accordingly, I find that Respondent did not violate Section 8(a)(1) of the Act by transferring Pacheco, Marin, Llamas, and Lowe to full-time status.

On the other hand, I find that the circumstances of Ron Murphee's transfer to full-time status do not establish a legitimate business reason for the timing of his transfer. He does not meet with Respondent's most basic requirement—that he regularly work a 40-hour week. I therefore conclude that the evidence supports an inference of unlawful motivation. This conclusion is buttressed by my finding below that the grant of certain wage increases was unlawfully motivated. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by transferring Murphee to full-time status with the accompanying grant of benefits and wage increase.

As to the wage increases granted to Pacheco, Lowe, Marin, and Llamas, in accordance with Respondent's prior practice, these increases accompanied their transfer to full-time status. Since I have found these transfers were not violative of the Act, I also find that the wage increases which accompanied the transfers were not violative of Section 8(a)(1) of the Act.[12]

Regarding the other wage increases granted during the election campaign, seven were granted to employees with less than 6 months' seniority and two were granted to employees with more than 6 months' seniority. The General Counsel correctly argues the burden is on Respondent to establish that the timing of such increases was motivated by factors other than the union campaign or the pendency of an election, *Chester Valley, Inc.*, 251 NLRB 1435 (1980); and that the burden is met where the increases are shown to be granted in accordance with an established regular wage program. *Doces Sixth Avenue*, 225 NLRB 806, 810–811 (1976). The General Counsel also argues that a further indicia of unlawful motivation is the fact that wage increases were granted in "unprecedented" numbers for a 4- to 6-week period other than the period of the annual reviews. *Adam Automation & Mfg. Co.*, 218 NLRB 1255, 1258 (1975).

Respondent's only regular established program of wage increases for part-time employees with more than 6 months' seniority is that which accompanies a transfer to full-time status based on an annual review. This review is not given on an employee's anniversary date but rather is given to all employees during the same time period. Annual reviews, and the resulting wage increases, were

[12] In the circumstances, I find that Lowe's wage increase was the increase which accompanies a transfer to full-time status and that the delay in his receiving the increase was inadvertent.

given in 1980 during the month of April. Any other raises are given at the discretion of the supervisor and Homes. The raises given to Seybolt and Rodrigues fall within this discretionary category and were not based on any regularly established wage plan. I find that Respondent has not established a legitimate business reason for the timing of the wage increase granted to Seybolt and Rodrigues. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by the grant of wage increases to them.

As to the wage increases granted the newly hired employees, Respondent's stated wage policy provides for review after 2 weeks or 80 hours with a 25-cent wage increase and a second review after an additional 2 weeks or 80 hours with a 25-cent wage increase. All the wage increases were granted within 1 month of employment except for Orr who was given a wage increase after 5 weeks of employment. Although it appears from the record that Respondent's practice has not been to give all new employees two wage increases during their first month of employment, there is nothing to suggest that they did not receive one wage increase during that first month.

The General Counsel finds it suspicious that Murphee and Shipherd were the only employees who received wage increases approximately 2 weeks after their hire dates. Also none of the wage increases were granted exactly 2 weeks or 4 weeks after hire. I find that neither circumstance is an indicia of unlawful motivation. There is no reason to conclude that the actual timing of the wage increases, as opposed to the 2 weeks and 4 weeks, or 80 hours and 160 hours, anniversary dates, was more advantageous to Respondent's election campaign. All the raises were granted after the initial surge of card signing and the Union's demand, and all of the pertinent anniversary dates would have been prior to the election.

I find no significance in the fact that the raises were not granted precisely on the appropriate anniversary dates. In all the circumstances, I find that the wage increases granted to new hires conformed generally to Respondent's wage plan for new hires. The fact that a large number of wage increases was given during the preelection period only reflects that a number of new employees were hired in September and October. There is no contention, or evidence, that the hiring of these new employees was unlawfully motivated. Accordingly, I find that Respondent did not violate Section 8(a)(1) of the Act by granting wage increases to Camp, Foltz, Barbara Murphee, Nash, Navarro, Orr, and Shipherd.

D. *The Discharge of Funseth, Sterling, and Campbell*

As set forth above, on September 25 and 26 the Union notified Respondent that Funseth, Sterling, Schwarz, and Rodrigues were members of the volunteer organizing committee. Both Sterling and Funseth commenced working for Respondent in September and Campbell's first day of employment was October 7. On October 7, McCain discharged Funseth, Sterling, and Campbell for smoking marijuana during their lunch break. It is not disputed that they were in fact smoking marijuana. It is also undisputed that in September, prior to the union activity, McCain had told Sterling and two other employees that he thought he had observed them smoking marijuana and, upon their denial, warned them that if he caught them smoking marijuana again during their lunch break he would discharge them. In these circumstances I agree with counsels for the Respondent and the General Counsel that Respondent established the discharges would have taken place even in the absence of the union activity. Accordingly, the motion of counsel for the General Counsel is granted to withdraw subparagraphs 7(a) and 8(a) and (b) of the amended complaint insofar as they alleged the unlawful discharge of Funseth, Sterling, and Campbell. *Wright Line*, 251 NLRB 1083 (1980).

E. *The Discharge of Schwarz*

1. Facts

Allen Schwarz was hired on September 8 to work in the bindery. He had no prior experience doing bindery work. According to McCain, when he hired Schwarz he explained that there was a probationary period and that if his work was satisfactory he would receive a wage increase after so many hours and after so many more he would get another raise with the possibility of being transferred to full-time status; but, that if his work was not satisfactory, he could be discharged. Although McCain was Schwarz' supervisor, both Smith and McCain testified as to the reason for his discharge. According to Smith, Schwarz moved incredibly slow, he was always wandering around pretending to push his broom, talking to other employees, and "not doing much of anything." Smith further testified that on the day Schwarz was discharged she observed Schwarz pretending to sweep in a corner of an area between the bindery and the warehouse for a half hour when it only required 2 minutes at the most to sweep. According to her, she was furious and went to McCain, related to him what she had just observed, and told him that he had to do something about Schwarz, that Schwarz' work performance was terrible, other employees had been complaining[13] and, if McCain did not discharge him, she would.

According to McCain, he would assign Schwarz a job of cleaning up an area, emptying barrels or something of that nature, and then he would notice Schwarz leaning on his broom talking to other employees. As soon as McCain approached him, Schwarz would start moving his broom. McCain spoke to him regarding this a half-dozen or a dozen times, the first time being about a week after he was hired. Then he gave him a verbal warning on September 18 for leaning on his broom, not following instructions, and improperly feeding the pockets of the Perfect binder. According to McCain, on several other occasions he told Schwarz he was getting tired of him making mistakes and leaning on his broom, not doing his job, that he had better start straightening up or he was going to be out the door. Essentially McCain testified

[13] According to Smith, employee Larry Carpenter complained that Schwarz worked too slow and was too inept to be of any assistance in the operation of the three-knife trimmer. Kirsten Carpenter and Sonja Vaught generally complained as to Schwarz being permitted to stand around when they had to work.

that Schwarz was lazy and did not have the aptitude to be a bindery worker.

McCain further testified that, on September 26, Schwarz was assigned to feed pockets which he proceeded to do incorrectly and too slowly. McCain wrote up a warning, called Schwarz into the office, and explained to Schwarz that he had been watching him, counting the mistakes that he made, and that he was tired of warning Schwarz about just being a broom leaner. He said that with his mistakes, Respondent could not afford him, and if he did not get his act together he was not going to be there. McCain showed Schwarz the written warning, pointed out to him that he could either concur or disagree, and that if he disagreed he could write in a statement of disagreement. Schwarz said he neither concurred nor disagreed with the statement. Schwarz signed the warning, but did not write a statement on the warning report nor did he check the box for either concurrence or disagreement with the supervisor's statement contained in the warning. McCain's written comment, which appears on the warning, reads:

> I have explained what jobs have to be performed and have had to take over for Allen because he could not keep up with machine or made mistakes.
>
> On 9–26–80 he could not keep up with the first pockets I assigned him so I put him on some easier ones and he feed [sic] them backwards on 4 occasions and let them run out also.

Schwarz testified that on the day he received the written warning he had been loading the pockets in the binder and had been unable to keep up with the binder. According to him, the material was going too fast and he had too many stations. He was removed from the binder and was replaced by two employees who were assigned the same number of pockets that Schwarz had been handling alone. On direct examination, Schwarz testified that he did not recall how many pockets this was; however, on cross-examination he testified that he thinks it was about five pockets. He further testified he never observed how many pockets one person would typically feed so he does not know whether five was an unusual number or not.

McCain denies that he ever assigned Schwarz five pockets. According to him, normally, he would assign Schwarz three pockets and would assign other employees four. He specifically denies that he assigned more than one person on September 26 to feed the same number of pockets that Schwarz had been feeding by himself. I credit McCain in this regard. In doing so, I note that, though given the opportunity to do so, Schwarz made no notation on the warning of his alleged version of what occurred.

McCain testified that at the time he gave Schwarz the written warning he was beginning to think there was no hope for Schwarz, that he could not perform any job assignment free of mistakes. However, following the September 26 warning, he assigned Schwarz to stack books at the end of the binder. According to McCain, this was the least complicated of the bindery assignments. Schwarz testified that two employees are assigned to the end of the binder, one sits in a chair at the end of the conveyor and removes the material from the conveyor and hands it to the other employee who stacks it on a pallet. Schwarz further testified that for at least a week or 10 days after he received the written warning he worked as one of these two employees. He also testified that it had been his obvservation that, generally, no employee spent more than a half day at a time working at the end of the binder. Nevertheless Schwarz was not reassigned from that position until about 3 days prior to his discharge. He also testified that when he worked at the end of the binder he actually had no contact with any employees other than the one working with him. However, when he was working loading the binder pockets he had more contact with the other employees. Employees would sometimes stop the machine and go down and help other employees with the pallets, help people load the bins and, in general, mix around.

McCain testified that Schwarz' work performance did not improve after the written warning. He did assign Schwarz to the end of the binder for several days, the reason being that he could no longer assign Schwarz to feed pockets because of the mistakes he made. According to McCain, the jobs they were running during that period of time were too critical and too close as to count to allow for very many bad books. On October 10 they were having some difficulty with a particular job mainly because of a customer's problem. This resulted in quite a bit of downtime during which McCain would assign employees to clean up, break down and repair pallets, empty barrels, sweep the floor, and anything else that needed to be done but is difficult to find time to do when the binder is running. Every time he assigned Schwarz to do something, Schwarz would go in a corner or behind the collator where he could not be seen "unless you were specifically" looking for him; he would lean on his broom and watch the press run and stand in a corner and look around to see what everyone was doing. McCain observed him do this twice for 3 or 4 minutes at a time.

At some point during that day, according to McCain, Smith asked what he was going to do with Schwarz. She said she had been watching him sweep the same 3-foot square in the courtyard for the last half hour, that there was nothing there, that he was just pushing the broom around in a circle, and why McCain did not do something with him. She further said that if McCain did not get rid of Schwarz, she was going to go crazy. At the time, according to McCain, he was busy and did not have time to do anything; however, he told Smith that as soon as he could catch Schwarz doing something wrong again he was going to discharge him.

Subsequently, when McCain was checking to see what each employee was doing, he did not see a couple of employees so he began to look around for them. He walked over to the end of the cutter and observed Schwarz leaning on his broom behind the collator just standing there. According to McCain, he stood and watched Schwarz for 5 minutes. During that time Schwarz did not move at all; whereupon McCain filled out Schwarz' termination report, came out and asked Schwarz to come into his

office. Schwarz asked why. McCain said he was fired, that he was not doing what McCain asked him to do and McCain was getting tired of seeing him lean on his broom and making mistakes that cost money and books. Schwarz said he was doing as good a job as anybody and that the only reason McCain was discharging him was because he was a union affiliate. McCain said he was firing Schwarz because he was a lousy worker. Schwarz said he would take this either to the NLRB or to the attorneys. McCain responded that he did not care who Schwarz took it to, that he was discharged because he could not do the job. Schwarz said he was going to pursue it. McCain said, "You are free to pursue it as far as you want." McCain admits that at that time he knew Schwarz was interested in the Union. Schwarz's termination memo cites incompetence as the reason for termination and under comments notes: "Spent a good deal of time leaning on a broom talking to other employees and kept making the same mistakes—mainly loading pockets wrong."

Schwarz testified that on October 10 he spent the first half of the morning sweeping and the second half unloading the pallets into the bins. According to him, about a quarter of the signatures on the pallet had already been through the trimmer and that the signature mark, which is a black stripe on the side of the folds, had been trimmed off which made it more difficult to know in which direction the signatures should be placed in the bins.[14] When questioned as to whether it mattered whether the signatures are placed in the bin correctly, he testified that it helps to have them going in the same way as they are going to go into the binder or at least whatever way you are putting them in; if you are putting them in the bin all the same way, the person loading the pocket will have less chance of placing the signatures in the pockets incorrectly. He further testified that if signatures were placed in the bins incorrectly, the person loading the pockets could correct it, since all they had to do was simply to look at what they had in their hands and be sure that they placed it in the pocket correctly.

Schwarz testified that on the morning of the day he was discharged, he was loading bins and Larry and Kirsten Carpenter were loading pockets. According to Schwarz, neither of the Carpenters mentioned that he was loading the bins incorrectly nor did the binder make any significant stops. According to Schwarz when he returned from lunch McCain told him, "I'm sorry, I've got to let you go." Schwarz asked why and McCain replied that Schwarz had loaded three layers into the bin incorrectly and that the Carpenters had complained about it. Schwarz said that the Carpenters were the ones who were responsible for loading the pockets, not him. He further complained that he could not see the way the signatures were going, apparently referring to the alleged absence of the signature marks. McCain said that someone had said they saw Schwarz leaning on a broom that morning and that Schwarz only had two speeds, slow and stop. Schwarz said he thought the real reason for his discharge was his organizing activity. McCain said, "You go ahead and get your NLRB. I can get 10 employees to swear you are not a good worker." At this point, Schwarz walked away.

Schwarz admits he did not deny that he had loaded the bins incorrectly. Rather, he said that since he had been written up for loading pockets incorrectly, it was incumbent on the person loading the pockets to load correctly. He also told McCain no one had said anything to him and there had been no significant stoppage, to his recollection, and that based upon the written warning he had received, it seemed to him the primary responsibility for loading the pockets correctly lay with the person who was loading the pocket. He admits, however, that McCain was speaking to him regarding the proper loading of the bins. McCain testified that the Carpenters had complained to him about Schwarz on numerous occasions but does not recall for sure whether they complained on the day of Schwarz' discharge. Nor does he recall for sure telling Schwarz that day the Carpenters had been complaining regarding him loading bins incorrectly that morning.

There is no substantial disparity between the testimony of McCain and Schwarz as to this conversation. However, to the extent that Schwarz' version of the reason given by McCain for his discharge implies that Schwarz was discharged because the Carpenters complained. I credit McCain's version of what he said and his denial that complaints by the Carpenters were factors he considered in making the decision to discharge Schwarz. Further, I do not credit Schwarz that the binder did not make any significant stops that morning. It is apparent from his testimony that he is not very knowledgeable regarding bindery operations.

As to Schwarz' overall work performance, McCain testified that Schwarz made a number of mistakes, that he warned Schwarz he was making too many mistakes, and would have to watch what he was doing or he would be discharged. McCain specifically referred to Schwarz' work on the Perfect binder. The operation of the Perfect binder requires, in addition to the operator, employees to stack into bins forms consisting of several pages which are called signatures. Then other employes remove the signatures from the bin, jog them so that they are even, and fill the pockets that feed the Perfect binder. The machine then collates and binds the books and other employees are required to remove the bound books and stack them on pallets. From there, the books are moved to the three-knife trimmer where the edges are trimmed. Employees are then required to remove the finished books from a conveyor belt and box them or stack them on pallets.

According to McCain, Kirsten Carpenter, and Larry Carpenter, who is the operator of the three-knife trimmer, Schwarz was assigned to these various jobs and constantly made mistakes and/or worked so slowly doing all of them. Specifically, when he loaded the bins, he placed the signatures in the wrong direction and/or the wrong bin. When he was assigned to load pockets, he worked too slowly which resulted in the pockets not being kept filled which caused the machine to shut down. According to McCain, even prior to September

[14] Apparently Schwarz referred to this stripe to determine the proper placement of the signatures.

19 he had spoken to Schwarz about loading pockets backwards. On at least one occasion, McCain stopped the binder and showed Allen what he was doing wrong. He took some signatures out of the pocket and showed Schwarz the correct way to place them in the pocket and immediately thereafter Schwarz again placed signatures in the pocket incorrectly. McCain told him he was doing it wrong and he would have to watch what he was doing. McCain cannot recall the date of this incident.

According to McCain, Schwarz put signatures into the wrong pockets and did not jog the signatures properly. Jogging requires a certain amount of manual dexterity which apparently Schwarz did not possess. He was all thumbs; he could not move his hands properly and he held the forms too tightly, McCain would explain and show him how to do it correctly but Schwarz could not seem to catch on. McCain assigned Schwarz to stack books off the end of the binder. These books have to be stacked on a pallet in a pattern so as to prevent the books from tumbling off when the pallet is moved. Schwarz could not keep up. He could not remember the pattern. He would get flustered and sometimes take 8 to 10 books and throw them on the ground and just start over. All of the books that he threw on the ground would be ruined.

McCain also testified that when Schwarz was assigned to work at the end of the binder, he complained that the books were too hot (from the hot pre-melt glue used in the binder) and began to wear gloves, he stacked the books incorrectly and when he got begind he threw them on the floor. At this point McCain told him that if he threw any more books away McCain was going to throw him away. This was 3 to 7 days prior to the written warning. As to why he did not give Schwarz a written warning at this time, McCain testified that he was trying to give him a chance. He wanted to see if he could at least improve.

McCain testified that most of the employees under his supervision are instructed that they are to find something to do when the binder shuts off such as pick up scrap, empty barrels, load bins, sweep, or anything they could do that makes them at least look like they are working. He further testified that when the binder is down, most of the employees load pockets if there are pockets to be loaded, pick up scrap, move skids, and sometimes repair bad books. It depends upon what needs to be done and how severe the stop is. If it is going to be brief, perhaps 5 minutes, he usually tells employees to clean up any bad books on the floor and load pockets. If it is going to be 15 minutes or more, he will tell them to sweep up any bad books, empty barrels, repair pallets, etc. He would assign different jobs to different employees. When questioned as to whether he considered these to be "make work" tasks or important tasks, McCain testified that he considers them to be important, that, when the binder is running, if 10 pallets are needed to pack a job and there are only 6 in the shop, then somewhere they have to find 4 additional pallets at a point when they really do not have time to do so. Therefore, if there is downtime and pallets are available to be repaired or garbage bins to be emptied, it is important to get those tasks done so that they are not required to do it while the binder is operating.

McCain admits that it is common for new employees to make mistakes on the binder but asserts that the extent of the mistakes made by Schwarz was uncommon, that most employees learn to perform satisfactorily within a few days or a week at the most. Schwarz never achieved this level of performance. McCain also testified that he does not recall seeing any other employees standing around like Schwarz and that, on the occasions when he observed Schwarz leaning on his broom, there were jobs to be done such as repairing pallets, emptying garbage, sweeping the floor, and loading the bins. According to him, he never had any problems on any consistent basis with any other employee not doing anything productive when the binder was down.

Employees Kirsten and Larry Carpenter testified as to Schwarz' work performance. Kirsten Carpenter[15] testified that Schwarz was lazy, that she does not know whether it was just that he did not want to work or whether he just could not handle the job, but she does know that he did not work very well. Specifically he would fill the pockets of the bins backwards and when she would tell him he had done it incorrectly and try to explain to him what to do, he would respond that he did not care, that other employees could fix it. When Kirsten explained that the other employees did not have time to fix it, he would again say "They can fix it."

She also testified that a couple of times she was feeding pockets while Schwarz was filling the bins and half of her time would be spent rearranging her pockets. Further, there were a couple of times when the machine ran out because he had wrong signatures in the wrong bin. He would place the signatures in the bins backwards or he would put signatures in the wrong bin. She further testified that McCain places the new employees by experienced employees on the binder so she has observed Schwarz feeding pockets as she was working next to him. According to her, when she would try to show him how to do it, he would say that he had a better way. When she told him that if he did it the way she was instructing, it was a lot easier and would get the job done, he would reply, "No, I'll do it my way." Then the pocket would shut off because he did not get the signatures jogged properly and, when he placed signatures in the wrong pockets, the result was bad books and damaged books that could not be fixed.

Kirsten Carpenter also testified that she has observed Schwarz stacking books at the end of the binder quite frequently. He worked too slowly, and stacked the pal-

[15] Kirsten Carpenter was the observer for Respondent at the election. However, according to her, prior to the beginning of November she had not made up her mind about the Union. She was just debating whether to vote for or against it. She once had a discussion with Schwarz regarding the Union during the lunch period which turned into an argument. According to her, she does not actually remember what was said but she was very upset when she finished talking to him. He promised a lot of things and she said she did not see how he could do that, that she thought the Union would have to discuss it, would have to bargain with the Company and it would be decided there. She admits that she was angry with him during that discussion but denies that she felt any personal animosity towards him or that she wanted to see either him or Rodrigues discharged because of their union activity.

lets incorrectly. The books are supposed to be turned on the pallet every so often so that the spines are distributed on the pallet in a way that keeps the books from falling off the pallet when it is moved. Schwarz just could not seem to do it correctly. He would not remember to turn the books, consequently the layer of books would be very uneven and they would fall when the pallet was moved. She further testified that she has worked with Schwarz boxing books as they come off the trimmer. The books which come out of the three-knife trimmer are finished product. They come out on a conveyor belt about 3 feet wide and approximately 6 feet long. There is a table placed sideways to the rollers and an employee stands on each side of the table and boxes the books in certain patterns. One person stands in the front and another in the rear. Usually the front person will box more books because that person is closer to the belt. According to Carpenter, she has worked with Schwarz when he has been in the front position. The books would come out and he would get so jumbled that instead of picking up the books he would just shove them at her so that she would be doing twice the work, with stacks of books. When the stacks get too piled up, then Schwarz would just throw them on the floor. She told him that the books were finished product and that was what was paying both of their salaries. Schwarz said he did not care.

After receiving that response on several occasions, Carpenter admits that she finally got upset and told him "Don't throw them on the floor and don't push them towards me," that he had to at least try to pick up every other stack of books. After this, Schwarz stopped throwing the books on the floor. He would throw them on the table and would push the books towards Carpenter. She switched positions with him. The books were coming out fast and she was still boxing probably three boxes to his one. According to her, Schwarz could not keep up and she was rushing and it was really a mess. The books fell off the end of the roller. Finally, Schwarz stopped trying to place books on the pallet and just handed them to Carpenter. When asked how she would compare Schwarz' work performance to that of other new employees working on the binder and the trimmer, she testified, "There's no comparison. Allen was the worst, plus when you try and teach him something he just didn't want to. It was like he didn't want to learn. He just felt, I don't care, You know, who cares? Or let me do it my way. And there are some things that you just can't do your way. You just have to do it the set way until you figure out or get good enough to figure out doing it your own way."

Kirsten Carpenter testified in agreement with McCain that all employees are required to clean up. According to her, a number of times Schwarz would sweep in a 3-foot wide square and just keep sweeping that place for half an hour when in a half hour you could get the entire plant done with a couple of people. Other times, he talked to press employees or other employees. On occasion, according to Carpenter, she would say to Allen, "Let's get busy, everybody else is cleaning up." Schwarz would say okay and walk away. She admits she complained to McCain regarding Schwarz, that he did not like to work with him and wanted him to be discharged because he was incompetent and made her job a lot more difficult so that sometimes she would have to work twice as hard. She further testified that in the 2-1/2 years she has worked for Respondent in the bindery she has never observed any new employee having as much trouble feeding pockets on the Perfect binder as Schwarz nor make as many mistakes as he did.

Larry Carpenter operated the three-knife book trimmer which takes a paperback book, cuts the top, bottom, and front square and feeds it out on a conveyor system where other employees remove them and stack them on pallets or box them. Larry Carpenter testified that Schwarz had been assigned to stack a box of books as they come off the three-knife trimmer which he was operating. According to him, Schwarz did not do a very good job. He told Schwarz to turn the books and showed him how, but Schwarz never turned the books the way he instructed him. Rather, he would place the books however he could stack them with the end result that the books would fall. Carpenter explained to Schwarz several times how to perform the job properly. Nevertheless, his performance did not improve after the explanation. According to Larry Carpenter, Schwarz seemed to lack the coordination and speed to keep up with the books. On one occasion, Schwarz got so far behind that the second person could not keep up with the books and the books backed up into the machine causing a jam which resulted in a loss of 4 hours of production time. This happened about 2 weeks after Schwarz began his employment. At this point, Carpenter requested that Schwarz not be assigned again to the three-knife trimmer. At the time of this incident, Carpenter had no knowledge of any union activities among the employees. According to him, he first learned about the union activity when Schwarz had worked there for a little more than 3 weeks. Carpenter further testified that he never had as much of a problem training anyone on the three-knife trimmer as he did with Schwarz.

Carpenter also testified that he has seen Schwarz feeding pockets on the Perfect binder and that Schwarz had a lot of problems jogging signatures. According to him, when you are feeding pockets, you have to jog the signatures square to the front edge. Otherwise, the machine will not pick them up and feed them. Schwarz never seemed to be able to do that very well. When asked if he could tell what the problem was with Schwarz in this regard, Larry Carpenter testified that Schwarz would work twice as hard as he needed to and still he would not get the job done the way it should be done; he does not know whether it was lack of coordination or what, but Schwarz just did not seem to have the ability. Carpenter also testified that he has observed the binder shut off when Schwarz was feeding pockets and that he knows it was Schwarz who caused the machine to shut off because, when he would go over to fix it he would pull Schwarz' signatures out and rejog them, show him how to jog them and put them back in. Schwarz could not seem to jog them flat. Instead of being all jogged down square to the front edge, some of them would be

off a half-inch or better or would be turned the wrong way.

2. Conclusion

Where, as here, the determination as to whether a discharge was unlawful turns on motivation, the General Counsel is required to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980).

I find that the General Counsel has made a sufficient prima facie showing based on the animus indicated by Respondent's election campaign and the concurrent unfair labor practices found above; Respondent's knowledge that Schwarz was one of four persons identified by the Union as members of the employees' volunteer organizing committee for the Union and the timing of the discharge within less than 3 weeks after Respondent acquired such knowledge and within 3 days after Respondent received the Union's demand for recognition; the absence of a single, major precipitating incident; and the coincidence of the other three known members of the Union's employee organizing committee all being discharged during the course of the preelection campaign.

However, I also find that Respondent has rebutted this prima facie case by demonstrating that Schwarz would have been discharged even in the absence of the union activity. Thus, Schwarz commenced work for Respondent on September 8. Within a week, McCain began speaking to him regarding the mistakes he was making. On September 18, the day before he, Funesth, Sterling, and Rodrigues signed union authorization cards,[16] he was given a verbal warning for leaning on his broom, not following instructions, and improperly feeding the pockets of the Perfect binder. Nevertheless he continued the same conduct which led to the verbal warning. On two or three occasions, McCain told him he would be discharged if his work did not improve and on September 26 McCain gave him a written warning regarding his unsatisfactory work performance. Despite all this, Schwarz' work performance did not improve. In this regard, I credit the mutually corroborative testimony of McCain, Smith, and Larry and Kirsten Carpenter as to Schwarz' incompetence, particularly since the General Counsel adduced no evidence to refute it. Further, there is no evidence which establishes disparate treatment[17] and Schwarz' employment—only one month—was too short, absent a contrary practice, to support any adverse inference from McCain's failure to discharge him earlier. In fact, excluding his first 10 days of employment, a discharge at any time during his probationary period would have raised suspicions as to timing. Similarly, any adverse inference which might have been drawn from the absence of a major incident on the day of his discharge is negated by the continuing pattern of unsatisfactory performance. Accordingly, I find that Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Schwarz.

F. *The Discharge of Rodrigues*

1. Facts

Rodrigues was hired on June 17, 1980,[18] as a general cleanup employee. He was terminated on November 11, 1980, allegedly for incompetence and excessive tardiness and absenteeism. Initially he was supervised by Gary Shultes, the plant manager. His job was to clean the press and bindery areas, the warehouse and the courtyard and to gather and remove trash from those areas. Additionally, he did some painting and some light carpentry work. Around the first of September, when Shultes left Respondent's employ, Smith became his supervisor. About September 9, Rodrigues, who had been working a regular 40-hour shift, was transferred to part-time hours at his request. Thereafter, his working hours were from 12:30 to 5:30 p.m.

According to Smith, during the month of September, she spoke to him several times regarding mistakes he was making in performing his work such as using the wrong type of strap, failing to straighten up the pallets, not keeping boxes of paper full, not putting them on the right pallets, not keeping the aisles clear, not keeping the courtyard properly swept, and putting the wrong type of paper in the compactor. His frequent response, when she inquired as to why he had not done various things, was to say that he did not know he was supposed to do that. During this period, she made no notation of verbal warnings to be placed in his personnel file nor did she give him a written warning.

On October 3, Smith prepared a written schedule of Rodrigues' job duties which she gave to him. According to Smith, when she gave him the schedule they went over it item by item. She asked if he understood it and he said he did. She told him that she was getting tired of him saying he did not know he was supposed to do various things and the schedule should solve that problem. The schedule was as follows:

ED'S SCHEDULE

Throw away garbage between double doors & sweep.
Get all garbage around press & bindery into courtyard
Throw away—
Make sure pallets are straightened up.
Strap all pallets of cardboard, boxes & trash (with metal strapping).
Sweep press area & straighten up.
Make sure courtyard is swept up.

[16] There is no evidence that any authorization cards were signed prior to September 19.

[17] Contrary to the General Counsel, in the absence of evidence to establish that other employees had been similarly incompetent, I do not find it significant that neither McCain nor Smith could recall any other employee who had previously been discharged for incompetence.

[18] Rodrigues testified that he was hired on June 17 and a notation of his hire filled out by Shultes show 6/17/80 as the date of hire. Rodrigues' W–4 form and a notation made by Homes on his application shows May 28 as the date of hire. I find the testimony of Rodrigues and the notation by Shultes to be more reliable.

RULES

Always use metal strapping
Do not use MP pallets
Do not talk to employees leaving at 5:00 p.m.
Do not block isles [sic]
Do not leave any equipment outside.

Rodrigues agreed that Smith did give him a written list of duties and that the list contained no duties he had not previously performed under Shultes' supervision. On October 2, Smith prepared an employee performance evaluation of Rodrigues. The record is not fully clear as to why the evaluation was prepared at this point in time. Rodrigues testified that about September 15 he asked Smith if he was entitled to any benefits after 3 months because Shultes had said he was. Smith said, to her knowledge, no, but there would be a review made as to his progress. About a week later, he asked her if there was any new information about this review from a manager. Smith said she was still working on that. Smith testifies that on October 2 she had been his supervisor for about a month, and that she believes she prepared the evaluation because it was around the time to do it from a length of service standpoint. However, it was not the time for a 6-month evaluation and the record does not establish any practice of giving employees a formal evaluation a month after being assigned to a new supervisor. On its face, the evaluation indicates that it is an evaluation of a new employee. No rating was given for the various performance factors listed on the evaluation form. Under the heading "General comments as to employee's strengths, weaknesses and action taken to improve job performance," Smith wrote, "I feel I cannot give Ed a fair review since I have only been his supervisor for about 1 month. When Ed's next review comes up I feel I can fairly evaluate his job performance." She discussed the evaluation with Rodrigues on October 29 at which time Rodrigues wrote in the following comment: "I look forward to a better review in the future. Now, I have a written schedule."

On October 1, Rodrigues was 10 minutes late. On his daily timesheet for that date opposite the start time, Rodrigues made a notation, "No break at 3:00." Apparently this was to compensate for arriving 10 minutes late to work. On October 2, he was 1-1/2 hours late. On October 2, Smith spoke to him about his tardiness and about not taking his break. She told him not to skip his breaks and that if he was going to be 15 minutes late or more he should telephone her. On October 3, he was a half-hour late; On October 6, he was 40 minutes late; on October 7, he was 15 minutes late; and on October 8, he was a half-hour late. He did not call in on any of these occasions. October 9, Smith gave Rodrigues the following verbal warning:

VERBAL WARNING FOR ED RODRIGUES

Ed is not showing up for work on time. He is up to 45 minutes late at a time without calling in.

I am also warning Ed about a metal device I found that is quite dangerous. I was told that Ed has been seen with this object. I don't want to see him or anybody else with this object.

Ed is leaving piles of garbage in the courtyard & not picking it up. This is his job and I expect him to do it.

According to Smith, she told Rodrigues that he has been coming in late too often and had not been calling in. She told him that was not a good situation and the Company did not want it. She also told him that she had found the metal object in the pallet, that it could have really hurt someone, and that he had been identified as the person having the object. Rodrigues said he had found one and he had thrown it away. Smith told him she was not accusing him of throwing the object or of having it but if he ever found one again she wanted him to bring it to her, she did not want to see him or anyone else with one. She also told him that if he saw anyone else with one to tell her because it was such a dangerous article. He said fine and agreed that it was a dangerous article.[19] She told him he had been leaving piles of garbage in front of the compactor and that he was supposed to keep that courtyard area clean. He said he did not know he was supposed to do that. She said it was on his list and he said, "Yes, you are right." Smith also testified that she told him if he did not improve, she would have to give him a written warning.

Rodrigues testified that he was given two verbal warnings by Smith in August. This is clearly incorrect inasmuch as Smith did not become his supervisor until the day Shultes left Respondent's employ, a date which the parties stipulated was September 14. According to Rodrigues, the first verbal warning was for tardiness only. He does not recall exactly what Smith said but she did complain about the days that he had been late reporting to work. He does not recall whether Smith told him at this time that, if he ever had to be late or absent, he was to call in. He does recall that this was discussed at some point in time and that he was aware this was Respondent's rule. The second warning, according to him, concerned his work quality—specifically, cleaning up the courtyard area. He does not recall specifically what was said. However, Smith did ask him why the area had not been cleaned. He thinks he gave her a reason. He does not recall what her respnse was but she seemed to be dissatisfied with his explanation. He also testified that it was in the latter part of the day that Smith asked him why the area had not been cleaned and that he had not cleaned the area because he had been attending to other duties to which he gave priority—emptying the trash bin used by the pressmen. According to Rodrigues, these had to be constantly kept empty so he had not cleaned up the debris in the driveway. He agreed that the area was "quite a mess."

As set forth above, on October 17, Rodrigues was given a wage increase of 25 cents an hour. On October 27, Smith gave Rodrigues a written warning. The warn-

[19] The metal object, known as a charade, was described by Rodrigues as a sharp star-shaped metal object used as a weapon in one of the martial arts. It is thrown like a frisbee with the object of embedding it in the target.

ing report shows that it was for work quality and that a previous verbal warning had been given on October 15. The statement written by Smith on the warning report reads:

> Ed was told during the week of 10–20 to 10–25 to clean the compactor on 10–27–80 this was still not done. Also on 10–27–80 Ed was throwing away books. The problem was that he was throwing them away one by one seeming to make a game out of his job. Ed is not performing his assigned duties satisfactorily.

Rodrigues signed the warning report and indicated thereon that he concurred with the statement written by Smith.

According to Smith, she had instructed Rodrigues to clean around, and in back of, the compactor and to clean the courtyard. Sometime during the afternoon of October 27, as she was standing on the loading dock, she observed him, for at least 10 minutes, picking up damaged books from a bin and throwing them away one by one. About every couple of books he would flip through the pages and read some portion of it.[20] She yelled at him, "Ed you can't do that. Start throwing them away faster." To which he responded, "But this is really interesting." Smith testified that this response really upset her and she prepared a written warning. According to Smith, when she gave him the written warning she told him she had asked him to clean up around the compactor and she noticed that it was still not being done. She told him she was very unhappy with the way he was throwing away the books, that she had watched him for approximately 10 minutes or so, and he was not handling that efficiently, throwing the books away one at a time and glancing through them. She said she was very unhappy about this and would not tolerate him continuing to do so. She further told him that, in general, he was not performing his assigned duties up to par, and if his performance did not improve he would be discharged. She also told him if he disagreed with anything, he could check the box on the warning report which said that he disagreed and then he could write anything he wanted to on the warning report. Rodrigues testified that Smith gave the written warning to him around 1:30 p.m. He does not recall what they discussed.

In October, Rodrigues was subpoenaed to testify in the representation hearing in this matter. On October 22, he showed the subpoena to Smith. Smith said she did not understand why they wanted Rodrigues. Rodrigues said he had never been subpoenaed before and he did not know what it was going to be about but he wanted to inform her that he might be a bit delayed that next day getting to work. According to Rodrigues, Smith said she wanted him to be there at his regular starting time regardless. Rodrigues testified that he did not in fact testify at, or attend, this hearing.

On Thursday, November 6, Rodrigues did not report to work and did not call in. According to Smith, when he came to work the following day she told him that he already had problems with his attendance and that she just could not put up with much more of his poor attendance. As usual, he agreed with her assessment of the situation but she does not recall that he offered any excuses. However, according to her, Rodrigues usually offered one of two excuses—either he had missed his bus or had to take his brother to the doctor.

On Monday, November 10, Rodrigues reported to work 1 hour late. He neither called in nor did he report to Smith upon his arrival at work. He testified he did not see Smith when he arrived so he proceeded with his job duties. He further testified that he boarded the wrong bus. When he realized his mistake and left the bus he was about a mile and a half from Respondent's plant so he proceeded to walk to the plant. When asked if it took him an hour to walk a mile and a half, Rodrigues testified, "No, I was already late from getting on a later bus. And when I realized my mistake, that I was on a 303 instead of a 306, I presumed it was most important just to start to work. And I did not have any change to make a phone call. That's why I did not call that day." Rodrigues was then shown his prehearing affidavit dated November 25, in which he claimed that he did not call to say he would be late because he was on his way and he thought it best to get there as soon as possible rather than taking the time to call. His prehearing affidavit further recites that when he got to work he saw Smith but she did not say anything to him at that time. He then testified that he seemed to remember that the reason he did not call in was both because he had no change and because he thought it was important to get to work as soon as possible; and that when he arrived at work he did see Smith, but she did not approach him, they just made eye contact.

Later that day, Rodrigues testified, about 1:45 p.m. Smith told him she wanted to speak to him and they went into the small luncheon area. She closed the door and said, "This is going to be your last day here." Rodrigues asked why. Smith said, "What time did you get in here to work?" Rodrigues replied, "I got in late because I got on the wrong bus." Smith said, "Well, I've been getting complaints about your work," and further stated that Rodrigues had been late before. To which Rodrigues replied, "Yes, I'm aware of that, but I've never been this late." Rodrigues then apologized and said he was looking for another job in the area because he had heard that a union was organizing in the plant and he thought if he remained in Respondent's employ he would have to join the Union. Smith said, "Well, I don't know if that's true. But it's probably part of the contract." He does not recall whether Smith explained exactly what complaint she had received about his work if he asked her what the complaints were, nor does he recall if there was any discussion of anything that had happened the previous week.

Rodrigues admits that he had not been looking actively for a job, that he had been making phone calls and asking people, but he was not going for employment interviews. He further testified he does not know why he made the statement to Smith about the Union and seek-

[20] Prior to this date, she had observed him doing the same thing on two or three previous occasions and had told him that he had to throw them away faster and more efficiently. He said okay.

ing other employment. However, his prehearing affidavit states:

> I had been playing dumb about the union around supervisors like Smith and Jim McCain. And at the end of the conversation, I continued to do so. I did so at this time to see if she would tell me what she knew about the union and who was involved. I told her I would have been looking for another job sooner or later, because I had heard a union was trying to get into the plant. She asked me why I was looking for another job. I said because I had been told that if the union came in, I would have to join. She said she didn't know about that. But she guessed it was true. It would be part of the contract.

He further admitted that he was attempting to get Smith to tell him she knew he was involved with the Union.

Smith testified she spoke to Rodrigues in the breakroom around 3 p.m. According to her, she told him his absenteeism and tardiness had not improved but rather seemed to be getting worse, insofar as she would tell, that they could not use employees like that at Mariposa Press and she could have to let him go. She further told him his general work habits and productivity were not good enough. He said, "I think you're right and besides I'm already getting another job." He said he was going to get some other kind of job with some electronic place or something like that. She does not recall if he gave her a reason for being late that day nor does she recall whether he said anything about taking the wrong bus or missing the bus.

Smith further testified that her statement to Rodrigues with regard to his work performance referred to him being very slow and very erratic in his work habits. For example, when he swept between the double doors near the courtyard it would take a half-hour rather than the 5 minutes it should require. Part of the press crew is stationed on that side and he would yell back and forth to them. He was supposed to work until 5:30 but he did not accomplish very much after 5 p.m. when the other employees' shift ended. As other employees walked through the area to leave, he talked to them and worked very slowly so he could maintain a conversation. Further, he was always going from one thing to the other very quickly without finishing jobs. He still was not keeping the courtyard area clean nor was he keeping the pallets stacked properly or strapping the boxes tightly enough. Also, he was continually leaving baskets full of paper, etc., in the aisle.

Based on the above, Respondent contends that Rodrigues' discharge was justified. However, the critical question is not simply whether his discharge may have been justifiable, but rather would he have been discharged absent his union activity. *Wright Line*, supra. Viewed from this perspective, whether his discharge was justified for legitimate business reasons is only one of the factors to be considered rather than the sole factor. Respondent's rules and procedures provide, inter alia, that "the employee's immediate supervisor must be notified prior to the beginning of a work day of a non-attendance due to sickness or emergency" The rules and procedures contain no provision as to tardiness. As to Respondent's practice, there is no evidence in the record of any employee being discharged because of a tardiness problem.

However, Smith was questioned as to two employees who had an absenteeism problem, Andy Navarro and Derrex Nash. Nash quit his employment and Navarro was discharged.[21] Respondent's records show that Nash overslept and was 2-1/2 hours late on October 1. He did call in that day. He had unexcused absences on October 29 and November 5 for which, according to Smith, he received a verbal warning at least once. However, she placed no written notation of this warning in his file. He was also absent without calling in on November 10 and 11. On either November 11 or November 12 Smith placed a notation on Nash's November 11 daily timesheet, "Paula, please prepare his last check. He will pick it up on Friday." According to Smith, even though she thought Nash was a very good employee and she wanted to keep him she felt that she could not continue to tolerate his poor attendance. She did decide to terminate him on November 11. However, he telephoned and quit before she made out his termination papers. She does not recall whether when she talked to him she told him he was discharged and simply did not write "discharge" on his termination slip.

On October 6, Andy Navarro was not at work and did not call in. On October 8 he was given a written warning for attendance which indicated that he had been given a verbal warning on October 3 and states, "Andy was told that he must call when he cannot come to work. On 10–6–80 he did not call in. This is the second time this has occurred." On November 17 and 18, Navarro was absent and did not call in. On his daily timesheet for November 18 Smith wrote the notation, "Last day." Navarro was also absent on October 7 and November 3. Smith testified that Navarro was a former warehouse supervisor who had lost his job through no fault of his own and had come highly recommended by his previous employer. She considered him a very good worker and did not want to lose him.

Smith further testified that when she is confronted with an employee who is tardy or has unexcused absences, she considers several factors in determining whether she should discipline the employee. She tries to give everyone a chance. For one tardy, she does not get upset at anybody. She does consider though whether the employee is totally unproductive and whether that affects the production of other employees, although, even for a person like that, she does not fire them because they were late or had an unexcused absence for 1 or possibly 2 days. As to Navarro, even though she wanted to keep him, she felt she could not condone his conduct any further without being unfair to other employees. Navarro was still a probationary employee.

Smith testified that during the time Rodrigues was under her supervision she was trying very had to work with him and to motivate him to do a better job. How-

[21] Smith testified that she has discharged four employees—Rodrigues, Navarro, Teresa Allen, and Thomas Hendry. Both Allen and Hendry were discharged for poor productivity.

ever, she did not seem to be having much success and he probably would have been discharged for incompetence even if there had not existed the attendance problem. She admits that the attendance problem hastened his discharge. She also testified that Rodrigues' poor attendance caused a somewhat greater problem than Navarro's attendance. Navarro worked in the warehouse and there are three or four employees that are basically trained in each aspect of shipping. So if one is absent, his work is just covered by the other employees. On the other hand, Rodrigues was the only person who regularly performed the duties assigned to him. If he was absent, part of his work could be covered with little difficulty, but with the press running the press area gets bogged down with papers which is the reason Respondent has a special person just for that job. If Rodrigues was not there, Smith would have to assign someone else to the job and go through a short training session with them to show them where to put the different papers.

2. Conclusions

The General Counsel argues that "based upon the animus displayed by Respondent's active anti-union campaign and other unlawful actions, the timing of Rodrigues' discharge just prior to the election, his known position as an employee organizer and the weak, inapposite reason precipitating his discharge, the General Counsel has established a *prima facie* case in support of Rodrigues' unlawful termination." The General Counsel further argues that Respondent has failed to rebut this prima facie case inasmuch as his attendance and tardiness allegedly precipitated his discharge and the evidence shows disparate treatment of Rodrigues as to absenteeism and tardiness.

I agree that, based on the general animus displayed by Respondent, the unfair labor practices I have found above, the timing of the discharge, Rodrigues' status as the sole known employee organizer remaining in Respondent's employ is sufficient to establish a prima facie case of unlawful discharge. However, I do not agree that Respondent had engaged in disparate treatment of Rodrigues as to his attendance. The General Counsel's contention as to disparate treatment seems to be based on the argument that absenteeism is somehow more egregious than tardiness and that the improvement in Rodrigues' attendance between October 8 and November 6 was not given the consideration that it should have been given.

This argument is not persuasive. Unannounced tardiness can be just as disruptive as unannounced absenteeism for an employer has no way of knowing whether or not the employee plans to report to work, and may be required to make arrangements to cover the employee's work load just as would be necessary if the employee remained absent for the entire shift. Further, it is not unreasonable for an employer to conclude that any previous "improvement" in his attendance was negated by his unannounced absence on November 6 and his tardiness of 1-1/2 hours on Monday, November 10, particularly since Smith had warned him on the previous Friday that she could not tolerate much more of his poor attendance. In the circumstances, I do not find that the attendance record of Nash and Navarro were significantly worse than that of Rodrigues. I credit Smith that she had decided to terminate Nash.

Rodrigues does not deny Smith's testimony as to his work performance, or that he received the counseling and warnings described by Smith. No inference can be drawn from her failure to discharge him earlier because of his poor work performance since he had worked under her supervision only since around the first of September. I credit Smith that she decided to discharge Rodrigues because of his poor work performance coupled with his poor attendance record. In this regard, I note that she has discharged other employees for poor productivity and, as noted above, for poor attendance. I further note that notwithstanding that Rodrigues was tardy for one-half hour to 1-1/2 hours on 4 days and 10 and 15 minutes on 2 days within a period of 1 week, and that this record was established within the 2 weeks following Respondent's notification that he was one of four employee organizers for the Union and during the period of time when the other three employee organizers were discharged, Rodrigues was not discharged in October. Such forbearance does not appear to be the conduct of an employer bent on ridding itself of a union activist.

In all of the circumstances, I find that Respondent has demonstrated that Rodrigues would have been discharged in the absence of any union activity. Accordingly, I find that Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Rodrigues.

G. *The Alleged Refusal to Bargain*

1. The unit

The complaint alleges, Respondent admits, and I find that the appropriate unit is:

> All regular part-time and full-time production and maintenance employees of Respondent at its Concord, California location, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The General Counsel contends that, during the period September 30 until October 15, the Union was the majority representative of the employees in the appropriate unit as evidenced by valid authorization cards. Of the nonsupervisory employees who performed unit work, only two—Karrie Vaught and Becky Steiner—are in dispute as to their inclusion in the unit during their term of employment. The General Counsel contends that Steiner and Vaught are casual employees who should be excluded from the appropriate unit and Respondent contends that they are regular part-time employees who should be included in the unit. Both of them are classified as "on-call" employees who are paid a special "on-call" rate of $4 an hour. As on-call employees, they are offered work whenever there is work available and they can either accept or decline. During 1980 Steiner, who was hired in 1979, only worked 2 days—8-1/4 hours on September 2 and 6-1/4 hours on September 25.

Karrie Vaught, a high school student whose mother is regularly employed by Respondent, worked on the day

of the election and worked prior to the election in 1980 as follows:

September 2	8.5 hours
September 25	7.9 hours
September 27	8 hours
October 25	8 hours
November 8	8 hours
November 11	5 hours
November 15	8 hours
November 22	8 hours
November 26	9 hours

Whether students are included in a bargaining unit with other employees depends upon certain factors which the Board has set forth in *Shady Oaks*, 229 NLRB 54, 54–55 (1977), as follows:

> At least with respect to the commercial sector, the Board has traditionally included part-time students in units of full-time and regular part-time employees where the students have a substantial and continuing interest in the wages, hours, and working conditions of the other unit employees. In determining whether students have the requisite community of interest with other unit employees, the Board conducts an analysis along the same lines that it normally employs when determining "regular part-time" status. Under this analysis, the Board takes into consideration such things as: (1) regularity and continuity of employment; (2) tenure of employment; (3) similarity of work duties; and (4) similarity of wages, benefits, and other workings conditions. [Footnote omitted.]
>
> Where students' employment is shown to be sporadic, temporary, or seasonal in nature or where it is shown that students are treated differently with respect to wages, benefits, and other working conditions, the Board excludes them from the regular full-time unit. [Footnote omitted.]
>
> Where, on the other hand, students' employment is regular and of substantial duration and the students are treated the same as other unit employees, the Board includes them in the unit. [Footnote omitted.]

Here, although Steiner, who is not a student, and Vaught work under the same supervision as unit employees, presumably doing unit work, they are paid a special rate of pay and they work on an irregular basis at their convenience. In these circumstances, I find that they should be excluded from the unit.

2. Alleged majority status

As of October 1, the Union had signed authorization cards from 15 of the unit employees and, by October 6, it had obtained authorization cards from 3 additional employees. Respondent disputes the validity of the cards signed by Ken Thorsen, David Gonderman, Wayne Lowe, Gary Marin, Derrex Nash, Marc Elliot, and Michael Foltz. The basis for Respondent's position as to these disputed cards is that the solicitors—Ziolkowski and/or Schwarz—only told card signers that the cards were to get an election and failed to inform them that the cards designated the Union as their bargaining representative. Respondent argues that this was deliberate concealment and that such "misrepresentation" can be cured only if the employees read the cards, a fact which Respondent contends was not affirmatively established on the record. Additionally, Respondent argues that Foltz' authorization card should not be counted because he was "obviously misled" as to the purpose of the card;[22] and that the cards of David Gonderman, Thorsen, and Lowe should not be counted because they were under the influence of alcohol.

I find no merit in these arguments. Respondent misstates the law. However, even assuming, arguendo, there exists some requirement, in the circumstances, that it be affirmatively established on the record the authorization cards were read by the card signers, the facts do not support Respondent's position. The wording of the cards is as follows:

AUTHORIZATION FOR REPRESENTATION
LOCAL UNION NO. 14 SUBORDINATE TO THE INTERNATIONAL PRINTING AND GRAPHIC COMMUNICATIONS UNION
AFL–CIO–CLC

Gentlemen:

I, _____, hereby make application to your organization, and designate and delegate the officers of this Union as my chosen representatives for the purpose of negotiating wages, hours and working conditions.

My address is _____
City _____ Zone _____
Telephone No. _____
I am employed at _____
(Job Title) _____
I am receiving $_____ per hour
Shift _____ Dept. _____
Signed _____

The blanks on the cards in question were filled in[23] and the designation is in close proximity thereto. Thus it is apparent that the card signers must have read the cards.

As to Lowe, Thorsen, and David Gonderman, Gonderman admits that he had read the card earlier. Lowe testified that he read the card before he signed it[24] and neither he nor Thorsen claim that, at the time they signed their cards, they were incapacitated by alcohol. The only evidence as to intoxication comes from Gonderman. He testified that he was not intoxicated but he thinks that Lowe was. I find this insufficient to establish that any one of them was incapable of understanding the

[22] This is abused on Foltz' alleged statement on October 17 that he did not know the card designated the Union as his collective-bargaining representative, but rather thought the card was just to have an election.

[23] The card signed by David Gonderman is undated. However, the evidence establishes that the card was signed on September 22.

[24] Additionally, I credit Ziolkowski and Gonzales, another union representative, that Ziolkowski also explained the representational purpose of the cards.

purpose of the card as set forth on its face. As to Foltz, he testified that he read the card prior to signing it and that the solicitor told him the card was to help bring a union into Respondent's facility.

It is well established that if an authorization card is unambiguous—i.e., states on its face that the signer authorizes the union to represent the employee for collective-bargaining purposes and does not speak of an election—it will be counted in the determination of majority status unless it is proved that the employee was told the card was to be used *solely* for the purpose of obtaining an election. Such explicit and unambiguous designation is not negated by statements by the solicitor to the effect that (1) the cards would be used to get an election; (2) the signer had a right to vote either way, even though he or she signed the card; or (3) the card would be kept secret and not shown to anyone except to the Board in order to get an election. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Walgreen Co.*, 221 NLRB 1096 (1975); *Levi Strauss & Co.*, 172 NLRB 732 (1968) *General Steel Products*, 157 NLRB 636, 634–648 (1966); *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963).

As stated by the Supreme Court in *Gissel:*

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% of the employees when an employer rejects a bargaining demand and insists that the union seek an election. We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else. [395 U.S. at 606–607.]

Thus, neither the facts nor the law support Respondent's position.

Based on a full consideration of the evidence and of the arguments advanced by Respondent, I find that the authorization cards herein are unambiguous and that the evidence does not establish that the designation clearly stated thereon was negated by any statements of the solicitors. I further find that, by October 1, the Union had received valid signed authorization cards from 15 of the 27[25] employees in the appropriate unit and that it maintained its majority status through October 12. On October 7, the date Respondent received the Union's demand for recognition, the Union had valid signed authorization cards from 14 of the 24 unit employees.

[25] Kathy Seybolt's hire date is incorrectly set forth on the stipulated lists of employees. Other evidence establishes that she was hired in 1979.

3. The appropriateness of a bargaining order

The complaint alleges that, by its unlawful conduct set forth above, Respondent has violated Section 8(a)(1) and (5) of the Act. The General Counsel argues that Respondent's conduct was calculated to, and did, undermine the Union's majority.[26] The record establishes that, by October 1, the Union had secured authorization cards from a majority of the unit employees and had notified Respondent as to the identity of employee organizers. Respondent responded with its October 3 letter to employees acknowledging that it was aware of the Union organizational efforts. The letter further announced, for the first time, an "open door" policy whereby employees could bring their problems directly to Respondent's president and other agents, thus obviating any necessity for union representation.

On October 15, Ron Murphee was unlawfully promoted to full-time status with the accompanying wage increase and grant of benefits; on October 17 Ed Rodrigues and Kathy Seybolt were unlawfully granted wage increases. On October 17 and November 24, in speeches to employees, Respondent's president continued to urge employees to take advantage of the "open door" policy and deal directly with Respondent. During the October 17 and/or November 24 meetings and certain of its campaign letters to employees, Respondent solicited grievances from employees and unlawfully promised to correct any inequities found, including a promise to consider establishing a dental plan in the future; threatened employees with loss of employment; and induced employees to revoke their union authorization cards.

Thus, Respondent, while refusing to recognize the Union as the majority representative of its employees, engaged in a course of unlawful conduct designed to induce employees to withdraw their support from the Union and to convince them that their grievances would be redressed through direct dealing with Respondent and that union representation would be of no advantage to them. This conduct, particularly where, as here, it is directed toward a small unit, directly inhibits activity in support of the Union, and the threat of loss of employment strikes at the very heart of one of the principal reasons employees are apt to seek union representation—job security. Such conduct is likely to have had a significant impact on the employees' freedom of choice rendering the election an inaccurate register of employee desire as to union representation.

Further, the nature and extent of Respondent's unfair labor practices make it unlikely that their effects can be expunged by traditional Board remedies. I therefore conclude that Respondent's conduct has undermined the Union's majority and rendered doubtful or impossible the holding of a free and fair second election and that the employees' sentiment, once expressed through authorization cards, would, on balance, be better protected by the issuance of a bargaining order than by traditional reme-

[26] I have considered and rejected Respondent's argument that the Union's majority was dissipated through substantial employee turnover rather than by Respondent's conduct. *Jamaica Towing*, 247 NLRB 353, 355 (1980).

dies. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *El Rancho Market*, 235 NLRB 468 (1978).

In these circumstances, I find that Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the majority representative of its employees while coterminously engaging in conduct which undermined the Union's majority status and prevented the holding of a fair election. *Trading Post, Inc.*, 219 NLRB 298 (1975).

IV. THE REPRESENTATION CASE

A. *The Challenges*

The challenged ballots involved herein were cast by James McCain, Kathy Smith, Edward Rodrigues, Allen Schwarz, Robert Sterling, Becky Steiner, and Karrie Vaught. The sole issue as to McCain and Smith is their supervisory status. Inasmuch as the parties stipulated, and the record establishes, that Both McCain and Smith are supervisors within the meaning of the Act, I shall recommend that the challenges to their ballots be sustained. I shall also recommend that the challenge to the ballot of Robert Sterling be sustained inasmuch as I have granted the motion of General Counsel to withdraw the allegations of the complaint relating to his discharge. As to Rodrigues, Schwarz, Steiner, and Vaught, I have found above that the discharges of Rodrigues and Schwarz were not violative of Section 8(a)(1) and (3) of the Act, and that Steiner and Vaught should be excluded from the unit. Accordingly, I shall recommend that the challenges to their ballots be sustained.

B. *The Objections*

As set forth above, the Union filed timely objections to the election. These objections are as follows:

> I. The Employer violated Section 8(a)(1) of the National Labor Relations Act.
>
> II. The Employer violated Section 8(a)(3) of the National Labor Relations Act.
>
> III. The Employer violated Section 8(a)(5) of the National Labor Relations Act.
>
> IV. The Employer granted Employees fringe benefits in order to discourage their Union activities.
>
> V. The Employer promised Employees fringe benefits in order to undermine their support for the Union.
>
> . . . .
>
> VII. The Employer made substantial misrepresentations of fact and law regarding the Union at a time when the Union was unable to respond to those misrepresentations.
>
> VIII. The Employer unlawfully terminated Employees in order to undermine the Employees' support of the Union.
>
> . . . .
>
> X. The Employer unlawfully interrogated Employees regarding their support for the Union.
>
> XI. The Employer unlawfully threatened Employees because of their support for the Union.

The critical period is from October 6, 1980, the date the petition was filed, to November 26, 1980, the date of the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961).

With the exception of Objection VII, these objections are based on the same conduct alleged in the complaint. Objection VII is based on Respondent's alleged misrepresentations as to wage rates if the employees selected the Union as their collective-bargaining representative. The specific conduct involved concerns the statements made by Goldman at the Monday, November 24, meeting that most of its employees were apprentices or trainees; under the Union's contracts, a certain number of years of working as an apprentice or trainee is required before one becomes a journeyman; and, in this interim, these employees would receive only a graduated percentage of journeyman wages. Earlier, by individual letters mailed to employees on Thursday, November 20, Respondent made this same point on an individualized basis.

Thus, the letter to each individual employee contained a comparison of the employee's current wage rate to what the employee's wage rate would be if this graduated percentage was applied to the applicable wage rate set forth in a wage schedule posted on the bulletin board in Respondent's facility. In some instances, this adjusted rate was less than the employee's current wage rate and, for some, it was even less than minimum wage. Respondent does not claim it knew the source of the posted wage schedule and Homes testified that he assumed the schedule had been posted by someone connected with the Union. Homes admits he did not attempt to ascertain the specific contract from which the posted schedule was taken, even though Respondent was a member of the Printing Industries of Northern California[27] and presumably had access to those contracts with which the organization was concerned.

Union Representative Ziolkowski testified that the posted wage schedule was taken from the Union's industrial contract which is executed by a number of small employers in the area and covers press and prepress employees as well as other employees, including bindery employees. This contract sets forth a progressive wage rate for "Pre-Press and Press" employees and also for "Assignments other than pre-press and press." The graduated percentages set forth in this contract for the latter are as follows:

Assignments other than pre-press and press

Up to 6 months experience	80% of appropriate rate
Up to 12 months experience	90% of approporiate rate
Up to 18 months experience	95% of appropriate rate
Up to 24 months experience	100% of appropriate rate

[27] This is an organization of employers in the printing industry. At least one of the contracts in Respondent's possession was negotiated by this organization. It is unclear whether the industrial contract was also negotiated by the organization.

The graduated percentage scale utilized by Respondent came from a contract which covers only prepress and press employees and which provides for wage rates for such employees which are substantially higher than those in the industrial contract.

The effect of Respondent's conduct is illustrated by the information given Annie Llamas, an employee with almost 14 months' seniority whose job duties, according to Homes, would place her in the classification of specialty worker. She was sent the following information:

November 20, 1980

Name: ANNIE LLAMAS
Curent Rate: $4.50
Posted Rate: $3.20

Note: The posted rate is for SPECIALTY WORKER adjusted by 66% for your length of service.

If the 95-percentage from the appropriate contract had been applied, the posted rate would have been $4.61 as compared to her current rate of $4.50. Thus, Respondent has clearly made misrepresentations.

The Board's policy as to the effect of a misrepresentation on an election is articulared in *Hollywood Ceramics Co.*, 140 NLRB 221, 224 as follows:[28]

> [A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. [Footnote omitted.]

Since the misrepresentations herein concern wage rates, a matter of utmost concern to employees, I find them to be substantial and ones which, if not rebutted, would be likely to have a significant impact on the election. See *Information Magnetics Corp.*, 227 NLRB 1493 (1977). In reaching this latter conclusion, I have fully considered the possibility that the interchange during one of the November 24 meetings, regarding the adjusted rate shown for some employees being below the minimum wage, could have been sufficient to put the employees present on notice that Respondent was distorting the facts. However, this session was attended by less than half of the employees, whereas Respondent had sent the misleading information to each individual employee and later reinforced it through the November 24 speeches, illustrating the point with visual aids.

I find that, based on the manner in which wage comparisons were made for each individual employee, the employees could reasonably conclude that Respondent was not engaged in idle generalization, but rather had carefully gathered the relevant facts for this presentation. In these circumstances, I find the employees could reasonably conclude that the information was obtained from a union contract and was somewhat authoritative. I further find that, even though Goldman disavowed any intent to indicate what their wages would be with union representation, the employees could reasonably expect that this information reflected the Union's "track record" as to wages it had secured for represented employees performing work similar to that performed by unit employees.

The remaining question is whether the timing of Respondent's misrepresentations afforded the Union sufficient opportunity to make an effective reply. Ziolkowski contends that it did not. He creditably testified that he first learned of the meeting on the evening of November 24 when he spoke to Llamas on the telephone. However, her account of what transpired there did not reflect that Respondent had made material misrepresentation, and he did not receive a copy of the November 20 letter until November 25. Thus, it was during a meeting with employees on the evening of Tuesday, November 25, the night before the election, that he first learned of the misrepresentation. Only a few employees attended this meeting and, according to Ziolkowski, he did not thereafter have sufficient time to prepare a reply and have it reproduced prior to the election which was held on Wednesday, November 26. On election day, the employees commenced work between 7 and 8 a.m. and the election was held from 11:45 a.m. to 1:15 p.m. I therefore recommend that Objection VIII be sustained.

The remaining objections are based on the same conduct as are the allegations of the complaint which I have considered above. Since I have found that Respondent did not unlawfully terminate or interrogate employees, I shall recommend that Objections II, VIII, and X be overruled. However, I have found that, during the critical period herein, Respondent, by the conduct alleged in Objections I, IV, V, and XI, violated Section 8(a)(1) of the Act, thereby undermining the Union's majority and preventing the holding of a fair election, while coterminously refusing to recognize and bargain with the Union as alleged in Objection III. Accordingly, I shall recommend that Objections I, III, IV, V, and XI be sustained.

As I have found that said unlawful conduct interfered with the employees' exercise of a free and untrammeled choice in the election held on November 26, 1980, undermined the Union's majority, rendered doubtful or imposible the holding of a free and fair second election, I shall recommend that the said election be set aside and the petition in Case 31-RC-1175 be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On October 1, 1980, the Union was designated as the majority representative for purposes of collective bargaining of Respondent's employees in the unit described as follows:

[28] This policy was abandoned in *Shopping Kart Food Market*, 228 NLRB 1311 (1977), but after a brief period was adopted in *General Knit of California*, 239 NLRB 619 (1978).

All regular part-time and full-time production and maintenance employees of Respondent at its Concord, California location, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The aforesaid unit is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Commencing about October 7, 1980, the Union has requested, and is requesting, Respondent to bargain collectively with it as the exclusive bargaining representative of the employees in the unit described above with respect to wages, hours, and other terms and conditions of employment.

5. By refusing to recognize and bargain with the Union as the majority representative of its employees while coterminously engaging in conduct which undermined the Union's majority status and prevented the holding of a fair election, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. Respondent has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act by soliciting grievances from employees and implicitly promising to correct any inequities found; by threatening employees with loss of employment if they selected the Union as their collective-bargaining representative; by inducing employees to revoke their union authorization cards; and by transferring an employee to full-time status with accompanying benefits and wage increase; and by granting certain other employee wage increases in order to induce them to withdraw or withhold their support from the Union.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not engaged in the other unfair labor practices alleged in the amended consolidated complaint herein.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Airport Bus Service, Inc., Debtor-in-Possession *and* Louis Lyons

Airport Bus Service, Inc., Debtor-In-Possession, and its successors and alter egos Holland Industries d/b/a Dell Bus Co., Inc., Maintenance and Manpower, Inc., Cross County Coach Corp., Shortway Lines Inc.,[1] and Shortway Bus Charter Corp., its wholly owned subsidiaries, and Fugazy Continental Corp. of Connecticut *and* William Moser and Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract and Local 819, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract

Airport Bus Service, Inc., Debtor-in-Possession, and its successors and alter egos Holland Industries, Inc., d/b/a Dell Bus Co., Inc., Maintenance and Manpower, Inc., Cross County Coach Corp., Shortway Lines, Inc., and Shortway Bus Charter Corp., its wholly owned subsidiaries, and Fugazy Continental Corp. of Connecticut and Clayton Wynn d/b/a Wynn V.I.P. Limousine Service *and* Holrick White. Cases 29–CA–6185, 29–CA–6251, 29–CA–7174, 29–CA–5134, and 29–CA–5148

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 23 September 1982 Administrative Law Judge Joel P. Biblowitz issued the attached decision. Respondent Fugazy Continental Corporation of Connecticut (Fugazy) filed exceptions and a supporting brief,[2] Respondents Holland Industries, Inc. (Holland Industries) and Shortway Lines, Inc. (Shortway Lines) filed joint exceptions, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[4] findings,[5] and conclusions and to adopt the recommended Orders to the extent consistent herewith.

1. The judge concluded that Respondents Holland Industries, Dell Bus Company, Inc. (Dell Bus),[6] Maintenance and Manpower, Inc. (Maintenance and Manpower), Shortway Lines, and Shortway Charter Corporation (Shortway Charter) were the alter egos of, and engaged in a single integrated business enterprise with, Respondent Airport Bus Service, Inc., Debtor-in-Possession (Airport Bus) at the time that the unfair labor practices found herein were committed. We have carefully reviewed, and hereby affirm, the judge's factual findings. We adopt, however, his alter ego and single integrated business enterprise conclusions only as clarified below.

It is well established that in determining whether two or more nominally separate businesses operating simultaneously are sufficiently interrelated so that they may be treated as a single integrated business enterprise, the Board looks to four principal factors: common management, centralized control of labor relations, interrelation of operations, and common ownership or financial control. No single criterion is controlling, although the first three factors, which reveal the degree of operational integration, are more critical than common ownership. *Radio Union v. Broadcast Service*, 380 U.S. 255 (1965); *Bryar Construction Co.*, 240 NLRB 102, 104 (1979). Similarly, in making the related, but nevertheless distinct, determination of whether a business is the alter ego or "disguised continuance" of its predecessor, the Board will find alter ego status where the record demonstrates "substantially identical" management, business purpose, operation, equipment, supervision, customers, and ownership between the two businesses. *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 259 fn. 5 (1974); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

[1] The name of this Respondent appears as corrected at the hearing.

[2] Fugazy also requested oral argument. This request is hereby denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[3] The General Counsel's motion to strike Respondents' exceptions and Fugazy's supporting brief for failure to comply with the provisions of the Board's Rules and Regulations is denied.

[4] At the hearing, the judge granted the General Counsel's motion to consolidate the unfair labor practice proceedings in Cases 29–CA–6185, 29–CA–6251 and 29–CA–7174 with the backpay specification in Cases 29–CA–5134 and 29–CA–5148. Fugazy excepts to this ruling, arguing that the consolidation was an attempt to taint the present proceedings against Respondent Airport Bus Service, Inc., Debtor-in-Possession by revealing that Airport Bus was found to have violated the Act in Cases 29–CA–5134 and 29–CA–5148. We find no merit in this exception. It is apparent that the judge's unfair labor practice findings herein do not rely in any way on the earlier proceeding against Airport Bus. In addition, we find that consolidation was an appropriate conservation of Board resources since both cases involved Respondent Fugazy's alleged responsibility, as a successor, to remedy unfair labor practices committed by Airport Bus.

[5] Fugazy, Holland Industries, and Shortway Lines have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[6] The judge found, and we agree, that Respondent Cross County Coach Corporation (Cross County) was part of a single integrated business enterprise with Dell Bus.

At all times material herein Holland Industries owned Shortway Lines,[7] Shortway Charter, and Dell Bus. In addition, it effectively controlled and operated Airport Bus between June 1976 and 24 January 1978, and Maintenance and Manpower at least between October 1977 and October 1978. In October 1977, Airport Bus' operations were combined with those of Dell Bus and Maintenance and Manpower.[8] Although each of the three held itself out as a separate company, they were managed jointly by the same individuals, and they used the same buses,[9] supervisors, dispatchers, drivers, and mechanics.[10]

On 24 January 1978 Airport Bus was adjudicated bankrupt. Thereafter, the same individuals continued the bus operations at the same location under the corporate forms of Maintenance and Manpower, Shortway Charter, and Dell Bus, with the same buses and many of the same employees.

Based on these facts, we find that Holland Industries, Airport Bus, Dell Bus, and Maintenance and Manpower were a single integrated business enterprise (which, for ease of reference, we shall refer to here as Holland New York I) between October 1977 and 24 January 1978. We also find that, subsequent to Airport Bus' bankruptcy adjudication and continuing through the apparent cessation of operations in October 1978, Holland Industries, Shortway Charter, Maintenance and Manpower, and Dell Bus constituted another single integrated business enterprise (denoted hereinafter as Holland New York II). We further find that Holland New York II was the "disguised continuance" or alter ego of Holland New York I. We do not find, however, that Shortway Lines was a constituent company of either Holland New York I or Holland New York II. While it was owned by Holland Industries and it leased buses to Holland New York I and II, Shortway Lines, so far as this record shows, operated a completely separate business in the Midwestern States with its own management and labor relations policies. Accordingly, we find that Holland New York I is responsible for the unfair labor practices committed prior to 25 January 1978, and that Holland New York II is responsible for those unfair labor practices which occurred on or after 24 January 1978, and is responsible, as an alter ego, for those unfair labor practices committed by Holland New York I.

2. The judge found that Fugazy was a successor to the business operation of Airport Bus and its affiliates (that is, Holland New York I and II). Fugazy excepts to this finding, contending, inter alia, that its employee complement did not reflect a majority continuation of its predecessor's work force. We find merit in this exception.

An employer which takes over a business is a "successor" if there is continuity in the employing industry after the change of ownership. Although all the circumstances are considered, the key factor in making a successorship determination is whether a majority of the new employer's bargaining unit employees were members of the predecessor's unit work force at or near the time it ceased operations. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Pacific Hide & Fur Depot v. NLRB*, 553 F.2d 609, 612 (9th Cir. 1977); *Stewart Chevrolet*, 262 NLRB 362 fn. 5 (1982) (employee Woolcott).

On 13 June 1978 Fugazy purchased Airport Bus' ICC authority and the "airline crew" portion of Holland New York II's business and leased a part of Holland New York II's facility. In July Fugazy began operating a bus company, at least partially in competition with Holland New York II, utilizing its own management, buses, employees, supervisors, and dispatchers. On 9 October 1978 Fugazy purchased the charter bus portion of the Holland New York II operation and took over Holland New York II's entire premises. Holland New York II's remaining employees began working for Fugazy.

To establish successorship, the General Counsel must demonstrate that a majority of Fugazy's bargaining unit employees[11] in early July 1978 had been employed in the relevant units by Holland New York II in mid-to-late June and/or that a majority of the bargaining unit employees employed by Fugazy in mid-October 1978 were employed by Holland New York II immediately before its cessation of operations. We find that the General Counsel has not met his burden of proof.

Holland New York II's payroll records were unavailable, and the General Counsel, therefore, appropriately attempted to use secondary evidence to establish the identity of Holland New York II's employees in the relevant units. Unfortunately, much of this evidence is of little probative value. Thus, the General Counsel introduced into the record the payroll records for Airport Bus, union authorization cards signed by Holland New York I and II

[7] Shortway Lines was a bus company operating in Ohio and other midwestern States.

[8] These operations included regular charter bus service sold on a trip-by-trip basis and "airline crew work," that is, transporting airline crews under contract between JFK Airport and hotels.

[9] Some of the buses used were owned by Shortway Lines and apparently leased through Holland Industries to Airport Bus.

[10] It appears from the record that another corporation, JFK Parking Lot No. 7, Inc. was also part of this operation. We make no finding with regard to its status because it was not named as a respondent herein.

[11] The units involved herein are: (1) all full-time and part-time drivers and (2) all mechanics and helpers.

employees in the winter and early spring of 1978, and the testimony of four employees. Employee Gonzales named 12 individuals who had worked for Shortway Charter in June 1978 and who subsequently worked for Fugazy. Employee Beckles named approximately 34 employees who had worked for Shortway Charter both before and after Fugazy began using part of the Holland New York II facility in June and July 1978 and, in passing, noted that about 10 of these individuals subsequently worked for Fugazy. Employee Gibson testified regarding approximately 18 employees who worked for Holland New York II during the spring of 1978. Only the testimony of employee Goza, in which he named 16 Shortway Charter drivers who transferred directly to the Fugazy payroll in mid-October, is probative. The Fugazy payrolls for the periods 9–22 October 1978 list 48 drivers and 11 mechanics or cleaners.

Based on the above, we find insufficient evidence of work force continuity to establish successorship. In addition, there is no evidence that any of Fugazy's mechanics and helpers in mid-October 1978 had been recent Holland New York II employees. Also, the record affirmatively establishes only that 15[12] of 48 Fugazy drivers in mid-October 1978 were carryovers from Holland New York II's operation. Therefore, we find that Fugazy was not a successor to Holland New York II, and is not responsible for its predecessor's unfair labor practices.[13]

3. The judge found that the Respondents violated Section 8(a)(3) and (1) of the Act by conditioning the continued employment of unit employees upon two conditions: (1) their accepting wages and working conditions other than those provided in the then-current contract between Airport Bus and Teamsters Local 875 and (2) their willingness to relinquish union representation. The judge further found that the Respondents violated Section 8(a)(5) and (1) by withdrawing recognition from Local 875, abrogating the contracts, and unilaterally altering terms and conditions of employment. The Respondents except to these findings, asserting that the adjudication of Airport Bus as a bankrupt extinguished, by law, the collective-bargaining agreement between Airport Bus and Local 875. We find no merit in this exception.[14]

In light of the complete integration of the Holland New York I operation which we have found supra, we find that, subsequent to October 1977, the appropriate bargaining units were one of all drivers and one of all mechanics and helpers employed by Holland New York I and that Airport Bus' collective-bargaining agreements covered these units. *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976); *Land Equipment Inc.*, 248 NLRB 685, 688 (1980), *Safety Electric Corp.*, 239 NLRB 40, 43 (1978). As the alter ego of Holland New York I, Holland New York II was obligated to continue to recognize Local 875 and to observe the collective-bargaining agreements.

The judge declined to compel the General Counsel to name Airport Bus' Trustee-in-Bankruptcy as a necessary party to these proceedings. In addition, it appears that the General Counsel may not have filed timely proofs of claims against Airport Bus' bankrupt estate. The Respondents contend that these failures constitute procedural irregularities warranting dismissal of the complaint. We find no merit in these contentions.

The record reveals that, on Airport Bus' bankruptcy adjudication, the Trustee ceased Airport Bus' participation in the Holland New York I operation, proceeded to liquidate its estate, and was not involved in the commission of the unfair labor practices found herein. We also note that, under the Bankruptcy Rule, a creditor who wishes to collect against a bankrupcy estate must file a timely proof of claim with the bankruptcy court. We do not see how the absence of either the Trustee as a party or of timely proofs of claims can impede our authority to adjudicate the unfair labor practice issues herein.[15]

AMENDED REMEDY

Because it appears from the record that Holland New York II ceased operations at least for some time period beginning in October 1978, we shall

[12] The name of 1 of the 16 drivers identified by Goza does not appear on Fugazy's payroll.

[13] For the reasons stated by the judge, Member Zimmerman would find that Fugazy was a successor to Holland New York II and is therefore responsible for the latter's unfair labor practices. Accordingly, he dissents from the reversal of the judge's findings concerning Fugazy.

[14] We have duly considered the issues raised by the debtor-in-possession status and bankruptcy adjudication of Airport Bus in light of *NLRB v. Bildisco & Bildisco*, 104 S.Ct. 1188 (1984). On 29 November 1976 Airport Bus filed for debtor-in-possession status under Chapter 11. Subsequently, Airport Bus, as debtor-in-possession, was authorized to continue its business operations. On 29 December 1976 Airport Bus entered into two 3-year collective-bargaining agreements with Local 875 covering Airport Bus drivers and mechanics. Airport Bus was adjudicated a Chapter 10 bankrupt on 24 January 1978. There is no showing that during its term as debtor-in-possession Airport Bus sought to modify or reject the terms of its 29 December contracts. There is also no showing that the bankruptcy trustee or bankruptcy court disaffirmed these contracts following Airport Bus' adjudication as a Chapter 10 bankrupt. In comparison, *Bildisco* involved a company which, as a debtor-in-possession under Chapter 11, rejected, with court approval, a collective-bargaining agreement signed prior to its filing as a Chapter 11 debtor-in-possession. Accordingly, we find that *Bildisco* is inapplicable to the facts of this case.

[15] At most, these failures may diminish the Board's remedial opportunities against one of these Respondents. We leave to the bankruptcy court the determination of the effects of these failures, if any, under the bankruptcy laws.

order that the notice be mailed to the employees employed by Holland New York I and II during the time the unfair labor practices found herein occurred. *Cerro CATV Devices*, 237 NLRB 1153 (1978).

CONCLUSIONS OF LAW

1. The Respondents are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Locals 522, 819, and 875, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are each labor organizations within the meaning of Section 2(5) of the Act.

3. Between October 1977 and 24 January 1978, Holland Industries, Airport Bus, Dell Bus, and Maintenance and Manpower constituted a single integrated business enterprise, known herein as Holland New York I.

4. Between 24 January 1978 and 9 October 1978, Holland Industries, Dell Bus, Shortway Chapter, and Maintenance and Manpower constituted a single integrated business enterprise, known herein as Holland New York II.

5. Holland New York II was the alter ego of Holland New York I.

6. Shortway Lines was not a constituent company in either Holland New York I or II.

7. Fugazy was not a successor to either Holland New York I or II.

8. Holland New York I violated Section 8(a)(2) and (1) of the Act by:

(a) Assisting Local 522 in obtaining signed authorization cards from its employees.

(b) Executing a collective-bargaining agreement, dated 16 January 1978, with Local 522 at a time when Local 522 did not represent an uncoerced majority of its employees.

9. Holland New York II violated Section 8(a)(2) and (1) by assisting Local 522 in obtaining signed authorization cards from its employees.

10. Holland New York I violated Section 8(a)(3) and (1) by executing a collective-bargaining agreement, dated 16 January 1978, with Local 522 which contained a union-security clause requiring membership in Local 522 as a condition of employment.

11. Holland New York II violated Section 8(a)(3) and (1) by conditioning the continued employment of its employees upon (a) their accepting wages and terms and conditions of employment other than those provided by the 29 December 1976 collective-bargaining agreements between Airport Bus and Local 875, and (b) their relinquishing their right to union representation.

12. Holland New York II violated Section 8(a)(5) and (1) by failing and refusing to continue to recognize and bargain with Local 875 on and after 24 January 1978; by refusing to enforce the terms and conditions of employment contained in the 29 December 1976 collective-bargaining agreements between Airport Bus and Local 875; and by unilaterally changing the terms and conditions of employment of the employees covered by these agreements.

ORDER

The National Labor Relations Board orders that, in Cases 29–CA–6185, 29–CA–6251, and 29–CA–7174, Respondents Holland Industries Inc., Toledo, Ohio; Airport Bus Services, Inc., Debtor-In-Possession, New York, New York; Dell Bus Company, Inc., New York, New York; Maintenance and Manpower Inc., New York, New York; Cross County Coach Corporation, New York, New York; and Shortway Bus Charter Corporation, New York, New York; their officers, agents, successors, and assigns, shall take the following action.

1. Respondents Holland Industries, Airport Bus, Dell Bus, Maintenance and Manpower, and Cross County shall cease and desist from:

(a) Assisting Local 522, or any other labor organization, in obtaining signed authorized cards for said labor organizations.

(b) Entering into a collective-bargaining agreement with Local 522, or any other labor organization, at a time when said labor organization does not represent an uncoerced majority of the employees in an appropriate unit.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Respondents Holland Industries, Shortway Charter, Maintenance and Manpower, and Cross County shall cease and desist from

(a) Assisting Local 522, or any other labor organization, in obtaining signed authorization cards for said labor organizations.

(b) Conditioning the continued employment of employees on their acceptance of wages and terms and conditions of employment other than those contained in the valid collective-bargaining agreement covering their bargaining unit.

(c) Conditioning the continued employment of employees on their relinquishment of the right to be represented by a labor organization.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

3. Respondents Holland Industries, Dell Bus, Shortway Charter, Maintenance and Manpower,

and Cross County shall take the following affirmative actions to effectuate the policies of the Act.

(a) Offer to all employees (as listed in the judge's Appendix A) who refused to accept employment at terms and conditions less than that provided for in the collective-bargaining agreements dated 26 December 1976 between Local 875 and Airport Bus and/or who refused to accept employment without representation by a labor organization, full and immediate reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered as a result of the discrimination against them in the manner set forth in the section of the judge's decision entitled "The Remedy."

(b) Make whole, with interest, each of the employees who, on or after 24 January 1978, accepted employment with any of the Holland New York II Respondents for the difference between their rate of pay and other terms and conditions of employment and what their rate of pay and other terms and conditions of employment properly were, as set forth in the collective-bargaining agreements dated 29 December 1976 between Airport Bus and Local 875.

(c) Reimburse all employees for dues and other moneys deducted from their pay, or paid directly to Local 522, under, or in consequence of, the collective-bargaining agreement, dated 16 January 1978, between Respondent Maintenance and Manpower and Local 522.

(d) Preserve and make available to the Board or its agents, on request, payroll and other records necessary to determine the amount due under paragraphs (a), (b), and (c), above.

(e) Post at their principal offices copies of the attached notice marked "Appendix B."[16] In addition, mail a copy of said notice to each employee who was on any of their payrolls during the period 10 January 1978 through 9 October 1978. The notices shall be mailed to the last known address for each employee. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted and mailed by the Respondents immediately upon receipt. The posted notices shall be maintained by Respondents for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the posted notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the consolidated amended complaint be dismissed with respect to the allegations not specifically found herein to be violative of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that, in Cases 29–CA–5134 and 29–CA–5148, the Respondents, Clayton Wynn d/b/a Wynn V.I.P. Limousine Service, New York, New York, and Airport Bus Service, Inc., New York, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT assist Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 522), or any other labor organization, in obtaining signed authorization cards from our employees.

WE WILL NOT enter into a collective-bargaining agreement with Local 522, or any other labor organization, at a time when said labor organization does not represent an uncoerced majority of our employees.

WE WILL NOT condition the continued employment of our employees on their acceptance of wages and terms and conditions of employment which are other than those contained in the valid collective-bargaining agreement covering their bargaining unit.

WE WILL NOT condition the continued employment of our employees on their relinquishment of the right to be represented by a labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[16] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL reimburse, with interest, all our employees who had their union dues deducted from their pay, or paid directly to Local 522, under, or in consequence of, the collective-bargaining agreement between Maintenance and Manpower, Inc. and Local 522, dated 16 January 1978.

WE WILL offer to all employees, who refused to accept employment at terms and conditions other than those provided for in the collective-bargaining agreements, dated December 29, 1976, between Teamsters Local 875 and Airport Bus Service, Inc., and/or who refused to accept employment without representation by a labor organization, full and immediate reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss of earnings they may have suffered because of our discriminatory conduct against them.

WE WILL make whole with interest, each of the employees who, on or after 24 January 1978, accepted employment with any of us for the difference between their rate of pay and other terms and conditions of employment and what their rate of pay and other terms and conditions of employment properly were, as set forth in the collective-bargaining agreements, dated 29 December 1976, between Airport Bus and Local 875.

HOLLAND INDUSTRIES, INC.; AIRPORT BUS SERVICE, INC., DEBTOR-IN-POSSESSION; DELL BUS CO., INC.; MAINTENANCE AND MANPOWER, INC.; CROSS COUNTY COACH CORP.; AND SHORTWAY BUS CHARTER CORP.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in Brooklyn, New York, and New York, New York. The hearing opened on September 2, 1980; there were 22 hearing dates and the hearing closed on June 23, 1981.

The Cases Involved Herein

On November 1, 1977, the National Labor Relations Board (the Board) issued its Order (unpublished) in Cases 29–CA–5134 and 29–CA–5148; that Order adopted the recommended Order of the administrative law judge and directed Respondents Airport Bus Service, Inc. (Airport), and Clayton Wynn, d/b/a Wynn V.I.P. Limousine Service (Wynn), their officers, agents, successors, and assigns, to make Holrick White whole for any loss of earnings suffered by him because of their discrimination against him. On September 15, 1978, the United States Court of Appeals for the Second Circuit entered its judgment enforcing in full this Order of the Board. On July 15, 1980, the Regional Director for Region 29 of the Board issued an amended backpay specification and notice of hearing in this matter.

On January 30, 1978, Louis Lyons filed the charge in Case 29–CA–6185 solely against Airport; on February 28, 1978, William Moser filed the charge in Case 29–CA–6251 against "Airport Bus Service, Inc., Bankrupt" "and its successors and alter egos," naming Shortway Charter Bus Service, Inc., Cross County Coach Corp. (Cross County), Dell Transportation Service (Dell Transportation), and Manpower and Maintenance, Inc. On May 31, 1978, an order consolidating cases, complaint, and notice of hearing was issued, naming these employers as the Respondents. After the hearing in this matter was postponed on a number of occasions, Moser filed an additional unfair labor practice charge in Case 29–CA–7174 on May 7, 1979, against Fugazy Continental Corp. of Connecticut (Fugazy of Connecticut). On June 30, 1980, an order consolidating cases, amended complaint, and notice of hearing was issued in the three above-mentioned cases. The Respondents named are Airport and its successors and alter egos Shortway Bus Lines, Inc., Cross County, Dell Transportation, Manpower and Maintenance, Holland Industries, Inc. (Holland), and Fugazy of Connecticut. This consolidated amended complaint also names Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 522), and Local 819, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 819). The consolidated amended complaint alleges that Shortway Bus Lines, Inc. (Shortway Lines), Cross County, Dell Transportation, Manpower and Maintenance, Holland, and Fugazy of Connecticut are alter egos of, and successors to, Airport, and that Fugazy is the successor of, and alter ego to, Airport, as well as the other named companies; it further alleges that, at all times material since about 1976, Airport and Local 875, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 875), were parties to a collective-bargaining agreement covering Airport's employees, but since about January 24, 1978, the Respondents unilaterally changed the terms and conditions of employment of these employees without notice to Local 875, bargained directly with unit employees, and refused to recognize or bargain with Local 875; and it additionally alleges that on January 24, 1978, the Respondents discharged (and since, have failed to reinstate) numerous employees (some of whom were named in this complaint and others who were named pursuant to a demand for a bill of particulars) because the employees joined and assisted Local 875 and engaged in other protected concerted actions. The consolidated amended complaint further alleges that about January 1978 the Respondents urged their employees to sign cards designating Local 522 as their collective-bargaining representative, and about January 16, 1978, the Respondents and Local 522 executed, and, until June 1978, maintained and enforced a collective-bargaining agreement covering the Respondents' employees, providing, inter alia, that these employees shall

become and remain members of Local 522 as a condition of employment; that about June 14, 1978, the Respondents and Local 819 executed, maintained, and enforced a collective-bargaining agreement covering the Respondents' employees, providing, inter alia, that these employees shall become and remain members of Local 819 as a condition of employment; that the Respondents and Local 522 and Local 819 executed and maintained these agreements in effect, notwithstanding the fact that at the time of the execution of the respective agreements, nor at any time thereafter, Local 522 and Local 819 did not represent an uncoerced majority of the employees covered by the agreements, and notwithstanding the fact that the Respondents were under an obligation to continue to recognize and bargain with Local 875. As a conclusion, it is alleged that by these actions the Respondents have violated Section 8(a)(1), (2), (3), and (5) of the Act. During the hearing, pursuant to a motion to amend the consolidated amended complaint, I issued an Order dated February 12, 1981, wherein certain of the Respondents' names were corrected. Pursuant to that Order, the Respondents are Airport[1] and its Successors and Alter Egos Holland, d/b/a Dell Bus Co., Inc. (Dell Bus), Maintenance and Manpower, Inc. (Maintenance and Manpower), Cross County, Shortway Lines, and Shortway Bus Charter Corp. (Shortway Charter, its wholly owned subsidiaries), and Fugazy of Connecticut. On March 16, 1981, pursuant to a motion to consolidate by the General Counsel, Cases 29–CA–5134 and 29–CA–5148 were consolidated with Cases 29–CA–6185, 29–CA–6251, and 29–CA–7174.

FINDINGS OF FACT

I. JURISDICTION

Of the Respondents, only Fugazy of Connecticut, Holland, and Shortway Lines filed answers and appeared at the hearing. Summary judgment was granted as regards the other Respondents.

Airport is a New York State corporation engaged in the business of providing bus transportation services and related services. Prior to October 1977, Airport's office and principal place of business was located at Building 69 at Kennedy Airport (Building 69). In October 1977, Airport moved its office and principal place of business to 114–02 New York Boulevard, in Jamaica, New York (New York Boulevard). The Board, in Cases 29–CA–5134 and 29–CA–5148, has previously asserted jurisdiction over Airport. In addition, Michael Margolis, during much of the period herein the president of Airport, testified that Airport "probably" received revenues in excess of $50,000 (during 1977) for bus trips that originated in New York State and later crossed into a different State.

Dell Bus, Cross County, and Maintenance and Manpower are New York corporations engaged in providing bus transportation services and related services. At all times material herein, and until about November 1978, their principal offices and places of business were located at New York Boulevard, and they have been affiliated businesses with common officers, ownership, directors, and operators and constitute a single integrated business enterprise. During 1978, Dell Bus, Cross County, and Maintenance and Manpower purchased vehicular parts, fuel, and other goods and material valued in excess of $50,000 which were delivered to their places of business directly from points outside New York State.

Shortway Charter is an Ohio corporation engaged in providing bus transportation service and related services. All the stock of Shortway Charter is owned by Holland. At all times material herein it has maintained offices at the New York Boulevard location and at 645 Madison Avenue in the city and State of New York (645 Madison Avenue). During 1978, Shortway Charter purchased vehicular parts, fuel, and other goods and materials valued in excess of $50,000 which were delivered to it directly from places outside the State of New York.

Holland is a New York State Corporation with its principal office located in Toledo, Ohio, and, at times material herein, it has maintained an office at 126 East 35th Street in the city and State of New York. Although Holland itself does not operate buses or employ employees, it acts as a holding company, owning subsidiaries that provide bus transportation service and related services. Holland derives revenues from charges to these subsidaries, and in 1978 and 1979, Holland received revenue in excess of $500,000 in this manner.

Shortway Lines is a subsidiary of Holland. It is an Ohio corporation with its principal office at the same location as Holland in Toledo, Ohio. Shortway Lines is engaged in providing bus transportation and related services mainly in Ohio and other nearby States. During 1980, Shortway Lines received in excess of $50,000 for services performed outside the State of Ohio. Holland and Shortway Lines admit, and I find, that they are each engaged in commerce within the meaning of the Act.

Fugazy of Connecticut is a Connecticut corporation which, since June 1, 1978, has maintained its principal office at 645 Madison Avenue. Since about that time it has been engaged in providing bus transportation and related services. During the past year it purchased vehicular parts, fuel, and other goods and materials valued in excess of $50,000 which were transported and delivered to it directly from States other than the State in which it is located. Fugazy of Connecticut admits, and I find, that it is engaged in commerce within the meaning of the Act.

On the basis of the above, I find that Airport, Dell Bus, Maintenance and Manpower, Cross County, Shortway Charter, Shortway Lines, Holland, and Fugazy of Connecticut are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Respondents admit, and I find, that Local 875, Local 522, and Local 819 are labor organizations within the meaning of Section 2(5) of the Act.

[1] Later amended to read "Airport Bus Service, Inc., Debtor-in-Possession."

III. CREDIBILITY

The individual who maintains a presence throughout this entire commentary is Michael Margolies, who, at the least, held positions of authority with Airport and Holland and, for a time, was employed as a consultant by Fugazy of Connecticut. He was the individual who involved Holland with Airport until Airport was adjudicated as a bankrupt in January 1978. Between that time and June 1978, he was involved, at the same location, in the operation of other Holland enterprises, and later in 1978, after Holland sold its Interstate Commerce Commission rights to Fugazy of Connecticut, for a period of time he was employed by Fugazy as a consultant.

After observing Margolies on the witness stand for a number of days, I have sincere doubts as to his credibility. It was obvious that he and Arthur Wagner, counsel for Holland and Shortway Lines, took this proceeding less than seriously, talking back and forth and laughing while Margolies was on the witness stand. Additionally, it appeared that Margolies testified freely only where he felt it would not assist the General Counsel's case. My observation of Margolies convinces me that it is not the years that have clouded his memory, but rather a convenient loss of memory at certain times. This may have been due to the fact that at the time of the hearing he was still associated with Holland.

One example of Margolies' lack of credibility (in addition to his evasiveness) was his testimony in answer to a series of questions from the General Counsel regarding the tools and equipment in the garage at the New York Boulevard location:

> Q. . . . can I ask him if he was there after the move from Building 69 to New York Boulevard. Were you in the garage after—
>
> A. I was never in the garage.

Less than a minute later, Margolies was asked:

> Q. You have been in the garage?
>
> A. Certainly.
>
> Q. Did you say you had never been in the garage?
>
> A. No. I never said I have never been in the garage. I didn't work in the garage; I couldn't give you an independent verification of the items on there.

Whether this conflict was caused by a deliberate fabrication by Margolies or is just further evidence of his flippant attitude toward these proceedings, it further indicates his overall lack of credibility.

It should also be noted that at the time of the hearing Margolies was no longer employed by Fugazy of Connecticut as a consultant, and, in fact, had sued Fugazy of Connecticut for the alleged breach of this agreement.

I therefore did not find Margolies to be a credible witness for these reasons and others that will appear infra. I therefore have not credited him in many situations where there is conflicting testimony from other, more credible witnesses. At other times I have not fully credited him even where his testimony is uncontradicted, where his testimony appears to be highly unlikely. The credibility of the other witnesses, when necessary, will be discussed separately.

IV. AIRPORT

This tale begins about June 1976 when Holland asked Margolies to investigate the possibility of its purchasing Airport. At that time, and through January 24, 1978, the drivers and mechanics at Airport had been represented by Local 875 under separate collective-bargaining agreements.

Since at least 1976, Airport had been located at Building 69 at Kennedy Airport, which premises it leased from British Airways. During this period, and through January 1978, Airport performed two forms of bus transportation: crew work, for which it contracted with a number of airlines to transport their flight crews between Kennedy Airport and hotels in New York City,[2] and general bus passenger charter work for the public. In addition, to a lesser degree, Airport transported airline passengers between the numerous passenger terminals at Kennedy Airport and between Kennedy Airport and New York City, all pursuant to agreements between it and the airlines.[3] At that time, Airport had approximately 30 vehicles, all buses.

Margolies testified that about June 1976 he was in Toledo, Ohio, performing consulting work for Holland.[4] At that time either Wagner, an officer for Holland and counsel for Holland and Shortway Lines herein, Cappozzi, Holland's president at the time, or Wegerbauer, an officer of Holland and, at a different time, president of Holland, asked him to investigate the situation at Browns Limousine Service, Inc. (Browns),[5] and Airport; he testified that he was asked: "Could you stay an extra week in the United States? Could you go to New York and take a look at the situation?"

Margolies went to New York, spent some time at Building 69, and reported to Holland that, although Browns' situation appeared hopeless, Airport appeared to be viable and might serve as a starting point for a Holland operation in New York.[6] Later in his testimony,

---

[2] Margolies testified that Airport did not perform this crew work when he arrived at Airport in June 1976 and "may have" performed this work in 1977. However, I credit the testimony of employee Peter Pena, who testified that Airport performed crew work as well as charter work during this period. In addition, the decision in the case involving Holrick White found that Airport performed crew work under contracts with airlines. Finally on this issue, Margolies, in an affidavit submitted to the court on Airport's Chapter XI bankruptcy petition, dated November 29, 1976, referred to Airport's business as "providing general charter and crew service." Additionally, Steven Goldman, Airport's vice president, testified that Airport performed airlines crew work.

[3] Airport did not transport people from the airport on an individual passenger fare basis.

[4] He was residing, at the time, in Spain and "I was looking for something more permanent to do."

[5] There is some question as to the connection, if any, between Browns and Airport at the time. Margolies testified that when he investigated their viability on behalf of Holland their operations were intermingled. After he became president of Airport, he separated the management and payroll of the two companies.

[6] Margolies' answers herein were often "probably," "I certainly might have," or similar vague answers. Because I found that Margolies had difficulty making admissions to questions from the General Counsel, in this situation I have translated these answers to mean "yes."

Margolies testified that he reported to Holland that it was "questionable as to whether this might be a viable situation" and that Airport's operation was "so-so. I couldn't really tell, there was nobody there." Margolies testified that, at the end of his stay in New York investigating Airport and Browns on behalf of Holland, he informed Jack Feldman (a major stockholder of Airport at the time) that Holland was not interested in it at the time. Feldman asked him if he would be interested in remaining and running Airport.[7] No salary or position was discussed. Margolies answered that he might be interested and returned to Europe. A couple of weeks later Margolies called Feldman or Wagner and said, "I might be interested in coming back, I'm leaving my family here, I want to come over and give it a whirl." He returned to New York and went to Building 69. He testified that he became president of Airport although nobody appointed him or elected him to that position: "I walked in and I sat down; because I wore a suit and tie people—I sat in the president's office, the emperor's clothes or something. There I was, I ran the company." When asked who determined what his salary would be, Margolies testified: "I called in the bookkeeper and said put me on the payroll. She said how much. I think it was nine hundred dollars[8] a week and she said, 'Yes sir'"; "I picked a number for myself, told the girl to put me on the payroll." Margolies could not be any more specific about how his salary was determined. However, the General Counsel produced a transcript from the bankruptcy proceeding in which Margolies testified that, in a conversation with Cappozzi and Wegerbauer, Margolies agreed to become president of Airport, and at the same time they fixed the salary he was to receive in that position; Margolies testified that he remembered that testimony.

As stated, supra, Holland does not itself operate buses, but rather owns stock in, or assets of, other transportation companies. It attempts to learn of possible acquisitions in this industry and investigates these situations; this was how Margolies and Holland first became involved with Airport, as discussed supra. Margolies testified that, during the period of his presidency of Airport, he was informed by officers of Holland that they were negotiating to purchase Airport, but that no such agreement was ever consummated.

Louis Lyons was employed first by Browns as a mechanic in 1967. He testified that the company name of his employer changed "quite a few times" and changed to Airport Bus about 1976. He had also been the Local 875 shop steward since 1971. He testified that sometime in 1976, when Margolies first arrived at Airport, Margolies said to him, "I just want to get acquainted with you, I'm the new president, I'm taking over, Price Porter is the president of Browns, but I'm over the whole thing."

Robert Seymour, who was originally employed by Browns in 1972 and was employed by Airport in 1976, testified that when Margolies first arrived at Airport he made a speech to about 20 or 30 of Airport's drivers in the drivers' room. Margolies told them that Porter was his vice president and that he was the sole owner of Airport and Shortway and "Shortway would be in there too." He also made mention of Holland in this meeting.

From 1977 through January 24, 1978, Steven Goldman was vice president of Airport in charge of charter sales. Margolies appointed him to that position. Joseph Bonasia was the Airport executive who represented Airport in dealings with the airport, the port authority, and certain customers. He also supervised the dispatchers. About January 1978, Margolies was chairman of Holland. He testified that he could not recall how much before that time he assumed that position. The General Counsel produced a transcript dated September 14, 1979, where, in answer to questions from a representative of the Board, Margolies testified that he assumed the position of chairman of Holland "just about the same time" as he was appointed the president of Airport. In addition to that position, he has been the secretary[9] of Holland since 1978, and has been a stockholder of Holland since about that time. In 1978, Margolies appointed Goldman a vice president of Holland; it was a position he held for a short time.[10] Goldman, on December 29, 1976, signed the collective-bargaining agreement with Local 875 covering Airport's mechanics and helpers on behalf of Airport. He signed it on behalf of Airport because "I was available at the time." He did not take a major part in the negotiations leading to the agreement. After Airport was adjudicated a bankrupt on January 24, 1978, Goldman was employed as vice president for Shortway Charter; Margolies appointed him to that position as manager of charter sales for Shortway Charter. Sometime during the latter half of 1978, he was asked by someone (whose name he does not remember) from Fugazy of Connecticut to run their charter department. He was employed by Fugazy of Connecticut for a few weeks.

Airport operated out of Building 69 until October 1977; at that time they encountered difficulties with their landlord and they moved into a terminal and office located at 114–02 New York Boulevard, Jamaica, New York (New York Boulevard). Airport continued to operate from this location until the termination of its operation in January 1978.

New York Boulevard is a large two-story "L shaped" building with a large parking area in between. The building contains offices on both the first and second floor, a garage, and body shop. There is also a parking lot on the premises. Shortly prior to October 1977, Paulding Equities, which is wholly owned by Holland and was created

[7] Margolies testified that his inspection of the Airport operation revealed "that there was nobody there, no officers, there were people working, but unsupervised."

[8] In the affidavit to the bankruptcy court dated November 26, 1976, referred to supra, Margolies states: "Prior to the filing of this petition, Mr. Margolies was receiving $900 per week in the form of $400 paid directly to him and $500 paid to Holland Industries, Inc., as a return against advances which Holland paid on behalf of Margolies. Mr. Margolies is a consultant to Holland Industries, Inc."

[9] Beginning about March 1977, Airport paid Wagner $250 a week as "transportation consultant." Wagner was the secretary of Holland in 1977. In December 1977, Margolies, Wagner, and Wegerbauer were the sole Holland directors.

[10] He testified that he did not perform any duty specifically in that capacity as compared to his capacity as an officer of Airport.

specifically for the purpose, purchased New York Boulevard from Dell Bus. Shortly thereafter, Airport transferred its operations to New York Boulevard.

On August 24, 1977, Margolies executed an agreement[11] on behalf of Holland as "President" (although he testified that he never was president of Holland); the other signatures to this agreement were those of Gordon Dern and his brother Norman Dell[12] (with no company name beside their signatures). The agreement identifies Dell and Dern ("Sellers") as the owners of all the shares of Dell Bus Co., Inc (Dell Bus) and the real property at 114–02 New York Boulevard in Jamaica, New York (New York Boulevard) and states that they desire to sell all the outstanding shares of Dell Bus to Holland ("Purchasers"). Holland agreed to pay Dern and Dell the sum of $1 for the outstanding shares of Dell Bus, and agreed to "retain the services of" Dell and Dern "to devote their full time and efforts and generally manage the operational affairs of Dell and other subsidiary and associated transportation companies." A specific salary is provided for, and "in addition, Sellers shall be entitled to receive 25% of the net after tax profits of the New York Operation. Said compensation to continue so long as purchaser actively maintains its New York operation." The agreement is stated to be effective October 1, 1977.

During Margolies' tenure, Airport owned some of its own buses and leased 10 buses from Bus Exchange. Sometime between November 1976 and January 1978, Holland purchased five of the buses Airport owned[13] and leased them back to Airport. In addition, because Airport could not meet the insurance payments on the buses it was leasing from Bus Exchange, Holland purchased these 10 buses from Bus Exchange and likewise leased them back to Airport.[14] The accountant's report to the Trustee-in-Bankruptcy for Airport states that by March 1977 Airport was paying to Holland $33,500 monthly for rental of buses and had a security deposit of $23,500 with Holland for the leasing of 23 buses.

There were other transactions between Airport and Holland as well; some are set forth in the bankruptcy case docket. The docket indicates that Airport filed its Chapter XI petition, with the supporting papers, on November 29, 1976. The General Counsel's brief alleges that on December 29, 1976, Holland commenced a series of loans to Airport. The docket is not entirely clear on this issue; for December 29, 1976, the docket contains the following relevant items:

> Order signed authorizing execution of documents to complete transfer of certain buses.
>
> Order signed authorizing Holland Industries, Inc., to advance insurance payments for debtor.
>
> Order signed authorizing the granting to Central State Bank of a security interest in accounts receivable of debtor.

The docket entries for October 28 and November 3, 1977, are clearer, however:

> Order signed (October 25) authorizing Holland *nunc pro tunc* to lend the debtor $28,370 by paying the sum directly to Barbara Rosen.[15]
>
> Filed unsigned Order authorizing Holland Industries, Inc., to lend debtor a certain sum in a revolving fund.

In addition to this direct financial assistance, Holland also obtained some charter business for Airport through its wholly owned company Shortway Charter. Shortway Charter acts solely as a broker in the bus charter business; it owns no buses of its own and earns its income from brokerage commission of the charters it places. Prior to 1976, Shortway Charter, as broker, obtained the Thomas Cook charter account and brokered it to a bus company in Westchester. As Margolies testified before the bankruptcy court:

> When I came to Airport, Holland went back to X and said quote hey, we are now in business in New York. We have an operation in New York. We are involved with this Airport.

On the basis of this request from Holland, the Westchester bus company performing this charter work relinquished the work and Airport performed the work thereafter.[16]

Between October 1977 and January 1978, Airport had four dispatchers—Frank Capella, Frank Wurth, George Gaynor, and Stencil Stokes.[17] In addition, Dern often acted as dispatcher for Airport, although he was not actually employed by Airport. When the drivers reported for work in the morning, the dispatcher on duty at that time assigned him to a particular job; in addition, some of the buses had two-way radios and the dispatcher could make his assignment over the radio.

As stated, supra, through January 24, 1978, Airport performed a number of different services: charter work available to the public for periods ranging from a few hours to a week or more and crew work, under contract with the individual airlines, under which Airport would transport the airlines crews from the airport to a hotel in New York City or elsewhere. In addition, Airport also transported passengers to other airlines or to hotels on behalf of the airlines; no individual fares were received

[11] Margolies testified that he also negotiated this agreement on behalf of Holland.

[12] Dell did not testify herein.

[13] These were the "typical Greyhound bus," with a lavatory, and were used for charter work.

[14] Petta testified that about October 1977 Airport operated approximately 10 Airport and Browns buses and 4 to 6 Shortway Lines buses. The Shortway name appeared on the sides of the buses in lettering about 2 feet high, in addition to being on the rear as well. The registration was also in the name of Shortway Lines.

[15] The identity of Barbara Rosen was not explained at the hearing.

[16] Margolies' testimony at the hearing herein was that the company performing the work (whose principal Margolies knew) took the initiative in relinquishing the Thomas Cook account to Airport, although it received nothing in return. Although on its face this appears to be questionable, I find it unnecessary to make such a credibility finding as the testimony otherwise establishes that Holland took part in Airport's obtaining this account.

[17] All except Stokes had been employed by Airport as dispatchers at Building 69. Stokes had previously been employed as a dispatcher by Dell Bus/Ominbus at the New York Boulevard location.

for these trips. When Browns ceased operations approximately 6 months after Margolies' appearance at Building 69, Airport attempted to capture whatever business it could from the former Browns operation. In addition to some charter work and crew work, Airport acquired work under Browns' contract with the Port Authority of New York and New Jersey (Port Authority), for the transportation from Parking Lot 7.

Parking Lot 7 is a parking lot located at Kennedy Airport which is used by individuals who are employed at Kennedy Airport to park their cars. They then board a bus at this parking lot which takes them to the location at the airport where they work. Through most of 1976 this bus service was provided by Browns under a contract with the Port Authority. About the end of 1976, Airport began to operate this bus service (although without benefit of a Port Authority contract) with its buses, drivers, and mechanics. In late 1976 or early 1977, Airport ceased performing this work when the Port Authority awarded the contract to Dell Bus. Lyons testified that in 1977 he observed that Dell Bus was using the same buses that Airport had used on the Parking Lot 7 operation, and, in fact, with registrations under the Airport name. Lyons further testified that, after the contract was awarded to Dell Bus, he was often sent to Parking Lot 7 to work on one of the buses.[18]

Jay Strauss,[19] who at the time of the hearing was employed by Schenck Tours[20] (Schenck), managing the Parking Lot 7 operation, was president of JFK Parking Lot No. 7, Inc. (Parking Lot No. 7, Inc.), although he testified that he neither managed the operation, nor was he present at the location. Parking Lot No. 7, Inc. was set up by Dell who gave it the work involved after Dell Bus was awarded the Parking Lot 7 contract by the Port Authority. Parking Lot No. 7, Inc. began performing this work on April 1, 1977. Notwithstanding that Strauss was president of the company, he testified that he did not know who owned Parking Lot No. 7, Inc., although Dell was his boss during that period and supervised his work; his Parking Lot No. 7, Inc paychecks were signed by Susan Margolies, the then wife of Margolies. During that period, Parking Lot 7 was managed by Robert Barkley.[21] There was a collective-bargaining agreement, dated April 1, 1977, between Parking Lot No. 7, Inc. and Local 875 covering the company's drivers. The agreement was executed by Strauss on behalf of the company. Strauss testified that Dell asked how to sign the agreement, although he did not know who negotiated the agreement on behalf of Parking Lot No. 7, Inc.; Strauss also did not know whether Parking Lot No. 7, Inc. was affiliated with Holland on April 1, 1977.[22]

During the latter part of 1977, Strauss and Pete Puglese were the service managers for Airport; Strauss testified that during this period he was paid personally by Dell, rather than by Airport or Dell Bus, although "it's possible" that he could have been paid by an Airport check "by mistake." Airport's payroll lists Strauss as having been paid $340 on November 6 and 13, 1977.

Petta testified that during the fall of 1977 he attended a meeting with Margolies, Lyons, and (he believes) Nick Emannual, the representative of Local 875. The meeting took place at New York Boulevard after Airport moved there. Margolies told them that he was the president of the Company. He drew a corporate diagram containing Holland Industries at the top (with the words "owns 15 companies" beside it); beneath Holland are six named companies, including Shortway Lines, Airport, and Dell Bus. Margolies gave the diagram to the Local 875 representative. Margolies then said that Goldman was in charge of the charter department at Airport; Petta asked what were the functions of Dell and Dern; and Margolies said that Dell was the chief or general manager in charge of the dispatchers and drivers, and Dern was the head dispatcher. They were also informed that Jay Strauss was the maintenance manager.

After Airport transferred its operations to the New York Boulevard location, the following employees of Dell Bus or other companies owned or operated by Dell and Dern, at the least, began working for Airport: Elton Nocks, William Pearson, Selvin Gibson Jr., John Eagle, Robert Bertart, Hubert Howie, Robert Bryant, Erastus Clifton, Peter Gumpel, Phil Tesco, Arthur Johnson, Willie Quick, and Stokes, the dispatcher.

Leroy Andrews, who was employed by Airport and Browns as a mechanic, testified that after Airport moved to New York Boulevard he worked on buses marked Airport, Dell Bus, and Shortway.[23] On numerous occasions during this period Dell instructed him to perform maintenance work on a Dell Bus vehicle. On all of those occasions Andrews told Puglese what Dell had told him to do and Puglese always told him to work on the Dell Bus vehicle as Dell had instructed him. On those occasions when Dell, Dern, and Strauss all asked him to perform some work, when he asked Puglese which work he

[18] It should be noted that at one point Margolies testified that he did not believe that Airport employees ever performed any Parking Lot 7 work or that Lyons ever performed any work at Parking Lot 7. I would not credit this testimony. Firstly, I found Lyons to be a more credible witness than Margolies: he was not an evasive witness as Margolies was and, unlike Margolies, Lyons appeared to look upon the proceeding seriously. Additionally, the collective-bargaining agreement between Airport and Local 875, dated December 29, 1976, states: "If the company loses PONYA [presumably the Port Authority] contract on Employee Parking Lot #7, Louis Lyons will be retained as a diesel helper with no cut in pay." Finally, other employees, and Goldman, testified that Airport performed this work.

[19] Strauss was an extremely hostile and evasive witness.

[20] About 1975, Dell and Dern sold a major portion of their crew transportation business to Schenck. The agreement, according to Dern's testimony, contained a restriction on their operation within a 150-mile radius of New York City or with vehicles carrying over seven passengers, but they never produced this agreement.

[21] When asked what he did as president of the company, Strauss testified "nothing." When asked about Dell's involvement in Parking Lot No. 7, Inc., he testified: "He operated it, he ran it."

[22] The business account application of Citibank for Shortway Charter, under "remarks," has a handwritten notation stating: "Affiliated with Holland Industries, Inc., JFK Parking Lot #7." The manager of the bank testified that this was his handwritting. When asked what he meant by affiliated, he testified: "Could be the same principals." As to how he came to write this on the application, he testified: "Well, I wouldn't write it on my own, the question would be asked to whoever I opened the account for."

[23] This would be Shortway Lines, rather than Shortway Charter, which was solely a bus brokerage concern, subcontracting charters but owning no buses of its own.

should perform first, Puglese said: "Do what Norman [Dell] said to do." Other than those situations, Puglese never directly asked Andrews to work on a Dell Bus vehicle.

Lyons testified that during the summer of 1977 he worked on Parking Lot 7 buses (marked "Airport Shuttle"), Airport buses, Shortway[24] buses, and Browns buses, even though Browns was no longer in existence. After the move to New York Boulevard, he worked on those buses and on Dell Bus vehicles as well.

Earl Autry, who was employed by Airport as a driver, testified that, while Airport was located at New York Boulevard, Shortway Lines also operated out of that address; Dern was "to my knowledge, the chief dispatcher" for both companies; Dern had dispatched Autry on some jobs while Autry was employed by Airport when the other dispatchers were not present.

William Richards, who was employed as a driver first by Browns and then by Airport, testified that while Airport was located at the New York Boulevard location he drove buses with the names Airport, Dell Bus, and Shortway. Robert Seymour, who was employed by Airport until it was adjudicated a bankrupt and who mostly drove crew jobs, testified that while Airport was located at the New York Boulevard location he was dispatched by Dern in addition to the regular Airport dispatchers and "only a couple of times" drove a Dell Bus. Edward Segal, who was employed by Airport until about December 1977, testified that during the period October through December 1977 Airport had three dispatchers who each worked one shift—Frank Wurth, George Gaynor, and Stencil Stokes; in addition, Dern's role "was like a dispatcher."

William Moser, who was employed by Airport as a driver between October 1977 and January 1978 (and who is a Charging Party herein), testified that during this period he was dispatched by Wurth, Gaynor, Stokes, and Dern and, also during this period, he drove buses marked Airport and some were marked Shortway Lines.[25] Devon Wing, who was employed by Airport as a mechanic, testified that while Airport was located at New York Boulevard he worked on Airport, Dell Bus, and Shortway buses. Of all three, he spent the most time working on Dell Bus vehicles (limousines and buses). During this period, Wing observed Dell walking around the area where he worked, observing the vehicles, but he never instructed Wing on what work to perform. Strauss testified that when both Airport buses and Dell Bus buses were in the garage Airport buses, which were newer, were used.

After Airport moved to New York Boulevard, Dell and Dern operated a private limousine service with station wagons carrying up to seven passengers,[26] in addition to the Parking Lot 7 operation it ran through Parking Lot No. 7, Inc. Dern testified that during this period (October 1977 through January 1978) he was spending his time selling Dell Bus surplus station wagons,[27] while Strauss was operating the limousine service under Omnibus Corp. (Omnibus).

Dern[28] testified that about 6 months after their agreement with Schenck, he and Dell created Omnibus, which also operated out of New York Boulevard, employing drivers. He testified that until about December 1977 Omnibus had its own employees; at that time Maintenance and Manpower was created and began supplying employees to Omnibus.[29]

Strauss testified that he was the president of Omnibus and Dell was the "operator," but he was not sure who the owner of Omnibus was. The most straightforward answers the General Counsel was able to obtain from Strauss regarding Omnibus were: "Omnibus Limousine Service operated in lieu of Dell" and "Omnibus died September 30, 1977." Robert Bertart, who was employed by Dell Bus prior to October 1977, testified that just prior to Airport's moving into the New York Boulevard location he received paychecks under the company name Omnibus. Selvin Gibson Jr., who was employed by Dell Bus prior to October 1977, testified (as did Bertart) that sometime after Airport moved into the New York Boulevard location some of his paychecks were from Airport.

As of March 1978, the officers and directors of Dell Bus were Dell (president), Dern (secretary-treasurer), and Joseph Bonasia (executive vice president). The stockholders at that time were Daniel Dern (otherwise unidentified), who owned 50 percent of the shares, and Dern and Bonasia, who each owned 25 percent of the shares.[30]

Strauss became president of Maintenance and Manpower at its inception (although he testified that he did not know when that was). He became president at the request of Dell[31] and remained as president for only 1

[24] He testified that he observed that these buses were registered in the name of Shortway Lines, as well as having the Shortway name on them. As to whether any of the buses Airport operated were registered under the name Shortway Lines, Margolies testified: "I don't think so," "I don't recall it."

[25] He later testified that Shortway Lines buses may have read "Shortway, Operated by Airport Bus," but he testified, "Now, that I'm not positive of."

[26] Dern testified that this operation was allowed under its restrictive convenant with Schenck.

[27] Dern testified that, at the time of the agreement with Schenck, Dell Bus had 30 to 35 vehicles, but by January 1978 they had only 10 to 12 remaining. Strauss testified that in October 1977 Dell Bus had approximately 20 buses, 12 stretch cars (extra long limousines commonly seen on airport work), 3 station wagons, 6 limousines, and 2 sedans. At the end of January 1978 (according to Strauss' testimony) Dell Bus had only buses, about 30 in number.

[28] I did not find Dern to be a credible witness. Although he appeared to be a friendly witness (unlike Strauss), a close examination of his testimony establishes that he was extremely evasive on numerous occasions, and reveals numerous conflicts with other, more credible, witnesses. Additionally, he often testified that he could produce documents to support his testimony, but never did.

[29] He testified that when Maintenance and Manpower was created the Omnibus employees "joined" Maintenance and Manpower. He also testified that Omnibus had a collective-bargaining agreement with Local 522, and after Maintenance and Manpower came into existence it executed an agreement with Local 522. Dern could not produce any payroll records for either company.

[30] Dern testified that about 1972 the officers of Dell Bus were he (secretary and possibly vice president) and his brother Dell, who was the president and treasurer and the owner of all the stock of Dell Bus at that time.

[31] Strauss testified that Cross County was operated by Dell. It had an ICC certificate to perform charter work; Dell Bus did not have such a certificate. Cross County had no employees or buses. Strauss did not testify as to what position, if any, he held with Cross County.

week. He executed the collective-bargaining agreement with Local 522 dated January 16, 1978, on behalf of Maintenance and Manpower (as president), although, he testified, he did not participate in any negotiations; Dell asked him to sign it and he did so.

Louis Lyons was a mechanic first for Browns and then for Airport and the Local 875 shop steward for Airport; he testified about a grievance meeting he had with Margolies where Dell was present. Although he was generally a credible witness, his testimony on this subject was very confusing; at one point he testified that the subject of the grievance was the poor condition of the New York Boulevard building, while shortly thereafter he testified that "one of the workers didn't get his pay check." However, it is unnecessary to resolve this conflict as the General Counsel introduced into evidence two letters (one on Airport stationery, the other on blank untitled stationery) from Margolies to Lyons. The first is dated October 31, 1977, has the heading "Subject: Grievances," and begins "this is in partial answer to some of the written grievances we received from you two weeks ago"; the letter sets forth improvements that would be made in the lighting of the building and the toilets. The memo (as it is entitled) states that copies of it were sent to Dell and Emannual. The second letter from Margolies to Lyons is dated November 8, 1977, and states his regrets that two of Airport's mechanics had resigned. The letter asked "the union to do whatever they can to furnish us with replacements." This letter also states that copies were sent to Dell and Emannual.

Willy Goza, who is presently employed by Fugazy of Connecticut as a driver, testified that about September 1977 another driver introduced him to Dell at the International Arrivals Building at Kennedy Airport. He told Dell that he was getting ready to leave his job and he would like to fill out an application to work for Dell. Dell told him that when he was ready he should come by for the job. About late October or early November 1977, Goza went to Building 69 and told dispatcher Frank Wurth that he was there to speak to Dell. Wurth told him that Dell did not work at Building 69, that he worked at New York Boulevard. Sometime within the next few days Goza went to New York Boulevard and again saw Wurth and asked to see Dell. Wurth sent him to an office behind the dispatcher's office. Goza told Dell that he was there to fill out the application and he would be available to begin work at the beginning of 1978. Dell handed Goza a form entitled "Application for Employment." Dell wrote the words "Airport Bus Service Building 69" at the top of the application prior to giving it to Goza; Goza completed the rest of the application.[32]

About January 25, 1978 (approximately a month after leaving his prior employment), Goza returned to New York Boulevard; he again saw Wurth and asked to see Dell. Dell came out to see him and Goza told him, "I'm back, I'm ready to go to work." Dell went back into his office, and when he came out he handed Goza an application for employment. This one had the words "Maintenance and Manpower" on the top of the application. Goza asked Dell who that was and Dell said it was a new company. Goza filled out the application and Dell asked him when he could begin working; Goza said that he could begin that day, and he did begin his employment that day with Maintenance and Manpower.

Peter Petta, who was employed by Airport as a driver beginning about October 1977, and who became shop steward for Local 875 in December 1977, testified that about 3 to 4 weeks after Airport moved to New York Boulevard he attended a meeting with Emannual, Lyons, Dell, and Margolies in Dell's office at New York Boulevard. (Margolies did not stay for the entire meeting.) Emannual informed Dell that he was the representative for Local 875 and that employees who supposedly were employed by Dell Bus were being used by Airport. Dell denied that Dell Bus employees were working for Airport or using its equipment and said that he would not discuss it any further as he had nothing to do with Airport or Local 875. They then left Dell's office and went to speak to Margolies in his office. Petta told Margolies that certain nonunion employees were performing work for Airport when the work should have been performed by Airport's employees. Margolies said that the employees involved were performing Dell Bus work and were employed by Dell Bus, not Airport. Petta said that he had seen the men being dispatched by Airport's dispatchers—Gaynor and Wurth—and performing crew work similar to Airport's. Emannual told Margolies he had Local 875 authorization cards signed by individuals who were allegedly employed by Dell Bus, but were paid by checks from Airport and were working at the same address as Airport, and therefore they should be represented by Local 875. Margolies looked at the authorization cards, and said that as far as he knew the employees who signed the cards were working for Dell Bus, but that he would investigate the situation, and, if the employees involved were employed by Airport, they would be covered by the Local 875 contract. Petta showed Margolies an Airport pay stub for Bill Davis, a Dell Bus driver, and told him that it established that Dell Bus drivers were being paid by Airport. Margolies answered that Dell Bus employees were being paid by Airport for the

[32] Counsel for Fugazy of Connecticut spent a considerable amount of time examining and cross-examining Goza on the subject of his meetings with Dell and his applications for employment. In this cross-examination he established that the affidavit Goza gave to the Board stated that he first met Dell at Building 69; Goza testified that it was at the International Arrivals Building at Kennedy Airport, not at Building 69 that he first met Dell; when he gave that affidavit he had just left work and had not yet been asleep and was not thinking properly; regardless, this is an obviously minor discrepancy. During cross-examination, Goza also testified that he filled out six to eight applications for employment; in addition to the applications for Airport and Maintenance and Manpower he was asked to fill out a few applications for employment for Shortway Charter and Fugazy of Connecticut. On these occasions, Goza was told that this was the company he was now working for and he had to fill out a new application, or that he had to complete the new application because the prior applications had been misplaced. Finally, during some portions of this extensive examination by counsel for Fugazy of Connecticut, Goza's testimony became confused regarding the chronology of events. Regardless, I found Goza to be an extremely credible witness; he appeared to be testifying in a truthful manner as to events that occurred 3 or 4 years earlier. Although he was at times confused regarding dates, these errors appeared to be inadvertent mistakes and did not detract from what I conceived to be his obvious credibility.

sake of simplicity, and Dell Bus was reimbursing Airport for the amounts.

As stated, supra, since prior to Margolies' appearance at Airport in 1976, its drivers and mechanics had been represented by Local 875 under separate collective-bargaining agreements. On December 29, 1976, Margolies executed a 3-year collective-bargaining agreement with Local 875 covering Airport's drivers. On the same day Goldman executed a 3-year collective-bargaining agreement with Local 875 covering Airport's mechanics. The record indicates that at least through the week ending January 12, 1978, Airport was still deducting Local 875 dues from the employees' salary.[33]

V. BANKRUPTCY ADJUDICATION

On November 29, 1976, Airport filed a petition under Chapter XI in the bankruptcy court. Airport operated in that manner until January 24, 1978.[34] Two events occurred on that day. First, the bankruptcy court adjudicated Airport bankrupt and appointed Albert Altesman as the Trustee-in-Bankruptcy. Later in the day, Margolies returned to New York Boulevard where he spoke with a number of employees about the situation. Only Margolies testified to the former, while Margolies and numerous employees testified to the latter.

Margolies testified that for months prior to the adjudication he had been attempting to work out a plan acceptable to Airport's creditors, but that about a week to 10 days prior to the adjudication he and Martin Brecker, the attorney for Airport, as Debtor-in-Possession, decided that no plan could be arranged with the creditors and they had no choice but to request that the judge adjudicate Airport bankrupt; the petition was made jointly by Margolies and Brecker. After the court proceedings that day, Margolies asked Altesman and Israel Halpert, Esq., the attorney for the Trustee-in-Bankruptcy, what he was to do:

> They said to me, you go back and close-up. I said what about all the people. There are no more people, everything is shut down, you just stop doing business, close everything up . . . . I was told to go back and tell everybody that the company was closed and was out of business and none of us had jobs.[35]

Margolies then went to the New York Boulevard location and called Goldman and Bonasia into his office; he told them what had occurred in court earlier that day and that Airport was out of business; he told Goldman to notify the employees in the charter department and the office of this and asked Bonasia to notify the people in the garage and the drivers that the Company was closed and that the employees would be paid through the end of the day. Only Margolies testified to the above occurrences; however, as to subsequent discussions between Margolies and employees later that day, there are major credibility issues. First, Margolies' version.

Margolies testified that he returned to New York Boulevard about 2:30 p.m. and went upstairs to his office where he had the above-mentioned conversation with Goldman and Bonasia. He had occasion to go downstairs to the dispatchers office about 4 or 5 p.m. While he was there, about four to six drivers and mechanics approached him and asked him what was going on. (He believes it was Lyons who asked.) Margolies asked, "Didn't Goldman and Bonasia tell you?" The employees said that they had, but "what does it mean?" Margolies said:

> I told them that the company was bankrupt, that it was closed, that it wasn't going to open, that all work was ceased, finished. I said you have to call the Union to find out what that means to you individually. . . . We are out of business, we are closed, there is nothing more we can do. . . . The Court closed us up and that's it . . . we are out of business. We all have to worry and fend for ourselves.

Margolies testified that in this conversation he made no reference to Dell Bus or Maintenance and Manpower, nor did he comment on the possibility of their future employment at New York Boulevard. He testified that he did not suggest that the employees speak to Dell nor make reference to work being available with Dell at a cut in pay. The testimony of the employees involved is substantially different.

Petta testified that between 6 and 8 p.m. on January 24, 1978, he attended a meeting in which Margolies spoke to about 12 employees; the meeting took place in Dell's office, which was entered from the right rear of the dispatcher's office. He testified that the employees who attended, whom he can remember, were Tony Rodnite, Bill Davis, Gibson, Charles Hay, and Earl Autry. When Petta entered the garage Rodnite told him that the Company was bankrupt. He went to see Dell and asked him what the story was. Dell said, "Airport Bus Service is bankrupt and you're out of a job." Petta asked for proof and Dell told him that Margolies would be down to speak to the employees in a few minutes. Within a few minutes Margolies arrived and said, "As of 3:00 this afternoon Airport Bus Service was put into bankruptcy

[33] The General Counsel argues in his brief that although Airport deducted these Local 875 dues, "as soon as Airport Bus moved into the Dell garage, Margolies' dues payments to Local 875 ceased entirely." I find insufficient evidence with which to make such a finding; to support this allegation, the General Counsel uses Local 875 dues and initiation reports for August and September 1977, and the stipulation "that they don't have records subsequent to that, September of 77." However, this stipulation does not establish that no dues were transmitted to Local 875 after this date; it could also establish that Local 875 misplaced its past September 1977 records.

[34] The testimony at the hearing generally establishes that it was on January 24, 1978, that Airport was adjudicated a bankrupt, and placed in Chapter X of the Bankruptcy Act, and that following this adjudication, and the appointment of a Trustee in Bankruptcy by the Court, Margolies returned to the New York Boulevard location later that same day and discussed the situation with a number of Airport's executives and employees. However, the Order of Adjudication of the Court is dated and signed January 25, 1978. Although it is not particularly crucial to this matter whether these events occurred on January 24 or 25, 1978, I would find it more likely that the events occurred on January 24, 1978, while the Order of Adjudication was not signed until the next day.

[35] No evidence was adduced herein that the Trustee or the bankruptcy court ever disaffirmed the Local 875 contracts with Airport.

by the courts." He then said that he had something else to say to them, but first Dell wished to speak to them. Dell then told the employees that he would employ them if they wished to work; they should fill out applications for employment and they could begin work the following day transporting crews to and from Kennedy Airport; Dell said that he would be doing all the crew work, and that Margolies had nothing to do with it. Margolies said that it was true that he was no longer involved with crew work, and that he (or Shortway) would continue to operate a charter business. Petta asked Margolies where the buses for the operation would come from. Margolies answered that Shortway was going to lease buses to Dell and Dern for their operation. According to Petta's testimony, Dell said that there would be no union or no benefits, and the employees would have to accept the conditions he sets, for example, a set price of $15 per crew or passenger movement rather than a guaranteed weekly pay; that the employees would be paid by Maintenance and Manpower; and that he would bring disciplinary action against any employee who attempted to bring a union to the shop.

Airport mechanic Devon Wing testified that on the day in question he attended a meeting in an area close to the dispatcher's office about 6 or 7 p.m. It was attended by Margolies, Strauss, Goldman, Dell, Dern, Airport drivers, and himself. Margolies said that he was sorry to tell them that Airport was going out of business,[36] that it was finished. He would help any of them if they needed a recommendation for another job. Margolies then said that Dell and Dern would be operating the buses under a different name, that the employees could work for them and be employed by Maintenance and Manpower, but could not be represented by Local 875 and the salary would be less (although he did not specify a salary), and would be negotiated on an individual basis; and that employees who were interested should speak to Strauss, Dell, and Dern. Margolies then informed the employees that he would remain, but would do strictly charter work. Wing testified that he was "positive" that Charles Gillard (who did not testify) and his brother were present at this meeting, and that he believed that Robert Seymour, Ortiz, Creighton, Munoz (first names not stated), Victor Diaz, Charles Hay, Wurth, Ralph Cronenburg, Don Mortis, Major Darlington, and Eddie Segal were present. At the end, Dell spoke to the employees, but Wing does not remember what he said because "it wasn't to my interest."

William Richards, an Airport driver, testified that on the day in question he was home on his day off and he received a telephone call from Dern about 6 or 7 p.m.: "He says that Margolies wanted to tell us something, and would I come in." He went to New York Boulevard and went into the dispatcher's office; Bob Seymour, Ben Gallager, and Hay were other employees who were present. He testified that he does not specifically remember who else was present at the meeting in the dispatcher's office, but Wing was not there. In addition, Dern and Dell were present. A few minutes later Margolies came downstairs and said, "[A]s of 4:15 that 24th day of January, that the company is bankruptcy [sic], and that there was no more work for us. . . . He said that he was going to keep the Shortway Line, and that's all he was going to handle because he lost the rights to operate on the airport. . . . He said that Norman Dell was going to operate the airport work." Margolies finished by telling the employees that they could talk to Dell about a job with him.

Richards testified that he and a number of other Airport employees (Bob Seymour, Bill Moser, Charlie Hay, Ed Segal, and Charles Gillard were some of those present in Dell's office in addition to Richards, although people were walking in and out) went into Dell's office with Dell and Dern. Dell told them that he had jobs for them, but they would not be paid as much as they had been by Airport; they would be paid $6 a trip into New York City, they would receive 20 percent on charter work, and there would be no union.[37] Dell then told them that Margolies would handle the charter work and he would handle the airport work, and pay them under Maintenance and Manpower.[38] When Dell finished speaking Richards said that he would not accept his proposition. He was at New York Boulevard for 45 minutes, and does not know whether Margolies, Dell, or Dern had any other meeting with Airport's employees on that day.

Robert Seymour, who was employed by Browns and Airport as a driver, testified that on the day in question about 7 p.m. he received a call at home (it was his day off) from one of the dispatchers, who said the boss wanted to see him. He went to New York Boulevard and Margolies called him and about 10 other employees into the drivers' room, which is next to the dispatcher's office. The employees whom Seymour remembers being present at this discussion were Richards, Moser, Petta, Ben Gallagher, and Charles Hay.[39]

Seymour testified that Margolies told them:

> He just said he couldn't afford to operate. The banks had—he had signed bankruptcy that afternoon, or something had happened that afternoon, where he was bankrupt for some reasons.

---

[36] Wing testified that Margolies may have used the term "bankrupt" or referred to a chapter number, rather than the words "out of business."

[37] On direct examination, Richards testified that Dell said "and there'd be no union." When Richards was cross-examined about Dell's words, he testified:

> Q. . . . What else?
> A. And that there would be no union.
> Q. He said the words that there wouldn't be a union?
> A. That's right.
> Q. Well, did he say there wouldn't be an 875?
> A. He said there wouldn't be a union.
> Q. He said a union.
> A. Union.
> Q. Well, what about there wouldn't be your union?"
> A. Possibility.

When I asked Richards whether he remembered Dell saying there will be no union or there would be no Local 875, he testified that Dell said "there'll be no union."

[38] Richards testified that he was not aware whether the drivers whom Dell Bus employed were represented by a union.

[39] He testified that he does not remember whether Devon Wing was present at this meeting, although he does remember seeing Wing at a Local 875 meeting the following day.

Dell then called those present into his office; Seymour testified:

> He asked us did we want to work for him. He said there was no union, less money, charter trips would be much less than we were getting, and so, with no union, we told him no, we didn't.

Upon hearing that, Seymour left New York Boulevard.

Moser, who was employed by Airport as a driver, testified that on the day in question, late in the afternoon or early in the evening, he returned to New York Boulevard from a trip and Dern told him to go upstairs because Dell had something to say to him. Moser went up to the executive office; present were Dell, Bonasia, and Goldman; Moser was the only employee present. Dell said that Margolies had gone bankrupt. Either Dell, Bonasia, or Goldman asked him if he would consider staying on (which he did not answer) and then asked him how many people he thought would stay on. Moser answered, "Very few, less than 40%."[40] Dern then asked Moser to wait in the drivers' room because Margolies wished to see him. Moser waited for about an hour with Richards, Seymour, and Gallagher. About 5 or 6 p.m., Margolies arrived:

> [H]e says, well it's all over, we're bankrupt. The judge such and such signed an order at 4:00 and . . . he said we could stay on if we wanted to. He said he would handle the charter work and Norman Dell would handle the crew work and work out of the same building.

Moser testified further that about an hour later there was a further meeting in Dell's office. Dell was present with 15 to 20 drivers; Moser testified that he did not remember whether any mechanics were present, but that Dell told them that they could stay and perform the crew work for him and perform charter work for Margolies. Dell said he would pay a certain rate for crew work, and Margolies would pay 20 percent for the charter work.[41] Somebody then asked whom the employees would be paid by and Dell said they would be paid by Maintenance and Manpower. Moser also testified that during either the above-mentioned meeting with Margolies or the following meeting with Dell an employee asked either if there was going to be a union or "with our union?" and the answer (either from Margolies or Dell) was "definitely not."

Dern testified that he attended a meeting at about 7 or 8 p.m. in the back of the dispatch room on January 24, 1978, with a number of Airport's employees, Margolies, Dell, and Strauss, although he is not aware of how the employees were informed of the meeting. Present were Stokes, O'Reilly, Hubert Howie, Gallagher, Leroy Gillard, and maybe Gibson; Wing was not there; about six to eight drivers were present. According to Dern's testimony, Margolies said that Airport went bankrupt and was out of business, and there was another company that was looking for people and if anybody was interested they should speak to Dell or Strauss and he was sure they could get a job. Somebody asked Margolies if they would continue to be members of Local 875 and Margolies said that the Company already had a contract with Local 522. Dern was "on the sidelines" during conversations between Dell, Strauss, and the employees; Dell and Strauss told them:

> . . . that Maintenance and Manpower was a company that they formed, and it was to hire people to go to work, and there was immediate employment. That they could go to work immediately.

Somebody then asked what the working conditions would be at Maintenance and Manpower; Dern testified:

> And Jay [Strauss] said that these were the prices we were going to pay at least until we got off our feet and got ourselves started, and this is what we could afford. And he made it very clear, whoever wanted employment, he was ready to take them on.

Dern testified that Dell or Strauss "volunteered," saying that "we had a contract with 522 . . . I believe he said it was a two or three year contract,[42] I don't recall what, and this is the way we're going to start out."

Strauss testified that he attended one meeting that day in the drivers' room behind the dispatchers office; present at this meeting were Dell, Dern, Margolies, Stokes, and six or seven Airport drivers whose names he does not remember. He testified that Margolies said that Airport was bankrupt, but, if the employees wanted a job, they could work for Maintenance and Manpower;[43] if they wished such a job they should speak to Dell or Strauss. Strauss testified that he did not recall either Margolies or Dell mentioning Local 875, or any union, to any of the employees during this or the latter discussions.

Strauss further testified that Dell had probably asked him to speak to the maintenance employees; he did speak to some employees; although he could not testify as to what the rate of pay was that he offered them, it was less than that provided at the time in the Local 875 contract.

Leroy Andrews, who was employed by Browns and Airport as a mechanic, testified that on January 24 or 25, 1978, he reported to work at New York Boulevard at 6 a.m. and, as was his usual custom, went to Strauss' office

[40] Moser testified that prior to asking him if he would stay on, or how many employees he thought would stay on, he was never informed of the future terms of employment involved.

[41] Moser testified that Dell did state the amount he would pay for the crew work, but he did not recall what it was. Previously, the employees had been paid on an hourly basis for crew work, whereas they had previously received 25 percent on charter work.

[42] Dern testified that he did not remember whether he had seen this Local 522 contract by that time.

[43] Strauss testified that, although he was already the president of Maintenance and Manpower, he could not remember whether he was aware of Local 522 on that date and could not recall whether he (as president of Maintenance and Manpower) had already signed a collective-bargaining agreement with Local 522. This collective-bargaining agreement is dated January 16, 1978, although it is clear that under the "white out" where "16" has been typed the number "5" appears, although neither the month or the year appears to have been altered.

for his timecard. Strauss told him that he could not give him his card; when Andrews asked why, Strauss said that the night before "Airport Bus [had] gone bankrupt and they come out under a new name of Manpower something."[44] Strauss then told Andrews, "you'll still have a job if you take a cut in pay." Andrews asked, "How much?" and Strauss said, "Five dollars an hour."[45] Andrews then asked Strauss if the Union knew of the situation and Strauss said he did not know, he was only carrying out his instructions, but he could discuss it with Margolies. Andrews said that he would discuss it with Lyons, and Strauss told him that they would have a union with better benefits than Local 875 provided, and asked Andrews to see him after speaking to Lyons. Later in the day, after speaking with Lyons, Andrews saw Margolies; he testified he asked Margolies, "Mike, why should I take a cut in pay?" and Margolies said, "If you want the job that's it, take it or leave it," and walked away.

Lyons testified that he worked on January 24, 1978, and Strauss told him that Margolies would like to speak to him; Lyons told Strauss that his workday was over, and he was leaving for the day. The following morning he arrived about 7 a.m. and went to Strauss' office for his timecard. Strauss told him that it was a shame that he did not stay for Margolies' speech the night before. He then told Lyons that Airport was bankrupt, but he could work without a union for Maintenance and Manpower[46] at an hourly rate of $5 an hour. Lyons told Strauss that he could not work on that basis, with no union and no benefits.

Strauss[47] testified that he spoke to employees the day after Margolies spoke with the employees, although he could not name any employees he spoke with or the number he spoke with. He did speak to them about employment, but does not remember whether he said anything about a union, although he testified he did not tell them that they could not belong to a union.

VI. MAINTENANCE AND MANPOWER

Dern testified that Maintenance and Manpower was in the business of providing employees to individuals and companies; these employees ranged from drivers to mechanics to janitors; in the case of the drivers, it was the customer who supplied the vehicle. He testified that it began operating in December 1977 or January 1978; one company that Maintenance and Manpower supplied employees to (beginning about December 1977) was Omnibus. They previously had their own employees; when Maintenance and Manpower began operating, the former employees of Omnibus became employees of Maintenance and Manpower. Other than Omnibus, Dern could not name any customers of Maintenance and Manpower.[48] Dern further testified that neither he nor Dell owned any stock in Maintenance and Manpower, nor did he know who owned it; he was never employed by Maintenance and Manpower and never received a salary from it. The records establish, however, that he was, at one time, the secretary of the Company and received a check, dated March 17, 1978, from the Company in the amount of $92.03.

The certificate of incorporation of Maintenance and Manpower is dated October 18, 1977, and was filed by Wagner's law firm, Wagner, McNiff & DiMaio, who are also agents for service of process upon the corporation. In addition, received in evidence is the business account application of Maintenance and Manpower, dated January 16, 1978, with First National City Bank. It contains the New York Boulevard address and, where the application says "Name of Parent," the words "Holland Industries, etc" are written in. The signature card has two names: Strauss as president and David Alpert, controller. John Monfre, who was manager of the particular bank at the time, testified that the words "Holland Industries, etc." is his handwriting; although he cannot remember this situation particularly, he would have questioned the applicants in person and "whoever presented this application to me, I would've asked what the affiliation was."

Strauss testified that Maintenance and Manpower was set up by Dell, although he could provide little guidance on the Company's operation. Dell asked Strauss to be president of the Company and he agreed; Dell asked him to sign the collective-bargaining agreement dated January 16, 1978, on behalf of Maintenance and Manpower, and he did so, although he did not know whether any of the three employees who also signed the agreement ever worked for Maintenance and Manpower. He remained as president until about January 31, 1978. Strauss testified that, although he could not clearly state on what date Maintenance and Manpower began employing employees, it was not until January 24, 1978, that he saw payroll checks issued by Maintenance and Manpower.

Margolies testified that Dell "was the man behind Maintenance and Manpower," but that Holland did not own stock in Maintenance and Manpower. He further testified that Maintenance and Manpower was in the business of providing companies with personnel. As will be discussed more fully, infra, shortly after Airport was adjudicated a bankrupt, Margolies began operating a charter bus service at New York Boulevard as Shortway Charter (also wholly owned by Holland). From this time, at least, until the summer of 1978, Shortway Char-

[44] Andrews testified that this was the first mention he heard of Maintenance and Manpower; the next discussion of it was at the Local 875 meeting a few days later.

[45] It is not entirely clear whether this was a cut *to* $5 an hour or a cut *by* $5, although Andrews' testimony was very precise: "He did not say I'm going to take a five dollar cut, he said, I'm going to take a cut in pay. I asked him, 'How much?' and he said, 'Five dollars an hour.'"

[46] Lyons' affidavit refers to Strauss' offer of employment as being with "Dell."

[47] Although I have previously found Strauss to be an abrupt and unpleasant witness who constantly displayed his displeasure toward being subpoenaed to testify, I would not completely discredit his entire testimony; there were times when some brief ray of frankness and openness appeared in his testimony; I do not believe that this was one of those situations, however, as I found Lyons and especially Andrews clearly more credible than Strauss.

[48] The accountant's report to Airport's Trustee-in-Bankruptcy has a schedule for checks disbursed by Airport in excess of $1,100 between September 26, 1977, and January 25, 1978. It includes, inter alia, 13 checks to Maintenance and Manpower dated from October 20, 1977, through January 18, 1978. The checks aggregate approximately $27,000. During this period Holland received checks from Airport in the amount of approximately $200,000.

ter employed no drivers or mechanics; instead Maintenance and Manpower provided them with drivers and mechanics. Weekly, Maintenance and Manpower sent an invoice to Shortway Charter listing the number of employees provided, and the number of hours each work;[49] Margolies testified that he did not recall whether these invoices also set forth the names of the employees provided.

As stated, supra, Goza testified regarding his applications for employment at New York Boulevard. Prior to his commencing employment, the application had the name Airport on it; at the end of January, when he was ready to begin working, the employment application to be filled out contained the name Maintenance and Manpower; on the next few occasions when he was asked to fill out new employment applications (although his employment remained the same), the applications were captioned Maintenance and Manpower, Shortway, and Fugazy of Connecticut (about October 1978).

Earl Autry, who was employed by Airport as a driver, testified that he was not paid for the last week he was employed by Airport (the payroll period prior to January 24, 1978); about a month later he heard that the Company would be paying and he went to New York Boulevard and saw Dern, who told him to go to the offices upstairs, which he did. Autry introduced himself to a woman in the office, told her that he was there for his check, and she handed him a check which had the name "Maintenance and Manpower, Incorporated" on it, although Autry does not remember who signed the check. Moser likewise testified that on the Thursday after January 24, 1978, he was unable to receive his paycheck from Airport. The following week, however, Dern gave him a check with the Maintenance and Manpower name and told Moser that he was paid by a Maintenance and Manpower check because Airport was bankrupt and they could not pay from that account.

Robert Bertart, who was employed by Dell Bus or Omnibus (he is not sure which one was his employer) prior to October 1977, testified that both before and after January 24, 1978, he continued his employment at New York Boulevard. Prior to January 24, 1978, he was paid by checks from Omnibus, except for an occasional check from Airport; after January 24, 1978, the company name on the paychecks he received was Maintenance and Manpower; that was the first he had heard of it. Don Beckles, who was employed by Fugazy of Connecticut at the time of the hearing, was previously employed by, and received paychecks from, Shortway (presumably Shortway Charter) and Maintenance and Manpower, although he testified that he could not remember which he received first.

Selvin Gibson, who was employed by Dell Bus prior to October 1977, testified that sometime thereafter he received paychecks with the name Airport on them; shortly thereafter his paychecks contained the name Maintenance and Manpower, and that was the first he had heard of the Company.

VII. DELL BUS, MAINTENANCE AND MANPOWER, AND LOCAL 522

As stated, supra, the collective-bargaining agreement between Maintenance and Manpower and Local 522 is dated January 16, 1978, and signed by Strauss, as president, on behalf of Maintenance and Manpower, and a committee of employees (Samuel Riley, Selvin Gibson, and Hubert Howie) in addition to the union representative. The General Counsel alleges that the execution of this agreement, together with the maintenance and enforcement of the agreement, violates Section 8(a)(1), (2), (3), and (5) of the Act.[50] The defense to this allegation appears to be that the employees had previously been represented by Local 522 when the company name was Omnibus or Dell Bus, and therefore the execution of this agreement does not violate the Act.

Dern testified that the Dell Bus and Omnibus employees were previously covered by a collective-bargaining agreement with Local 522. When Maintenance and Manpower was created, these Omnibus employees "joined" Maintenance and Manpower and a new collective-bargaining agreement was executed with Local 522 on January 16, 1978. In evidence is a collective-bargaining agreement executed by Norman Dell as president of Dell Limousine Service, a Division of Dell Maintenance, Inc., Dell Bus, Dell Airport Service, Inc., and Fun City Private Car Service, Inc. and Local 522 covering drivers and maintenance employees. Also in evidence are letters dated March 1974 from Dell (of Dell Bus) to the Local 522 administrator and a return letter to Dell. The contract specifies that it shall be effective from July 1, 1971, through June 30, 1974. No subsequent contract was produced (other than the Janury 16, 1978 agreement) and Strauss testified that, although Dell Bus previously had collective-bargaining agreements with Local 522, they were not parties to such an agreement in 1977.

Gibson, who had been employed by Dell Bus prior to October 1977, testified that until January 1978 he never belonged to a union while at Dell Bus, and to his knowledge there was no union representing its employees. Sometime in January 1978,[51] Dell called him into his office and told him, "Gibson, I have a contract here that—we're going to have a union." Gibson answered, "How come we're going to have a union because no one approached us, we didn't have a discussion about the union." Dell said, "Well, I have this union, it's a very good union, you have nothing to worry about. I want you to read the contract and I want you to sign this union and sign this contract." Gibson asked Dell if he could read the contract before signing it and Dell said that he could. Gibson asked Dell a few questions "because I was concerned about the union, I never heard of the union before." Dell told him, "This is the union, this is the contract for the union and you're going to be the

[49] Margolies could not provide the General Counsel with any records of the employees who drove Shortway Charter buses during this period or the invoices or records rendered by Maintenance and Manpower to Shortway Charter during this period.

[50] The complaint alleges no violations by either Local 522 or Local 819.

[51] He estimated that it was 2 weeks to a month after he first received a check from Maintenance and Manpower.

shop steward." Gibson told Dell that he did not know how the other drivers would feel about having a union that they had never been approached by. Dell gave him the contract and Local 522 authorization cards and told him to have the men read the contract and sign the authorization cards with the name Maintenance and Manpower. Gibson signed the contract and then gave the contract and Local 522 authorization cards to other employees.

Gibson testified that over a period of less than a month after this discussion he handed out authorization cards to the other employees; he informed them, "Here are some cards and we have a union and we want you to join." One employee whom he can remember, Johnny Boyd, complained about the fact that there was a contract although nobody had ever approached them about the Union. Gibson told him that he did not know about it, but it was given to him by Dell, who wanted everyone to sign and join the Union. Gibson then informed Dell that some of the employees informed him that they did not want to sign the Local 522 authorization cards because they did not approve of the method that was used and did not like the terms of the agreement. Dell told Gibson, "You go back and you tell the guys that if they don't sign it, these union cards, they can no longer work here."

Received in evidence were Local 522 authorization cards received by the General Counsel pursuant to subpoena. In addition to other information provided or requested, the front of the card contains a space for "Date Started" and "Birth Date," while the reverse side of the card contains a space for "Date" under the applicant's signature. This is somewhat confusing at times as, for example, Gibson's authorization card lists "1/16/78" for "Date Started" (although, he testified this is not in his handwriting) and "1/10/78" for "Date."[52] As stated, supra, Gibson began his employ at New York Boulevard prior to October 1977.

Gibson testified further that on the basis of the instructions from Dell he solicited, and received, signed Local 522 authorization cards from the following employees:[53] Neubra Smith, Phillip Brown, Johnny Eagle, Hubert Howie, Leroy Gillard, Charles Gillard, Robert Duggan, Johnny Boyd, Harvey Wolen, Robert Bryant, and Ralph Cronenberg. He could not remember soliciting the Local 522 authorization cards of Harry Graham and Frank Zito. After Gibson had obtained these Local 522 signed authorization cards he brought them to Dell, who informed him that Local 522 had a union meeting scheduled. He and Dell went to this meeting and while there they gave all of these cards to an official of Local 522.[54]

Goza, who is presently employed by Fugazy of Connecticut, testified that about March 1978 Stokes, the dispatcher, told him that in order to work in the garage the employees had to join Local 522, so he signed an authorization card for Local 522. Bertart testified[55] that while he was employed by Omnibus and Dell he does not recall being a member of any union. However, sometime in mid-January 1978, he was given a Local 522 authorization card to sign; Dell[56] told him that everyone would have to sign one; Stokes and Robert Bryant were also present at the time. Bertart held onto the card "for a while" and then signed it and returned the signed card to Dell; it is dated January 14, 1978.[57] Richards and Seymour, both of whom were employed by Airport through the bankruptcy adjudication, testified that at least through January 24, 1978, they were not aware of any union representing the Dell Bus employees.

Charles Turner, who is presently employed by Fugazy, testified that he was employed by Dell Bus from 1972 until 1974 or 1975; during that period he was a member of Local 522, which had a contract with Dell Bus which provided for, at least, their wages and health and dental benefits; Turner saw this contract and was paid pursuant to its terms. Erastus Clifton, who is presently employed by Fugazy of Connecticut, testified that he began working for Dell about 1970; he became a member of Local 522 about 1971 and was employed at Dell Bus until about 1978 or 1979.[58] During his employment at Dell Bus, he saw the contract between Dell Bus and Local 522 and he was paid the wages provided for in the contract. He testified, in addition, that he was provided with hospitalization coverage through this period and during this period he observed Local 522 representatives on the Dell Bus premises.[59]

[52] This "1/16/78" "Date Started" was written in for five other employees as well. Presumably, it was filled in by a representative of Local 522 to indicate the date on which the applicant's membership began, i.e., the date of the execution of the agreement, January 16, 1978.

[53] All of these cards list Maintenance and Manpower as the applicant's employer. The range in which they are dated (in the space below the signature space) is from January 10 to March 31, 1978. Four of these authorization cards are dated January 10, 1978.

[54] It should be noted that, although this testimony is uncontradicted, I found Gibson to be an extremely credible witness. He appeared to be solely interested in testifying to the facts as he best remembered them, without being evasive or slanting his memory one way or the other.

[55] Although Bertart was a fairly credible witness, his memory was obviously quite poor, and much of his testimony was "refreshed" by the General Counsel showing him his affidavit.

[56] At the same time, Dell told him that he was being paid by Maintenance and Manpower.

[57] In all probability, this date is in error. Bertart testified that he signed this card a day or two after a fellow employee informed him of Airport's bankruptcy. Additionally, his affidavit states that Dell gave him the Local 522 authorization card a few days after Airport "was declared bankrupt."

[58] Clifton testified that shortly thereafter he was employed by Dell Bus for 2 or 3 years after Airport moved into New York Boulevard, which would be 1979 or 1980. However, he later testified that he began working for Fugazy of Connecticut in July 1978 after Dern called him at that time and asked him if he wished to begin working for Fugazy of Connecticut; at this time, it was about a year since he had last been employed by Dell Bus. It is reasonable to conclude, therefore, that he was last employed by Dell Bus no later than 1977 since he testified he was never employed by Shortway or Maintenance and Manpower.

[59] Clifton appeared to be a fairly credible witness, although I am not convinced that he was employed by Dell Bus, and covered by a Local 522 contract, as late as 1977; other employee witnesses deny that there was any union representation at Dell Bus that late in time. Additionally, I am bothered by Clifton's unexplained failure to list his employment with Dell Bus on his employment application for Fugazy of Connecticut, while listing a summer job he was employed at for the prior 7 summers. It appears unusual that on his application for employment with Fugazy of Connecticut he would list his summer employment and not list his alleged permanent employment of 7 years, with another bus company, *at the same location*. Another problem attendant with Clifton's testimony is how could he have been employed full time by Dell Bus from 1970 through 1977 when his Fugazy of Connecticut employment application

Continued

Petta testified that about a week or two after January 24, 1978, Richard Stolfi, an agent of Local 875, told him that there was a dispute between Local 875 and Local 522 and, after investigating the matter, Stolfi found that Local 522 had a contract with the Dell brothers and because of that Local 875 could not demand recognition. Lyons, who appeared to be somewhat less open and frank than Petta on this issue, testified that Stolfi told him that Dell Bus had a contract with Local 522 and that he and counsel (Sanford Pollack) were working on it, but he never informed him of any final decision that Local 875 made. On August 29, 1980, Local 875 sent a telegram to the Board stating:

> Re Airport Bus *et al* 29–CA–6185 *et al*, confirming conversation of even date please be advised that Local 875 has no interest in representing any employees of the respondents in reference to the captioned matter.

VIII. SHORTWAY CHARTER

As stated, supra, in his speech to the assembled employees on January 24, 1978, Margolies informed them that he would remain at New York Boulevard with a charter operation. The General Counsel alleges, basically, that the total operations at New York Boulevard after January 24, 1978, were the same as before, and only the names had been changed; the companies there still performed the same charter and crew work and were owned or controlled by Holland.

Margolies testified that prior to January 1978 he had no affiliation with Shortway Charter,[60] but after Airport was adjudicated a bankrupt he became president of Shortway Charter which, as stated supra, was wholly owned by Holland. Shortly prior to the adjudication Holland purchased the Interstate Commerce Commission (ICC) rights owned by Airport.[61] According to Margolies' testimony, since Holland then owned these ICC rights, and Holland subsidiaries owned the buses which Airport had been leasing from it prior to the adjudication, it was decided that they had the ingredients for a New York charter operation.[62] Shortway Charter was previously in existence and licensed to do business in New York and it therefore was the appropriate company to engage in this operation. With Margolies as the chief operating officer and Goldman as his assistant, Shortway Charter commenced charter operations at the end of January or beginning of February 1978 at New York Boulevard. They began to wind down the Shortway Charter business beginning in June 1978 until the company ceased functioning entirely in October 1978. Since it only had a limited number of buses, all leased from Holland subsidiaries, Goldman's responsibility, in addition to obtaining customers for Shortway Charter, was to obtain buses from other companies when they did not have a sufficient quantity of buses.

Margolies was also questioned by the General Counsel as to whether Shortway Charter performed charters that had been placed with Airport prior to the adjudication. He testified that he "assumes" Shortway did obtain some of these charters, and it would conform with his technique of operating a bus company. Margolies testified further that during this approximately 6-month period Shortway Charter employed only office and sales employees; all drivers and maintenance employees were employed by, and obtained from, Maintenance and Manpower.

The bank's business account application of Shortway Charter is dated January 4, 1978, and lists Holland as "Name of Parent Company" and New York Boulevard as the address. The accompanying signature cards list Margolies as the president and Susan Margolies, his wife, as secretary. Richard Roth is listed as controller. (He is also listed as controller on the business account application for Maintenance and Manpower.)

Goldman testified that during Shortway Charter's operation from about January until October 1978, it did not perform the airport type of service such as Airport had performed; it performed some of its own charters and brokered (subcontracted) others. He called numerous companies to supply him with drivers, buses, or both; Maintenance and Manpower was only one of the companies that supplied Shortway Charter with drivers. Dern testified that, during the latter part of Shortway Charter's operation, they brokered charter work to Fugazy of Connecticut, as well as to numerous other bus companies.

The drivers employed by Airport and Shortway Charter fill out a daily log which lists the vehicle number, the carrier, and the point of origin and destination. Goza's log for the period February through December 1978 establishes that from February 1 through 4, 1978, Goza listed the carrier[63] in this log as Dell Bus; between February 5 and October 10, 1978, he listed either Shortway Lines, Shortway Charter, or simply "Shortway" as the carrier; and from October 11, 1978, he listed Fugazy Continental as the carrier. In addition, a vast majority of Goza's worktime from February through October 10, 1978, was spent driving the "49 series" buses numbered 4901 through 4912, which, prior to January 24, 1978,

---

lists his former employer as Camp Bauman from "11/70 to 8/77" and his rate of pay as $160. Even if this were only summer employment as Clifton testified (although the application states that this employment began in November), the salary stated indicates that the work was full time.

[60] Margolies testified that from about June 1976 through January 1978 Shortway Charter was not operating.

[61] This purchase will be discussed fully infra. Suffice it to say, however, that these ICC rights grant to the holder of the rights the legal ability to operate from one point in the United States to another point so described in the rights. The New York State Department of Transportation permit is the State's equivalent to ICC rights.

[62] Margolies testified that, for monetary and other reasons, these rights were never formally transferred to Shortway Charter, so certain of its subsequent charter operations were illegal under ICC rules.

[63] The testimony of Goza regarding the factors he considered in what company name he listed as "carrier" is somewhat confusing. He testified that he stopped listing Dell Bus as the carrier on February 4, 1978, because he was told to do so. However, he did not clearly explain why, thereafter, he sometimes listed Shortway Charter, sometimes Shortway Lines, and at other times simply "Shortway." He testified that it depended upon what was contained on his work order or what was listed on his bus. Although Goza's testimony is not crystal clear on this issue, I found that he was an extremely credible witness; it should not be surprising that he could not clearly remember *why* he did something as compared to *what* he did.

were operated by Airport; after October 10, 1978, he continued to drive these buses, but with a slightly lower frequency.

IX. TRANSFER OF RIGHTS

During the period of Airport's operation, it owned ICC rights which gave it the authority to pick up passengers in certain portions of New York and Connecticut and take them outside New York State to virtually any place.[64] Margolies testified that about a week or two prior to January 24, 1978, Holland made the determination to purchase Airport's assets (including the ICC rights) if it became clear that Airport would be adjudicated a bankrupt. Margolies also testified that approximately 10 days before the adjudication it became clear to him and Brecker that there was no way that Airport could avoid the adjudication; at that point they informed Holland of the situation, and between that day and the court's approval the terms of the agreement were worked out between Holland and Margolies and Brecker.

On January 23, 1978, the bankruptcy judge issued an "Order Authorizing Sale of Assets," whereby he authorized Airport to sell its accounts receivables, trademarks, inventory, leases, and ICC rights "subject to all liens and security interests encumbering said property" to Holland for the sum of $50,000; $14,000 upon delivery of the bill of sale and other necessary documents by Airport and the remainder payable in 6 monthly installments of $6000 commencing 30 days after the closing.

The accountants report to the Trustee apparently indicates that as of the date of the adjudication, Airport was indebted to Wagner's law firm in the amount of $30,000 and was indebted to Holland in an amount in excess of $147,000. This report also states that a majority of Airport's assets (accounts receivable, inventory, property, and ICC rights) had been pledged as collateral (pursuant to ICC filings) to Wagner's law firm, Holland, and others.

Between that date and June 1978, Holland never exercised the ICC rights, although Shortway Charter was ostensibly (and illegally) operating pursuant to these rights. Margolies testified that there were a number of reasons for this; the high cost of transferring rights from one company to another as well as the fact that, since Holland itself does not operate buses, it would have had to transfer the rights to one of its operating companies and the legal fees, together with the ICC fees, would have been costly; in addition, by June 1978, the Trustee had not been fully paid for the rights and Holland was experiencing some financial difficulties generally, and specifically in completing the payments for these rights; enter Fugazy of Connecticut.

In early 1978, Fugazy of Connecticut was desirous of obtaining ICC rights which would allow it to expand its charter operation, operate regular service to Atlantic City, New Jersey, and operate a line service[65] from the airports to Connecticut. Wagner was at the time its ICC attorney, and it had asked him to ascertain if any appropriate ICC rights were available. Sometime in early to mid-1978, Wagner informed William Fugazy Jr., executive vice president of Fugazy of Connecticut, of the availability of the ICC rights involved herein. Between that time and June 13, 1978, the parties had numerous negotiating sessions; Fugazy Junior, together with the Company's attorney and controller, negotiated with Wagner, who represented the seller of the rights.[66]

On June 13, 1978, William Fugazy, as president of Fugazy of Connecticut, and Margolies, as chairman of both Holland and Dell Bus, executed an agreement providing for the sale of the ICC rights to Fugazy of Connecticut. The purchase price was $250,000[67] payable as follows: $32,000 to be paid to Holland in repayment for its payments to the Trustee-in-Bankruptcy, and $18,000 to the Trustee-in-Bankruptcy (the remainder of the $50,000 due to it) upon the ICC's granting temporary authority to Fugazy of Connecticut; and $102,000 to the Central State Bank (which Airport was heavily indebted to) and the remaining $98,000 payable to Halajen Diversified Funding, Ltd.,[68] (Halajen) (which Airport was heavily indebted to and which maintained security interests in its assets), Wagner's law firm, and Holland, payable in 30 equal, noninterest bearing installments.

In addition to the above, Fugazy of Connecticut agreed to pay annually to Holland 10 percent of its pretax profits up to $50,000, but not to exceed an aggregate of $250,000. The agreement further recites that it includes:

> . . . all of Holland's present airline crew business and its small car, limousine and stretch car business, as well as the business presently being operated by Holland's wholly owned subsidiary Dell Bus Co., Inc., and Dell's customer lists and contracts, if any.

Fugazy of Connecticut was also given an option (or, failing the exercise of the option, a right of first refusal) to purchase Holland's intra and interstate charter bus business in New York, New Jersey, and Connecticut for $100,000 payable over 3 years without interest. Fugazy of Connecticut was also granted a 3-month option to lease a portion of New York Boulevard for an annual rent of $3000.

In the agreement, Holland represented that, with the exception of the security interests of Central State Bank, Halajen, Holland, and Wagner's law firm, the ICC rights are held free and clear, and that:

---

[64] Margolies testified that the work performed by Airport under these rights comprised approximately 35 or 40 percent of Airport's total business.

[65] With "line service" each passenger pays a fare (in this case at the airport) and can disembark at any one of a number of destinations (in this case, Connecticut). At times the fares are uniform, at other times they are dependent on the length of the trip.

[66] Fugazy Junior testified that at the time he was not aware either that Holland had only paid $50,000 for these rights or that Wagner's law firm had a security interest in the rights.

[67] The agreement recites the security interest of Holland and Wagner's law firm in the ICC rights.

[68] There is no indication in the record whether Halajen is connected, in any way, with Holland.

> Holland and Michael Margolies will execute a restrictive covenant covering all of the routes, authorities and transportation services which are the subject of this agreement, said restrictions to extend throughout the States of New York, New Jersey and Connecticut and extend for a period of five years.

On June 13, 1978, Margolies (for Holland), William Denis Fugazy (for Fugazy of Connecticut), and Altesman, the Trustee-in-Bankruptcy, entered into a stipulation reciting the facts of the agreement, and on June 19, 1978, Joel Lewittes, the bankruptcy judge, issued an "Order Rescinding and Authorizing Transfers."

Margolies testified as to the reasons Holland relinquished these rights (in addition to the healthy profit they made on it) and why, he felt, Fugazy of Connecticut was willing to pay so much for these rights. Although I have found Margolies generally to be a less than credible witness, these answers appear to be very reasonable. First, as regards Holland:

> The indebtedness to the Trustee, the potential cost of transferring the right, the working capital necessary, the advertising promotion competitive nature of the business here in New York.
>
> When put all together with the pressures that were on this instant company that started from nothing, with nothing, they quickly realized you just couldn't open your doors and say there's buses.
>
> People weren't knocking on our doors looking for us. After a reasonable short period of time we realized you need a certain amount of wherewithal to keep the thing alive while you build it up.
>
> Shortway Bus Charter Corp just didn't have it; Holland was aware of it and started looking around for a way to get out of it.

And as regards Fugazy of Connecticut:

> As an example, Greyhound Corporation has no rights to Atlantic City which today is a big thing. They spent literally millions of dollars attempting to obtain rights by application to the Interstate Commerce Commission.
>
> They weren't successful for years and years; just couldn't get it. They probably could have gone out and bought it for a fraction of what the legal bill was. They wanted to do something; they anticipated what was coming.
>
> Fugazy, when they bought that right from Holland had an idea that they were going to run a line run, which that right entitles you to, between various places in the State of Connecticut and the airports, LaGuardia and Kennedy.
>
> That route for another company, Connecticut Limousine, is the most profitable transportation route in the United States of America.
>
> Fugazy said, "We're going to go head to head with this outfit, we want those rights." They were willing to pay for it.
>
> They ran the route for six months and it died on them. The whole thing turned out to be a joke but at the time they desperately wanted to get into that business.

Fugazy Junior testified that Fugazy of Connecticut was granted temporary authority to operate under these ICC rights in February 1979, and commenced these operations at that time.

X. FUGAZY OF CONNECTICUT OPERATION

As the General Counsel is attempting to establish that Fugazy of Connecticut is the successor to and/or alter ego of the other Respondents, counsel for Fugazy of Connecticut elicited testimony to establish that Fugazy of Connecticut was in existence and operating at the same time as its alleged predecessors, and, in fact, was competing with them.

Fugazy Junior testified that prior to the summer of 1978 Fugazy Continental Corp. (Fugazy Continental) had an office and place of business at 212–50 Jamaica Avenue, Queens Village, New York (Jamaica Avenue). During this period Fugazy Continental performed airline crew work and luxury limousine transportation. When they obtained charter work, they subcontracted the work to other charter operators unless they could perform the charter in one of their stretch cars. Until about the summer of 1978, its operation was solely at Jamaica Avenue, where it had been located since about late 1977. It was not until Fugazy of Connecticut leased buses and purchased buses that it needed additional space and leased approximately one half of New York Boulevard.

Fugazy Junior testified that from July to October 1978 Fugazy Continental employed a number of busdrivers.[69] Although Fugazy of Connecticut did not transfer its entire operations to New York Boulevard until February 1979, beginning about September 1978, it leased space at New York Boulevard for the storage and parking of the Pittsburg and Weirton (P&W) used buses it had just purchased and for the storage of spare parts.[70] Fugazy Continental received a study, dated May 18, 1978, which it had commissioned, entitled "Feasibility Study of Fugazy Continental's Expansion Into Bus Market." The study found that its entry into the bus market (as compared to airline crew work and luxury limousine work which they were then performing) would "complement your existing transportation services" and be "feasible and essential for Fugazy to maintain its continuous expansion."[71]

---

[69] On June 14, 1978, prior to hiring any employees, Fugazy of Connecticut executed a collective-bargaining agreement with Local 819. Except for the date of this agreement, and the effective date of a few of its provisions, this agreement is identical to the Maintenance and Manpower and Local 522 agreement dated January 16, 1978.

[70] Fugazy Junior testified that for the period prior to February 1979 Fugazy Continental and then Fugazy of Connecticut paid $3000 a month rent for their portion of the New York Boulevard premises. However, when he examined the Fugazy cash disbursement journal and check stubs, produced pursuant to subpoena, he could not locate any record of rent payments for the period prior to February 1, 1979. He also testified that on a number of occasions he was sued for nonpayment of rent for the New York Boulevard premises.

[71] As regards Jamaica Avenue, the study states "that with minor modifications this facility can accommodate the storage, repair and maintenance of approximately five to ten buses."

Dern, like Margolies, was present on the scene during a large portion of the timeframe involved herein; he was involved with Dell Bus, and remained at New York Boulevard after January 24, 1978; beginning in May 1978, he began employment with Fugazy. Dern testified then during the period between October 1977 and the time he was hired by Fugazy he did "nothing" for Maintenance and Manpower; he did no dispatching: "My job? Using the term broadly, I was self employed. I was trying to pick up dollars selling Dell equipment."

The employees who testified on the subject saw things differently; Lyons testified that, during the period while Airport was at New York Boulevard, speaking of Dern: "He runs the show." Autry testified that during that period Dern was the chief dispatcher and Goza testified that Dern did not leave New York Boulevard until about 1980, and in September and October 1978 "he was still the chief as far as I knew."

Dern testified that about May 1978 he went to Fugazy Continental and saw Fugazy Junior. He told him that he was with Dell Bus for a number of years, and he knew limousine operations and people at their airport and he felt he could be an asset to Fugazy Continental. He was hired as "operations manager of the Fugazy Limousine Company." He testified that at that time Fugazy was only in the limousine and travel business. Approximately 2 months later after Fugazy acquired the P&W buses, he generally dispatched the Fugazy drivers, either in person or over the telephone. He remained at the Jamaica Avenue location until September 1978 when he moved to Fugazy's limousine location in Manhattan. In November or December 1978, he returned to New York Boulevard. Fugazy Junior testified that Dern contacted his office about May 1978, and asked if a job was available. He was hired as assistant director of operations for Fugazy Continental, with jurisdiction over limousine operations, crew work, and dispatching—"He was a managing dispatcher."

Dern testified that beginning about June 1978 Fugazy Continental began hiring busdrivers and it was during June, July, or August 1978 that he hired 15 to 18 busdrivers.[72] They had some ads in the newspapers which attracted some drivers and others applied after hearing of the availability from others; he interviewed and hired all these individuals at Jamaica Avenue.

Dern also testified that between June and September 1978, while he was located at Jamaica Avenue, certain of the buses (in fact, probably all of them) were located at New York Boulevard. The procedure for dispatching the drivers during this period was for the drivers to go to the Jamaica Avenue location, receive the dispatch order from Dern (or someone else) for that day or the following day, and go to New York Boulevard, pick up their buses, and leave. In addition, according to Dern's testimony, Fugazy Continental then had a "hotline" telephone at New York Boulevard, which when picked up would ring at Jamaica Avenue. Dern would instruct a driver to call him in the morning on the "hotline"[73] and Dern would give him his orders over the phone in that manner.

Carlos Gonzales testified that he was employed by Airport and Maintenance and Manpower,[74] and began working for "Fugazy" about June 1978. He testified that because "we lose a job" at Maintenance and Manpower he went to "the Fugazy Limousines" for a job "because always I do the jobs in the Airport, I know Fugazy." Gonzales went to Jamaica Avenue where he asked Dern for a job as a limousine driver, but Dern told him that they were purchasing buses and they needed busdrivers. Shortly thereafter he began driving a bus for Fugazy. During the period while Dern was at Jamaica Avenue and the buses were at New York Boulevard, he drove to New York Boulevard, picked up his bus, drove it to Jamaica Avenue, received his dispatch orders, and was on his way.[75]

Earl Autry, who was employed by Airport as a driver through January 1978, testified that in June 1978 he went to Jamaica Avenue ("Fugazy's limousine operation, as far as I know, was up there") and asked Dern if he could get a job with Fugazy as a busdriver.[76] Dern told Autry that he had a job for him, but Autry explained that he would not be ready to work immediately because of a recent death in his family. He asked Dern if Fugazy would have a busdriver's job available for him shortly when he was ready to work, and Dern assured him that they would. In August 1978, he informed Dern that he was ready to work and he began working for Fugazy[77] on that same day doing charter work and crew work. On that first day he went from Jamaica Avenue to New York Boulevard where he introduced himself to someone and got his bus. On that first day of employment with Fugazy Continental he drove in his street clothes. For the next months he wore his Airport uniform, which he owned. A few months later, Fugazy of Connecticut distributed uniforms to its drivers.

Goza testified that about July or August 1978 Sylvester Green, a driver employed by Fugazy Continental, told him that Fugazy had an operation located at Jamaica Avenue, and that Clifton, Gonzales, Arthur Davis, and Prince Glover were working there as drivers.

There was a substantial quantity of testimony, principally from Goza, regarding driver seniority at Fugazy of Connecticut. Although there is no allegation herein of unlawful discrimination in regard to Goza's position on

[72] Fugazy Continental's check stubs beginning August 9, 1978, are in evidence. From that date until mid-October 1978, the payroll check stubs generally indicate the job the individual was employed in; the most common description is "mech." None of these check stubs have a notation that the employee was a busdriver.

[73] Dern testified that only the two Fugazy Continental maintenance employees—his son, Alan Dern, and Willie Green—had access to the room at New York Boulevard where the "hotline" was.

[74] Gonzales' application for employment with Fugazy Continental lists Browns, Airport, and Shortway as his former employers; he did not list Maintenance and Manpower there.

[75] Gonzales is presently second on the Fugazy of Connecticut seniority list; first on the list is Clarence Fisher, who is the shop steward, but it is not clear from the record whether Fisher is first simply because he is shop steward.

[76] He testified that a former fellow driver at Airport, Arthur Davis, informed him that there might be a job available at Fugazy Continental. Davis at that time was driving a bus for Fugazy Continental.

[77] He testified that in August and September 1978 the corporate name on his paycheck was Fugazy Continental Corp.

this seniority list, there is some relevance (albeit minor) of these facts to the ultimate issue herein.

Goza testified that his starting date on the Fugazy of Connecticut seniority list is October 11, 1978, although, he testified, "there is a little discrepancy." Ahead of him on this list were Leroy and Charles Gillard, Johnny Eagle, Stokes, Fisher,[78] Gonzales, Otis Creighton,[79] Erastus Clifton,[80] Raymond O'Kelly, Johnny Boyd, Neubra Smith, and Robert Duggan. The reason for the "discrepancy" appears to be that, since Goza was working out of New York Boulevard since January 1978, he felt that he should have had greater seniority with Fugazy of Connecticut than drivers who began working for Fugazy Continental between July and October 1978.[81] Goza testified that sometime "after Fugazy took over" in October 1978 the "old timers from Shortway,"[82] including himself, spoke to Fisher about all the names that were ahead of their names on the Fugazy of Connecticut seniority list; Fisher told them that these were the drivers who had previously been employed by Fugazy Continental at Jamaica Avenue and "they go to the top of the seniority list."

Received in evidence were the "Fugazy" payroll registers for the pay period ending June 28 through the pay period ending October 4, 1978. The first date on which these registers list names of busdrivers who had previously been employed by Airport, Dell Bus, Maintenance and Manpower, or Shortway Charter (or all or some of them) is the week ending August 2, 1978.[83] Prince Glover, Elton Nock, Stencil Stokes, and Otis Creighton appear on this payroll. Carlos Gonzales, as well as Robert Bryant, appears on the payroll the following week for the first time. Beginning the week ending July 26, 1978, and, at least, continuing through the week ending October 4, 1978,[84] Dell was on this Fugazy payroll register at $200 per week.[85]

The first buses that Fugazy Continental purchased were the used P&W buses; Fugazy Junior testified that about June he and Dell went to West Virginia to inspect these buses and that Dell was employed by Fugazy Continental for about 6 to 8 weeks and was paid as a consultant to examine the buses and make recommendations as to whether he should purchase them. They purchased 12 of these buses together with spare bus parts; the buses were delivered to New York Boulevard about July 1978, where the Fugazy name was painted on them and they were prepared for operation. Fugazy Junior testified further that in September 1978 Fugazy purchased 12 new buses from Motorcoach Industries; they expected delivery of these buses in February 1979; however, they did not arrive until June 1979; during this period between February and June 1979, Fugazy of Connecticut leased some buses from "Shortway" to cover its deficiency.[86] Margolies testified that in October 1978 Holland leased 12 buses to Fugazy of Connecticut on a month-to-month basis; these buses were leased to assist Fugazy of Connecticut which had previously purchased 12 new buses which had not yet been delivered.

XI. FUGAZY AND SHORTWAY TOGETHER AT NEW YORK BOULEVARD

Admittedly, between June or July and early October 1978, both Shortway Charter and Fugazy had buses located at New York Boulevard. Shortway Charter's entire operation was located there whereas, during that period, only Fugazy's bus operation was there. There is some conflicting testimony regarding the interaction between these two companies during this period.

In addition to its busdrivers, Fugazy had, at least, two regular employees at New York Boulevard, Dern's son, Alan Dern, a cleaner, and Willie Green, a mechanic. The pay stubs of the checkbook of Fugazy of Connecticut establish that on the first day that any checks were written from that checkbook, August 9, 1978, the employees were paid for a week's work.[87] Fugazy Junior, who testified that in the period from July 1978 through February 1979 he visited New York Boulevard "frequently,"[88]

---

[78] Fisher's application for employment with "Fugazy Continental Corp." is dated on the front page November 3, 1980, and on the back page July 7, 1978. The front page lists employment with Yellow Freight Company from 1970 to 1980. This conflict is unexplained.

[79] Creighton's application, which contains no company name, is dated March 9, 1978.

[80] Clifton, like Goza, for some unexplained reason also filled out more than one employment application, one on August 7, 1978, and one on September 19, 1980, where he lists "Fugazy" as his employer from July 8, 1977, to the time of the application.

[81] Illustrative of the problem is the following testimony of Goza:

Q. Isn't it a fact that these people were working for Fugazy before you started?

A. Fugazy wasn't even in existence when I started working for Maintenance and Manpower. How could they be working for Fugazy?

Q. Isn't it a fact that when you started to work for Fugazy on October 11, 1978, that there were 13 people who had already begun to work for Fugazy before you?

A. I don't know.

[82] Goza testified that he never saw any seniority list for Shortway or Maintenance and Manpower. The first time he saw the Fugazy list was about October or November 1978. It was on October 10, 1978, that he was first informed that from that date he was employed by Fugazy of Connecticut.

[83] This is not surprising as this corresponds to about the time that the P&W buses were delivered to Fugazy.

[84] Dell is not listed on the later payroll registers (Fugazy Continental) in evidence. However, I would not conclude from this that October 4, 1978, was his last day as a paid consultant for Fugazy as Dern, admittedly an employee of Fugazy after October 4, 1978, is not listed on these payroll registers as well.

[85] Fugazy Junior testified that he did not believe that Dell was ever on a Fugazy payroll.

[86] During other portions of his testimony, Fugazy Junior testified that about the latter part of 1978, or October 1978, he leased buses from Holland. During this period the number of buses leased varied from four to a greater number, and depended on the number of Fugazy buses that were nonoperational. He testified further that during this period Margolies' buses were being transported, or being made ready for transport, back to Ohio (the principal location of Shortway Lines and Holland).

[87] Other maintenance employees, J. Nicholas, Hubert Howie, H. Graham, and others, are named in these pay stubs, but the full record establishes that Green and Alan Dern were the Fugazy of Connecticut maintenance employees who were regularly at New York Boulevard.

[88] When pressed on cross-examination to be more precise, he testified that he visited New York Boulevard once a week, then "once a week,"

Continued

testified that Fugazy employees were not authorized or permitted to work on Shortway Charter vehicles; there was strict adherence to separation and allocation of space at New York Boulevard, according to Fugazy Junior's testimony.

Dern testified that after Fugazy moved to New York Boulevard, the area in which Fugazy employees performed maintenance work on the Fugazy buses was called the body shop. There was a door from the parking lot into the body shop and there was a door between the body shop and the Shortway Charter Maintenance area with a chain lock on it. During that period (July through October 1978) Fugazy had two regular employees at New York Boulevard—Dern and Green. At times other mechanics, such as Donald Beckles, helped out on their own time maintaining the Fugazy buses. Dern further testified that these Fugazy employees were only authorized to work on Fugazy vehicles, although he could not personally testify as to whether this rule was followed, since during this 3- to 4-month period he was present at New York Boulevard for "minutes." Margolies testified that during this period from June through October neither Shortway employees nor employees leased from Maintenance and Manpower drove Fugazy buses or performed any work on Fugazy buses.

Goza (who was employed at New York Boulevard and on October 10, 1978, became employed by Fugazy of Connecticut, infra) testified that, while he was employed by Shortway between June and October 1978, he was never told to have nothing to do with the Fugazy buses. Autry testified that he was not aware that there were separate parking spaces and separate maintenance employees for Fugazy buses, as compared to Shortway Charter buses, between August 1978 (when he obtained employment at Fugazy Continental) and October 1978. He did testify, however, as did Dern and Gonzales, that during this period there were some disagreements between the Fugazy employees and the Shortway Charter employees and dispatchers. The result of this was the Fugazy drivers had to use the "hotline" telephone in a separate room off the dispatcher's office to get their instructions directly from Jamaica Avenue.

Gonzales (who appeared to be a highly credible witness) testified that during the period of June through October 1978 (while he was employed by Fugazy) he had a specific area in which to park his bus and the Shortway Charter drivers had a specific area in which to park their buses. In addition, Green worked on Fugazy buses only and Alan Dern cleaned and fueled his bus, but not Shortway Charter buses, during that period. As regards repairs and spare bus parts, Gonzales (who had difficulty with the English language) testified, "I know, we park it and repair in different parts, Fugazy and Shortway, that's all I know," although he never watched Green perform mechanical work on the Fugazy buses. When he needed work to be performed on the bus he was driving, Gonzales filled out a defect card and gave it to the dispatcher at New York Boulevard, who, at that time, was Stokes. He testified that on a number of occasions this was the procedure he followed between August and October 1978; he did not bring the defect card to Jamaica Avenue or give it to Alan Dern. He was dispatched to jobs generally by Dern at Jamaica Avenue, where he turned in his receipts to be reimbursed for tolls.

Donald Beckles was employed by Shortway (although he testified that his paychecks sometimes had the name Maintenance and Manpower) and then by Fugazy as a mechanic. He testified that after the P&W buses were delivered to New York Boulevard (but prior to the time he received his first paycheck from Fugazy[89]) he performed mechanic's work for about a week on these P&W buses at the request of Dell, who paid him in cash for the work. He performed this work on his own time, after he had punched out on his Shortway timecard. Beckles also testified that during the period while he was employed at New York Boulevard, after the arrival of the P&W buses but before he received his first paycheck from Fugazy, the Fugazy buses were worked on in the body shop separate from the Shortway buses, but were washed and fueled in the same area as the Shortway buses. During this period Fugazy employed its own mechanics—Green, Dave Foster, and "Jean,"[90] who had previously been employed by Shortway Charter, "but after the Fugazy buses came in, they worked for Fugazy" and no longer worked on Shortway buses during their regular working time. During this period Alan Dern and "Michael"[91] cleaned and fueled the Fugazy buses only and during this period the spare parts for the Fugazy buses were kept in the rear of the body shop separate from the spare parts for the Shortway buses. Beckles also testified that "the drivers working for Fugazy and the ones working for Shortway were different. They were getting different checks." He testified that at one time (during this same period prior to Beckles receiving his first regular paycheck from Fugazy) the Fugazy and Shortway drivers were dispatched out of the same office, but "a little friction" developed between the two groups of drivers over the fact that the Fugazy buses were of a better quality. Beckles testified that he knew that there was a separate telephone for the Fugazy drivers located in the office beyond the dispatcher's office.

Autry testified that during the early period of his employment with Fugazy, and prior to October 1978, he was being dispatched by messages through the Shortway dispatcher. At a certain point that system terminated and he had to call Jamaica Avenue in order to be dispatched. During that same period, he observed Alan Dern fueling his bus.

---

maybe twice a week. It varied." In a prior deposition to the Board, he testified that between October 1978 and February 1979 he visited New York Boulevard "on a few occasions."

[89] Beckles first appears on the Fugazy of Connecticut payroll for the week ending October 15, 1978. His name does not appear on Fugazy's check stubs for the period prior to that. Willie Green and Alan Dern, whose names appear on numerous occasions on these check stubs, are not listed on any of the Fugazy payroll registers for the periods prior to October 22, 1978.

[90] The Fugazy check stubs for the period commencing August 9, 1978, show weekly pay to Foster, Jean Nicholas (as well as Alan Dern and Willie Green) and others through October 4, 1978.

[91] The check stubs referred to, supra, give no hint as to the identity of "Michael."

Gibson, who worked part time for Fugazy ("sometime I would call them, sometime they would call me"), testified that the Fugazy dispatchers whom he spoke to while employed there were Stokes, Gaynor, Wurth, and Canaday.

Goza testified that between June and October 10, 1978, he observed the newly painted P&W buses coming from Kennedy Airport; they were driven on these occasions by Green and Clifton. Between those occasions and October 10, 1978, he only saw Green at New York Boulevard on one occasion when he brought his bus to New York Boulevard for repairs and never saw Clifton at New York Boulevard. He also testified that about the end of September 1978 (about 2 weeks prior to the date that he was informed that he was then employed by Fugazy of Connecticut) while he was still employed by Shortway Charter, he drove one of the P&W buses, as did Smith, Gonzales, Clifton, Davis, and Green, who were then Fugazy employees. Gonzales testified that during the period that P&W buses were operational in October he drove only the P&W buses, and he did not observe any Shortway drivers driving these P&W buses.

Moser testified that about March 1979 he went to New York Boulevard and observed buses that were marked Shortway Lines,[92] Airport, and Fugazy; all of these buses had the same ICC number written on them.

As stated supra, the June 13, 1978 agreement providing for the sale of the ICC rights to Fugazy of Connecticut provided, inter alia, a 3-month option to lease a portion of Holland's premises at New York Boulevard for 10 years at an annual rental of $3000, plus 50 percent of the cost of utilities and maintenance, and an option to purchase Holland's charter business for $100,000. On October 6, 1978, William Denis Fugazy (as president of Fugazy of Connecticut) and Margolies (as secretary and chairman of the board of Holland) entered into an agreement which modified the June 13, 1979 agreement in a number of ways; it provided that "[c]ash payments pursuant to Paragraph 1(a)[93] shall be limited to the $18,000 heretofore paid the Trustee in Bankruptcy." Additionally, the agreement provides, inter alia:[94]

> Included in this sale is . . . Holland's *intra* and interstate charter bus business originating in New York State . . . . Connecticut hereby leases a portion of Holland's premises at [New York Boulevard] at a monthly rental of $3,000, plus 50% of the cost of utilities and maintenance, commencing July 1, 1978, through October 31, 1978. Commencing November 1, 1978, Connecticut leases the entire premises at a monthly rental of $6,000 plus all costs of utilities and maintenance.

Fugazy Junior testified that about the time he (together with Dell) purchased the 12 P&W buses, Wagner informed him that he might want to lease a certain part of New York Boulevard to maintain and store these buses and the accompanying parts. Fugazy Junior agreed that there was not enough space at Jamaica Avenue for all the buses and spare parts, so beginning in July 1978, with the delivery of the buses, Fugazy of Connecticut began occupying New York Boulevard. As to the nature of the lease, Fugazy Junior testified:

> It was oral, based on how much space we really occupied—you know, two or three buses didn't really make any—we could have kept those at the Jamaica Avenue property.

He also testified that he was "sure we paid some rent" between June and October 1978, although, as stated supra, there is no convincing proof that Fugazy of Connecticut paid any rent even through January 1979. Finally, he testified that the rent was "ultimately" $3000 a month "in February of 1979, when we had all our buses."[95] Margolies testified that Fugazy of Connecticut began to occupy "some" of New York Boulevard after the June 13, 1978 agreement was signed.

On October 5, 1978, Holland (by Margolies, secretary) and Fugazy Travel & Incentive Corp., herein called Fugazy Travel (by William Denis Fugazy, president), entered into an agreement whereby Holland agreed to act as a consultant to Fugazy Travel, and not to compete with it in the travel business, and Fugazy Travel agreed to pay Holland (referred to in the agreement as "consultant") an advance of $4000 a month with the actual amount dependent on a formula based on the net profits

[92] Margolies, who is secretary and a director of Shortway Lines, testified that its ICC rights provide that it can originate trips from certain areas of the midwest (Ohio, Indiana, etc.) east to Pennsylvania, but it has no ICC or local authority to pick up passengers in New York, nor is it licensed to do business in New York. He testified "there is no possible way that a Shortway bus would ever be in a garage while Fugazy was there" or even while Airport was there. According to his testimony, the only occasion a Shortway Line bus would be at New York Boulevard, or any other garage, was if they had a bus with mechanical difficulty; if that occurred, however, Shortway Lines would use the services of a garage of Greyhound with which it has contractual relations regarding the repair of each companies' buses. I would discredit Margolies' testimony as numerous employees (who were substantially more credible than Margolies) testified to the presence of Shortway Lines buses at New York Boulevard; additionally, it is admitted that Holland leased buses to Fugazy; it is reasonable that, for this purpose, Holland used the buses of Shortway Lines—which owned 50 to 75 buses.

[93] Paragraph 1(a) of the June 13, 1978 agreement states that the $250,000 purchase price shall be payable: "$18,000 to the Trustee in Bankruptcy and $32,000 to Holland Industries, Inc.," as well as to others.

[94] In addition, this agreement provides: "In addition to the aforesaid modifications, Connecticut agrees to hire Michael Margolies as a Consultant for three months commencing October 9, 1978, at a salary of $4,000 per month."

[95] I did not find Fugazy Junior to be a credible witness. While being questioned by the General Counsel he displayed a surprising ignorance of the facts that could demonstrate either his evasiveness as a witness or his lack of knowledge of many of the facts affecting Fugazy of Connecticut. In addition, his testimony contradicts itself at certain points; for example, when asked when he paid $3000 a month rent for New York Boulevard, he testified, "I believe it was in February of 1979 when we had all our buses." However, according to his testimony, Fugazy of Connecticut did not have "all" its buses until it received its Motorcoach Industry buses in June 1979. Additional conflicts appear in Fugazy Junior's testimony regarding the occasions that Fugazy of Connecticut leased buses from Holland and his testimony regarding the frequency of his visits to New York Boulevard, supra. Finally, at the hearing Fugazy Junior testified that, with minor exceptions, Margolies did not do any consulting for Fugazy of Connecticut regarding the bus business; yet, Fugazy Junior had previously testified, during an investigative hearing, that Margolies was a consultant on the direction the bus company should take and he consulted with Fugazy Junior on the matter of purchase of equipment, and recommended the purchase of the Motorcoach Industry buses as compared to a different bus.

of Fugazy Travel. The agreement is for a term of 10 years beginning October 16, 1978, and states:

> Consultant is the sole shareholder of Executives International Travel Agency, Ltd. ("Executives"); Consultant has also been engaged in the travel business and has acquired knowledge experience and expertise concerning this business.
>
> Executives has this date sold substantially all of its assets to the Company [Fugazy Travel] and incident to such sale Consultant has agreed to consult with and assist the Company and not to compete with the Company in the future. . . .
>
> The Company desires to enter into this Agreement with Consultant in order to insure the performance by Consultant of consulting services for the Company, and to insure that Consultant will not compete with the Company. . . .
>
> Consultant shall render services on such matters relating to all aspects of the travel business, including matters relating to management, sales, sales management, personnel and administration and business operations, as may reasonably be requested from time to time by the Company. The Consultant shall not be under any obligation to spend particular amounts of time in connection with its duties hereunder. The Company shall not exercise supervision over Consultant in the performance of its duties hereunder, nor shall the Company require compliance with detailed orders and instructions, it being the intention of the parties that the Consultant shall have sole discretion over the number of hours, schedule of hours, and nature of services which it shall render.

Margolies testified that, during his negotiations with Fugazy Junior regarding these agreements, Fugazy Junior told him that they needed someone who knew the industry and equipment and could assist them in those areas. During the 3-month period, beginning October 1978, that Margolies was employed as a consultant for Fugazy Travel, he had an office at 1345 Avenue of Americas (Executives' office) and at 126 East 35th Street (Holland's office), and "I had the use of desk and facilities at Fugazy office, 645 Madison Avenue," all in New York City. When he was asked if he was at the Fugazy office on a daily basis during this 3-month period, he testified, "Regularly would be a better word. Not daily but certainly regularly." He also testified that during this 3-month period he spent almost his full time consulting for Fugazy of Connecticut regarding the bus business, and, in that regard, assisted it in the purchase of the 12 buses in early 1979.

Fugazy Junior testified that the primary purpose of retaining Margolies was in the travel area; as stated supra, he also testified that Margolies did not do any consulting with respect to Fugazy of Connecticut's bus business. When asked if Margolies rendered any services to any Fugazy corporation concerning bus operations, he testified:

> Not really, I mean, his function in the travel operation did necessitate occasionally discussions about bus tours and ground transportation services for group transfers related to the sale of travel; but other than that, very little.

Not too long thereafter, Margolies sued Fugazy of Connecticut under these agreements; what is relevant herein is that in a demand for a bill of particulars dated October 29, 1979, the Respondents requested: "[S]pecifically set forth nature of the services plaintiff was to perform for defendant." The bill of particulars answered "Michael Margolies was to assist in the orderly transition of the bus business from Shortway to Fugazy. This involved all aspects of the business (administration, sales, management and maintenance)."

XII. SHORTWAY DISAPPEARS

As stated supra, Goza is an employee who began working for Maintenance and Manpower just at the time of the demise of Airport, and has been employed at New York Boulevard until the present time, having later been employed by Shortway Charter and Fugazy of Connecticut. He testified that about midsummer 1978 the name on his paycheck changed from Maintenance and Manpower to Shortway Charter; at that time, as well, Stokes, the dispatcher, asked him to complete a new employment application for Shortway. His paychecks contained the Shortway Charter name until October 1978.

Goza testified that on October 10, 1978, he left New York Boulevard about 7 a.m. for a trip to Washington and returned the same day about 7:45 p.m. (On his log that day he listed Shortway Charter as the carrier.) He and Neubra Smith were walking together when Larry Canaday, the dispatcher said, "Well, you no longer work for Shortway, fellows, you work for Fugazy now." That was the extent of that conversation and beginning October 12, 1978 (he was off the next day, October 11, 1978), he listed "Fugazy Continental" as the carrier in his log. Goza also testified about the dispatchers during the pre- and post-Fugazy period in October 1978; however, this testimony is so indefinite that it will not be recited or considered.

Margolies testified that the main period of Shortway Charter's operation after January 24, 1978, was until about July 1978; prior to that time, Margolies was at New York Boulevard "regularly"; over the following 4-month period beginning in July 1978, Shortway Charter phased out its operation at New York Boulevard (Margolies was there about twice a week during that period) and by October its operation had ceased entirely.

Goldman and Roth[98] appear on the Fugazy of Connecticut payroll in October 1978. (Goldman testified that he was employed by Fugazy of Connecticut in its sales department, but his employment with that company lasted only for 3 weeks.) In January 1978, shortly before the adjudication, Goldman was paid $461 a week and

[98] As stated supra, at various times Roth was listed as controller of Shortway Charter and Maintenance and Manpower; Goldman was an officer of both Airport and Shortway Charter, and, for a brief time, was an officer of Holland.

Roth was paid $366 a week by Airport.[97] For the short period of his employment with Fugazy of Connecticut, Goldman was paid $460 a week; Roth was paid $366 a week by Fugazy of Connecticut.

The General Counsel, in his attempt to establish that the numerous different employers at New York Boulevard were really one employer (or, stated more succintly, that Holland, Maintenance and Manpower, Dell Bus, Shortway Charter, and Shortway Lines were the alter ego and/or successors to Airport and Fugazy was the alter ego and/or the successor of Airport, Holland, and the others) presented evidence establishing a progression of telephone numbers going from one employer to another.

523–1010: The first billing was to Cross County in October 1977 at New York Boulevard, with a final bill to Cross County at that address in May 1978. In August 1978, there was a billing to Cross County, but this time at Jamaica Avenue; in September 1978, the customer's name was changed to Fugazy Continental at Jamaica Avenue. Beginning in October 1978 through April 1979, the billing was to Fugazy Continental at West 49th Street in New York City.

657–7600: The first bill, dated October 1977, through the final bill, dated January 1978, were to Airport Bus at New York Boulevard. Beginning January 1978, the billing is to Shortway Charter, also at New York Boulevard. In November and December 1978, the billing is still to Shortway Charter, but the address is changed to 645 Madison Avenue in New York City, the address of Fugazy's office. Beginning in December 1978 through, at least, April 1979, the billing for this number is to Fugazy Continental at 645 Madison Avenue.

526–2800: Beginning in July 1978, this number was billed to Dell Bus & Limousine Service at New York Boulevard. This billing continued unchanged until January 1979 when the billing was to Fugazy Continental at New York Boulevard at least through April 1979.

526–5700: Beginning in October 1977, this number was billed to Omnibus Limousine Service at New York Boulevard. The next bill that the telephone company could locate (pursuant to a subpoena from the General Counsel) was a December 1978 final bill to the same party at the same address. There is another bill for this number for December 1978 to Fugazy Continental at New York Boulevard.

565–4175: From the first listing in November 1977 to the final billing in September 1978, this number is billed to Dell Limousine Service at New York Boulevard. In September and October 1978, the billing for this number went to Fugazy Continental at its 645 Madison Avenue location in New York City.

291–3000: The first bill in evidence for this number is to Airport at New York Boulevard, and is dated November 1977. The February 1978 bill to Airport is a final bill, and there is another bill dated later in February 1978 to Shortway Charter at New York Boulevard for this number. The final bill to Shortway Charter is January 1979; on the same date there is the first billing to Fugazy of Connecticut at 645 Madison Avenue for this number.

656–5858: The earliest bill located for this number is dated October 1977, and is to Airport Bus Service, Incorporated, Debtor-in-Possession, at Building 69. The next billing located is for January 1978 to the same customer, but the billing address is New York Boulevard. In February 1978, the customer appears as Shortway Charter at New York Boulevard; the final bill to Shortway Charter for this number is December 1978; beginning January 1979, the number is billed to Fugazy of Connecticut at New York Boulevard.

XIII. BUS OPERATIONS COMPARED

One ingredient in establishing a successorship or alter ego relationship is the similarity or identity in the operation of the companies. It is therefore necessary to examine the operation of Airport, Shortway Charter, Maintenance and Manpower (between January and October 1978), and Fugazy.

Airport was principally engaged in two forms of transportation: charter work and crew work for the airlines. Additionally, Airport, on occasion and pursuant to agreements with the airlines, transported passengers between the airports or between the airport and New York City; this transportation was paid for by the airlines.

The testimony of the employees is that at the January 24, 1978 meeting Margolies told them that he would be operating charters only, but that Dell would perform crew work, and Margolies' testimony at the hearing herein is that Shortway Charter, during the period January through October 1978, did only charter work. However, Dern testified that Shortway Charter performed crew work during this period (he estimated that they did about 30 crew jobs each day) and Goza testified that most of the work of the Company prior to October 1978 was crew work which he drove;[98] for the reasons stated supra, I would credit Goza (and, in this case, Dern) over Margolies. Dern also testified that Shortway had an operation with Yeshiva University involving six coaches daily transporting children from Brooklyn and Queens to Yeshiva University. The record also establishes that Dell continued to perform the Parking Lot No. 7 operation previously performed by Airport.

From the very beginning, Fugazy also performed charter work and crew work;[99] in addition, when Dern began his employment at Fugazy it was already operating a limousine operation[100] composed of in excess of 100 limousines. Dern also testified that at the time of his employment with Fugazy the Company was performing little, if any, passenger service work from the air-

[97] As there are no Shortway Charter nor Maintenance and Manpower payroll records available (they were subpoenaed by the General Counsel, but never produced) I am unable to determine what salary Goldman and Roth received at these companies.

[98] In this comparison of company operations, I have combined Shortway Charter and Maintenance and Manpower. The employees whom they employed who testified could not differentiate between the two, and the degree to which they have been intermingled makes it impossible to separate the two.

[99] Margolies testified that for the period July through October 1978 Shortway Charter and Fugazy were competing with each other in a limited way.

[100] Under a different Fugazy corporation.

ports.[101] He "chased" this work for Fugazy and got the Fugazy name put on the airlines' list of bus companies to call in these situations.[102] In addition, about January or February 1979, Fugazy began transporting professional baseball and football teams, both within the New York area, and from the New York area to other cities.

Dern also testified that on December 30, 1979, Fugazy commenced a bus operation to Atlantic City. This was a line run[103] which involved making stops in the five boroughs of New York, taking people to the Park Place Hotel and Casino in Atlantic City, waiting 6 hours and then returning the passengers to the New York area. Dern testified that initially this operation accounted for almost half of Fugazy's buses, 13 out of 29.

Between January and November 1979, Fugazy operated a Connecticut run, which was a line operation from the New York area airports to New Haven, making stops along the way and returning by the same route.[104] The buses made a number of trips daily to Connecticut on this line run while it was still in operation. Of all the companies involved herein, only Fugazy had an operation such as the Connecticut line run, the Atlantic City line run, and charter work for professional athletic teams.

XIV. EMPLOYEES COMPARED

The difficulty herein in comparing the employees who were employed by Airport, Dell Bus, Shortway Charter, Maintenance and Manpower, and Fugazy (of Connecticut or Continental) in determining successorship or alter ego status among these companies is the lack of documentation of the employees employed by these companies. Payroll records of Airport for the period October 1977 through January 12, 1978 are in evidence, as well as payroll records for Fugazy Continental or Fugazy of Connecticut for the period June 28 through December 29, 1978. No other Respondent supplied any payroll records pursuant to subpoenas issued. As secondary evidence on this issue, a number of employees testified regarding the employees who were employed at certain times.

There are a number of Fugazy payrolls in evidence both for Fugazy Continental and for Fugazy of Connecticut and for different periods of time. Listed on the payroll registers for "Fugazy" from August through October 4, 1978, are a total of 28 drivers;[105] of these, nine appear on the Airport payroll registers for October 1977 through January 12, 1978.[106] Of the 44 drivers listed on the Fugazy of Connecticut payroll for the week ending October 15, 1978, 17 appeared on the Airport payroll registers for October 1977 through January 12, 1978. Of the 12 maintenance employees listed on the Fugazy of Connecticut payroll for the week ending October 15, 1978,[107] none were listed on the payroll of Airport between October 1977 and January 12, 1978. Of the 34 drivers listed on the Fugazy Continental payroll for the week ending October 29, 1978, 17 had been employed by Airport between October 1977 and January 12, 1978. Also on the Fugazy Continental payroll for the period ending October 29, 1978, is a listing of 14 individuals who appear to be mechanics and maintenance employees. Of these, 3 had been employed by Airport between October 1977 and January 12, 1978. Finally, of the 23 drivers listed on the Fugazy Continental payroll for the period ending December 31, 1978, 11 had been employed by Airport in the period October 1977 through January 12, 1978. On that same Fugazy Continental payroll, 10 mechanics and maintenance employees are listed; 1 had been employed by Airport between October 1977 and January 12, 1978.

The lack of payroll data from Shortway Charter, Maintenance and Manpower, or Holland clearly makes more difficult the General Counsel's attempt to establish a linkage between these companies, Airport, and Fugazy. In order to fill in this gap, the General Counsel used secondary evidence of testimony of employees regarding which employees were employed by these Respondents, together with Local 522 authorization cards, to establish that Fugazy employees had previously been employed by one of these Respondents at New York Boulevard.

As previously stated, the Fugazy of Connecticut payroll for the week ending October 15, 1978,[108] lists 44 drivers, 17 of whom were on the previously mentioned Airport payrolls; none of the 12 maintenance employees listed on the Fugazy of Connecticut payroll for that week were on these Airport payrolls. Apparently, the General Counsel is attempting to establish that at least another 12 of these employees had been employed by either Shortway Charter, Maintenance and Manpower, or Holland *and* that these companies are alter egos or successors of Airport.

In addition to the testimony of these 17 drivers,[109] the Local 522 authorization cards subpoenaed by the General Counsel establish that 2 additional drivers on the Fugazy of Connecticut payroll of October 15, 1978, Phillip Brown and Leroy Gillard, were employed by Maintenance and Manpower at New York Boulevard; Brown signed a Local 522 authorization card on January 26, 1978, stating that he commenced his employment with

[101] This involved unscheduled delays or cancellations for the airlines caused by mechanical difficulties or poor weather. The result is often that a large number of passengers have to be transported to another airline, another city, or to a hotel, requiring the use of a bus which is paid for by the airline.

[102] Dern testified that this work is substantially more profitable than regularly scheduled crew work.

[103] The schedule listing the stops of each of the buses appears in Fugazy advertisements in the newspapers.

[104] This was the line run referred to supra in Margolies' testimony as extremely unsuccessful.

[105] These payroll registers do not appear to list many, or all, of its maintenance employees.

[106] The last payroll supplied by Airport.

[107] Neither Alan Dern nor Willie Green is listed on this payroll; Alan Dern had previously been employed by Airport.

[108] I chose this payroll week as it is the first Fugazy of Connecticut payroll, and Shortway Charter was no longer located at New York Boulevard. On the payroll for the following week, the percentage of employees who previously appeared on the Airport payrolls is approximately the same.

[109] Johnnie Boyd, Otis Creighton, Erastus Clifton, Earl Autry, Arthur Davis, Ralph Cronenberg, Robert Duggan, Johnny Eagle, Selvin Gibson Jr., Charles Gillard, Prince Glover, Carlos Gonzales, Elton Nock, William Pearson, William Reed, Neubra Smith, and Stencil Stokes.

Maintenance and Manpower on January 24, 1978, while Leroy Gillard signed a Local 522 authorization card on March 19, 1978, stating that he commenced his employment with Maintenance and Manpower on March 19, 1978.

The remaining proof of the "bridge" between Airport and Fugazy of Connecticut, and the employees on its payroll of October 15, 1978, is based on the testimony of employees who were employed at New York Boulevard between February and October 1978. The clearest cases are Willie Goza and Donald Beckles. Willie Goza credibly testified that on separate occasions between January and October 1978 he was informed by his supervisors that he was employed by Maintenance and Manpower, Shortway, and Gugazy (on October 10, 1978). In addition, Beckles testified that he worked for Maintenance and Manpower and Shortway Charter prior to the time his name appears on the Fugazy of Connecticut payroll of October 15, 1978. Goza and Gonzales also testified that Beckles was employed by Shortway or Maintenance and Manpower prior to his employment with Fugazy.

The "inclusion" or "exclusion" of the other employees on the October 15, 1978 Fugazy of Connecticut payroll is based on the testimony of Goza, Gonzales, Beckles, and Gibson.

Larry Canady—All four testified that Larry Canady was employed by Shortway Charter prior to the date that it ceased operating and Fugazy began operating. Goza testified that Canady was the night dispatcher who informed him on October 10, 1978, that, beginning that day, he was employed by Fugazy; I would therefore find that Canady was employed by Shortway during this period.

Adam Merchant—Goza, Beckles, and Gibson also testified that Merchant was employed by Shortway before Fugazy began its operation at New York Boulevard, and I so find.

Devere Foster—Goza first testified that Foster was a Maintenance and Manpower mechanic during the summer of 1978, but he later changed his testimony to the effect that Foster was not employed by Maintenance and Manpower during this period. Only Beckles also testified regarding Foster and he testified that Foster was employed by Shortway prior to his employment with Fugazy. However, the Fugazy check stubs establish that from August 9 through October 4, 1978, Foster received a Fugazy check as "mechanic" for 40 hours of work at $6 an hour. Because I found Goza somewhat more credible than Beckles, and, more importantly, because Fugazy's check stubs establish that Foster worked full time for Fugazy from August through October 4, 1978, I find insufficient evidence that Foster was employed by Shortway Charter or Maintenance and Manpower during this period.

Schlomo Benjamin—At first Goza testified that Benjamin was employed by Shortway before Fugazy; when he was questioned again about Benjamin's status, he testified, "I pass" on the issue. Gonzales testified only that he had seen Benjamin at New York Boulevard; Beckles testified that Benjamin was employed only by Fugazy, and Gibson did not remember him. I therefore find insufficient evidence to establish that Benjamin was employed by Shortway or Maintenance and Manpower during this period.

Earl Gaston—As with Benjamin, Goza first testified that Gaston was employed by Shortway before Fugazy moved to New York Boulevard, but later testified that he did not know if Gaston was employed there before or after Fugazy moved to New York Boulevard. Beckles testified that Gaston was first employed on the premises by Fugazy. I therefore find insufficient evidence to establish that Gatson was employed by Shortway or Maintenance and Manpower prior to October 1978.

Sylvester Green—Goza first testified that Green was employed by Shortway before Fugazy appeared at New York Boulevard; he then changed his testimony to the effect that Green was not employed by Shortway prior to Fugazy; his final testimony was: "I don't think so." Beckles testified that Green came in with Fugazy, and Gibson testified that he did not remember if Green was there during the Maintenance and Manpower period, "but he was there for Shortway." On the basis of the above, I find that the evidence does not support a finding that Green was employed by Shortway or Maintenance and Manpower prior to his employment with Fugazy.

Clarence Drafts—Goza testified that Drafts was employed by Shortway before Fugazy, and Beckles testified that Drafts was employed by Shortway before and after the Fugazy buses appeared in the summer of 1978. I therefore find that Drafts was employed by Shortway prior to Fugazy.

Raymond O'Kelly—Both Goza and Beckles testified that O'Kelly was not employed at New York Boulevard prior to Fugazy; Gibson testified that he did not recall the name. I therefore find that he was not employed at New York Boulevard prior to Fugazy.

Fred Waring—Goza first testified that he thought Waring was employed by Shortway prior to Fugazy; he later testified: "I don't know" whether Waring was employed by Shortway before Fugazy. Gibson and Gonzales testified that they could not remember Waring. I therefore find that he was not employed at New York Boulevard prior to his employment with Fugazy.

Laval Alexander and Calvin Morris—Beckles testified that both Alexander and Morris were employed by Shortway prior to Fugazy; this testimony is uncontradicted, and I so find.

There was also testimony regarding the maintenance employees, which includes mechanics:

Everad Vassel—Goza testified that Vassel was not employed by Shortway prior to Fugazy, but Beckles testified that Vassel was employed for a short while before the Fugazy buses arrived at New York Boulevard in the summer of 1978. Although I have generally credited Goza's testimony and memory over that of Beckles, since Vassel and the other individuals discussed below are maintenance employees whom Beckles worked more closely with, I will credit him where there is a conflict herein, and I therefore find that Vassel was employed by Shortway prior to Fugazy.

Michael Wilson—Only Goza testified regarding Wilson and he testified that Wilson was employed by Shortway prior to Fugazy, and I so find.

Jimmie Huff—Both Goza and Beckles testified that Huff was employed by Shortway prior to Fugazy, and I so find.

Horance Briggs and E. J. Vann—Beckles testified that both Briggs and Vann were employed by Shortway prior to their employment with Fugazy, and I so find.

Jean Nicholas—Beckles testified that Nicholas worked for Shortway before and after the Fugazy buses arrived at New York Boulevard. The Fugazy check stubs for August 1978 through October 1978 show weekly stubs for Nicholas for August 9 through October 4, 1978, stating "P/R Mechanic." The hourly pay rate was $4.50 an hour and the number of hours worked ranged from 9-1/2 to 27, averaging about 18 hours per week. Counsel for Fugazy might argue that this establishes that Nicholas was actually employed by Fugazy during this period and that Beckles incorrectly assumed that he was employed by Shortway simply because he saw him at New York Boulevard. However, Beckles testified that Nicholas was employed by Shortway prior to as well as after the arrival of the buses at New York Boulevard. Therefore, even if the check stubs indicate that he was employed by Fugazy beginning in August 1978, he could well have been employed by Shortway prior to that time when Fugazy did not own any of its own buses. Additionally, the check stubs indicate that Nicholas was only a part-time mechanic; he may have continued to work full time for Shortway during this period and this would correspond with Dern's testimony that during this period Green and Alan Dern were the only ones working on the Fugazy buses at New York Boulevard. I therefore find that Nicholas was employed by Shortway prior to his employment with Fugazy.

Curtis Jordan—Beckles testified that Jordan was not employed by Shortway prior to Fugazy, and I so find.

In summary, there are 56 drivers, mechanics, and maintenance employees on the Fugazy of Connecticut payroll for the week ending October 15, 1978; of this number, 17 were listed on the Airport payrolls from October 1977 through January 12, 1978; 2 (Goza and Beckles) testified that they were employed by Maintenance and Manpower, Shortway, or both; 2 (Phillip Brown and Leroy Gillard) signed authorization cards for Local 522 stating that they were employed by Maintenance and Manpower during the period in question; and, finally, the testimony of Goza, Gonzales, Beckles, and Gibson establishes that 11 additional employees (Candy, Merchant, Drafts, Alexander, Morris, Vassel, Wilson, Huff, Briggs, Vann, and Nicholas) were employed by Maintenance and Manpower or Shortway Charter prior to their employment with Fugazy of Connecticut. Therefore, a total of 32 of the 56 employees on the Fugazy of Connecticut payroll for the period ending October 15, 1978, were previously employed by Airport, Maintenance and Manpower, or Shortway Charter.

Finally, if Fugazy of Connecticut is found to be a successor (rather than an alter ego) herein, it must be determined whether it had knowledge of the unfair labor practices committed by its pedecessor employer. *Perma Vinyl Corp.*, 164 NLRB 958 (1967); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). Admittedly, Region 29 of the Board did not file a proof of claim in the bankruptcy court with regard to Airport's unfair labor practices until June 1979. Additionally, counsel for Fugazy of Connecticut, in its brief, set forth that Fugazy Junior, in his testimony, denied acquiring any knowledge of these unfair labor practices during negotiations for the ICC rights or otherwise. Although, as stated supra, I did not find Fugazy to be a credible or convincing witness, his testimony that he would have demanded of Holland a specific indemnification agreement in the purchase agreement of the ICC rights if he were aware of the prior unfair labor practices does ring true.

The General Counsel, for his part, sets forth a number of factors that he alleges establishes knowledge (either actual or constructive) by Fugazy in June 1978 of the unfair labor practices committed by Airport. The bankruptcy court's docket for Airport contains the following relevant transactions prior to June 13, 1978; "5/9/78 Field S/C by attorney for National Labor Relations Board re: for an order vacating the automatic stay. Ret: 6/20/78 at 10:30. Filing fee paid"; "5/16/78 Filed affidavit of service by attorney for Nat'l labor relations Board re: S/C filed 5/9/78 Ret: 6/20 at 10:30"; "6/8/78 Filed Memorandum in support of complaint by attys for National Labor Relations Board re: S/C filed 5/9/78. Ret: 6/20 at 10:30." Fugazy Junior testified that he caused a search to be made of the bankruptcy court's documents to determine whether or not there were claims against any of the other Respondents involved herein and that the attorneys, who "I'm sure used due diligence [reported to Fugazy Junior that] . . . there were no claims against Holland [or Airport] at that time."

Additionally, the General Counsel points to Fugazy's employment in May 1978 of Dern in a managerial position, its early retention of Wagner to locate ICC rights that it could purchase, and its later and brief retention of Margolies, Dell, Roth, and Goldman as proof that it knew, or should have known, of the unfair labor practices committed by Airport.

One further matter that was never fully clarified is that Fugazy's cash disbursement book establishes two consecutive checks having been issued by Fugazy on February 28, 1979, each in the amount of $15,000. The name in this book next to each of these checks is "Shortway" followed by a question mark.[110] In addition, the same cash disbursement book contains an entry dated March 19, 1979, of another check payable to "Shortway" in the amount of $19,800. These three checks are carried forward to Fugazy's general ledger. Fugazy Junior testified that he did not know what these checks were for, but he knew that Fugazy did not purchase any buses from Shortway. He testified: "I have no definite confirmation of what the checks are. My suspicion is that they might have been the lease of some buses that we used." He testified further that after they purchased the 12 P&W buses in July or August 1978 they ordered 12 new buses

[110] Another check listed in the cash disbursement book, $300 to a driver for Fugazy Continental, also has a question mark following the driver's name.

from Motorcoach Industries in September 1978; they anticipated that these buses would be delivered in February 1979, but they were not delivered until June 1979: "So, I would say that we leased buses during that interim period from Shortway." The price Fugazy paid for these buses was about $300 a day.

XV. ANALYSIS

A. *Airport and Holland, Shortway Charter, Shortway Lines, Dell Bus, and Maintenance and Manpower as Alter Egos*

Are Maintenance and Manpower, Shortway Charter, Shortway Lines, Dell Bus, and Holland separate corporate entities from Airport or "merely a disguised continuance of the old employer?" *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 259 fn. 5 (1974), the Supreme Court referred to alter ego cases as involving "a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management."

The General Counsel, while alleging that Holland and the others are alter egos of Airport, admits that Holland never actually purchased the stock of Airport. This makes an alter ego finding more elusive[111] as the Board generally requires some identical ownership interests. These common ownership interests are usually present, as the "typical" alter ego situation involves a unionized employer closing his operation and reopening as a nonunion employer elsewhere or a unionized employer selling his operation in a spurious transaction simply to relieve itself of its obligations under a union contract. *Big Bear Supermarkets #3*, 239 NLRB 179 (1978); *NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979); *Denzil S. Alkire*, 259 NLRB 1323 (1982). In the situation herein there is neither common ownership nor evidence that Airport operated under Chapter XI, and was adjudicated a bankrupt, simply to avoid its obligation to Local 875, although both Maintenance and Manpower and Fugazy of Connecticut happily took advantage of the situation in order to discard the Local 875 contract.

The two principal Board cases on the issue of common ownership are *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), and *Morton's I.G.A. Foodliner*, 240 NLRB 1246 (1979). In *Crawford Door*, supra, the Board reversed the administrative law judge, who found no alter ego status:

> . . . because in his view identical corporate ownership is the *sine qua non* of *alter ego* status. We disagree. Clearly each case must turn on its own facts, but generally we have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

Although the common ownership interest in *Crawford Door*, supra, was not a major one (one-half of a 33-percent interest) the Board made an alter ego finding because the family involved controlled major interests in the company.

In *Morton's*, supra, the Board affirmed the administrative law judge's finding of no alter ego status, stating (at fn. 1):

> A finding of *alter ego* status requires, among other factors, the presence of "substantially identical" ownership between two enterprises. Here, neither Blackburn Foods, Inc., which owned 82 percent of the outstanding stock in Respondent Clinton, nor any of the five individual owners of Blackburn is an investor in Respondent Sam & Ed's or is in any way involved in its operation. The only stockholder present in both enterprises is Sam Morton, who owned 18 percent of the outstanding stock in Respondent Clinton and who has a 30 percent interest in Respondent Sam & Ed's. His interests in both enterprises, standing alone, are insufficient to establish "substantially identical" ownership.

The Board then distinguishes *Crawford Door*, supra, and stated (id.):

> Our dissenting colleague, however, would apparently require only that there be some ownership link between the two enterprises. But this would constitute an unjustifiable broadening of the *alter ego* doctrine and lead to a holding that enterprises with only limited similarities in ownership would be treated as *alter egos*, without other evidence that the new entity is but a disguised continuation of the former company. . . . Such an extension would have the unwarranted effect of precluding the bona fide sale of a business to any new enterprise whose stockholders included one who formerly held a minor interest in the closed enterprise (here, Respondent Clinton), since in all those situations there would be some continuity of direction and control.

Although Holland never purchased the Airport stock, it had no need to do so, as it appears that from June 1976 through January 24, 1978, Airport was run by, and for the benefit of, Holland. Admittedly, Holland asked Margolies to investigate Airport on its behalf, which he did. Although I do not credit Margolies' testimony that he simply walked into Building 69 and annointed himself with the title of president, it is clear that during the following 19 months he ran Airport. During this same period, Margolies was, at times, secretary and president of Holland, the chairman of Holland's board of directors, and a shareholder of Holland. In addition, Margolies agreed to assume the post at Airport at the urging of Capozzi and Wegerbauer, who fixed his salary as president of Airport at $900 a week. To further encourage Margo-

[111] A very recent case, *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982), found alter ego status absent common ownership and common management or supervision, stating (at 1226): "In point of fact, however, Ampac exercised a degree of control over Dean so as to obliterate any separation between them." In *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029 (9th Cir. 1982), affg. 249 NLRB 238 (1980), an alter ego finding was made where the common ownership was only 8 percent, although the remaining stock was owned by close relatives.

lies to take the job, Holland gave him a large advance of money which was repaid directly to Holland by Airport at the rate of $500 a week out of Margolies' $900-a-week salary. Neither Holland nor Margolies made a secret of its control of Airport; Margolies testified before the bankruptcy court that Holland approached a bus company it had previously given charter business to, and said, "[H]ey, we are now in business in New York." Additionally, Margolies, in the summer of 1976, told a large number of Airport's drivers that he was the sole owner of Airport and Shortway, mentioning Holland as well. Furthermore, in a meeting in the fall of 1977, Margolies gave the representatives and shop steward of Local 875 a diagram showing Airport, Dell Bus, Shortway Lines, and others as subsidiaries of Holland and told the Local 875 representatives that Dell was the general manager in charge of Airport's dispatchers and drivers and Dern was the head dispatcher.

In addition, there was substantial amount of business dealings between Holland and its subsidiaries and Airport during this period. Holland purchased 15 of the buses Airport was operating and leased them back to Airport; by March 1977, Airport was paying Holland $33,500 monthly for the rental of buses. From October 20, 1977, through January 18, 1978, Airport made payments to Holland for bus rentals and other items in excess of $200,000, and, beginning in March 1977, Airport paid Wagner, then Holland's secretary, $250 a week as "transportation consultant." In 1976, Holland obtained charter work for Airport and in late 1977 Holland lent $28,000 to Airport and, a week later, lent Airport money in a "revolving fund."

When Airport was experiencing difficulty with its landlord and was in need of a new garage, Holland (and Paulding) purchased Dell Bus and New York Boulevard; the agreement was signed on Holland's behalf by Margolies as president; Airport occupied New York Boulevard from October 1977 through January 24, 1978, although it was never established at the hearing that Airport paid any rent for the use of the premises. Once Airport moved to New York Boulevard all operations merged into one; this is not surprising since at that point Holland owned Dell Bus and Dell and Dern were salaried employees of Holland who were entitled to a percentage of the profits of Holland's New York operation. Vehicles marked "Airport," "Shortway,"[112] "Dell Bus," and "Browns" were all being operated by Airport's drivers, and many of the Dell Bus drivers found that they were employed by Airport after October 1977. When Dell Bus was awarded the Parking Lot 7 work by the Port Authority, they continued to use the buses that Airport had previously used on that work, and Lyons, an Airport employee, continued to service these vehicles. Lyons, Wing, and Andrews, Airport mechanics, worked on Airport, Dell Bus, and Shortway buses during this period.

An example of the commingling of the different operations at New York Boulevard is illustrated by Goza, who filled out employment applications for Airport, Maintenance and Manpower, Shortway Charter, and Fugazy of Connecticut. Further, after Airport was adjudicated a bankrupt, a number of Airport employees were initially unable to obtain their paychecks for their time worked. Shortly thereafter, a number of these Airport employees were paid with Maintenance and Manpower checks.

Between October 1977 and January 24, 1978, all the drivers at New York Boulevard were dispatched by Wurth and Gaynor, Airport's supervisors from Building 69, Stokes, from Dell Bus, and Dern. The extent of the mixture of the operations and labor relations of these companies is illustrated by the two letters sent by Margolies to Lyons late in October and early in November 1977. These letters are in answer to grievances filed by Local 875, and, on both, copies were sent to Dell.

The period prior to the adjudication is illustrative of the control Holland exerted over Airport and the fact that Airport was really being operated for the benefit of Holland. Shortly before the adjudication, Holland informed Margolies that it wished to purchase Airport's assets (actually the ICC rights were, in all probability, the only assets of any value that Airport owned) if Airport was about to be adjudicated a bankrupt. When it became clear that Airport had no choice and would be adjudicated a bankrupt, Margolies informed Holland of this approximately 10 days prior to the adjudication. Holland then purchased, with the court's approval (the day before the adjudication), Airport's assets for $50,000; 5 months later Holland sold the ICC rights to Fugazy for $250,000, clearly illustrating how valuable an "inside track" can be. In addition, Shortway Charter opened a bank account on January 4, 1978, 3 weeks prior to the adjudication, apparently in preparation for the death of Airport.

After the adjudication, Margolies, together with his management people from Airport, operated a bus charter service and crew operations at New York Boulevard under the name Shortway Charter, using Shortway Lines buses. Both companies are wholly owned subsidiaries of Holland. Margolies alleges that Shortway Charter employed no employees of its own during this period, but rather was provided with drivers and mechanics by Maintenance and Manpower; it is difficult to ascertain the truth of this allegation as neither Shortway Charter or Maintenance and Manpower was able to produce any records to substantiate this claim. At the same time, Dell was running a crew operation and operating Maintenance and Manpower out of New York Boulevard. Dern testified that neither he nor Dell owned any stock in Maintenance and Manpower, although he did not know who did own its stock. Margolies testified that Holland owned no stock in Maintenance and Manpower, and Strauss (who became its president at the request of Dell) also provided little assistance in determining the ownership of Maintenance and Manpower. However, Margolies and Strauss did testify that Dell set up Maintenance and Manpower and was the man behind it, and the business account application for the bank refers to Holland as its parent; also it paid the last paychecks to some of

[112] I find that these were buses owned by Shortway Lines; Petta testified that the registration on these buses was in the name of Shortway Lines. This is reasonable, as the other company with a similar name Shortway Charter, was a broker and owned no buses of its own. Apparently, these were the buses Holland leased to Airport.

Airport's employees. In addition, it had the same controller as Shortway Charter (Roth), and was registered by Wagner's law firm, its agent for the service of process. Finally, Dell was in charge of Maintenance and Manpower while being employed by Holland pursuant to the August 24, 1977 agreement. On the basis of the above, I find that Maintenance and Manpower was in all probability owned by Holland, but was certainly operated by, and on behalf of, Holland.

From January 24 through at least June 1978, the combined operations at New York Boulevard were the same as the period prior to January 24, 1978, except that some of the company names had been changed. The employees who remained, and the new employees who were hired, performed charter work and crew work using vehicles marked "Airport," "Shortway," and "Dell Bus," as they had been doing since October 1977, and were dispatched by the same individuals who had dispatched for Airport and Dell Bus both before and after October 1977. The interchange of employees that began in October 1977 continued. The degree of interchange is illustrated by Goza's log; during his first 4 days he listed Dell Bus as the carrier; between February 5 and October 10, 1978 (the day he was informed that Fugazy was his employer) he listed "Shortway," "Shortway Lines," and "Shortway Charter" as the carriers.

On the basis of all of the above, I find that Holland, Shortway Charter, Shortway Lines, Maintenance and Manpower, and Dell Bus were alter egos of Airport; although there was never ownership of Airport by Holland, the degree of control Holland exercised over Airport by having its chairman of the board secretary, and/or president as the president of Airport made the actual ownership of Airport unnecessary. Since Airport was being operated for Holland's benefit there was no need for Holland to expend a large sum of money in order to purchase its stock. Shortway Charter and Dell Bus are alter egos because, in addition to being subsidiaries of Holland, together they assumed Airport's operation after January 24, 1978, with some of Airport's employees and the buses that Airport used. Shortway Lines is an alter ego because, in addition to being a subsidiary of Holland, its buses were constantly intermingled with Airport's buses in Airport's operation from the summer of 1976 through January 24, 1978, and the period thereafter through about June 1978.

The General Counsel also alleges in the alternative that these companies constitute a single integrated business enterprise. The Supreme Court in *Radio Union v. Broadcast Service*, 380 U.S. 255 (1965), set forth the criteria for determining whether several nominally separate business entities constitute a single integrated business enterprise: interrelation of operations, common management, centralized control of labor relations, and common ownership. In *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040 (D.C. Cir. 1975), the court stated:

> [W]e conclude that "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present.

In *NLRB v. Triumph Curing Center*, 571 F.2d 462, 468 (9th Cir. 1978), the court stated: "The Board has determined that no single criterion is controlling, although it considers the first three, which evidence operational integration, more critical than the fourth, common ownership." See *Bryar Construction Co.*, 240 NLRB 102, 104 (1979). In *Gerace Construction*, 193 NLRB 645 (1971), the Board stated that the degree of common control of labor relations is a critical factor in this determination, and "such common control must be actual or active, as distinguished from potential control."

There was a large degree of common control of labor relations among all these companies, except Holland, which has no employees. There was a large amount of interchange of employees among these companies (excluding Shortway Lines, which itself appeared to have only buses, not employees, regularly in the New York area) and Margolies and Dell were in charge of the labor relations policies of these companies; further evidence of this was that Margolies sent Dell copies of his letters to Local 875 regarding certain grievances in October and November 1977 even through Dell held no formal position with Airport. Interrelation of operations and common management are clearly present herein, as discussed supra. All that is missing is common ownership, but all the other factors being present, I find Airport, Holland, Shortway Lines, Shortway Charter, Maintenance and Manpower, and Dell Bus to be single integrated business enterprises.

Having found these companies to be alter egos and, in the alternative, single integrated business enterprises, I find it unnecessary to determine whether Holland, Maintenance and Manpower, Dell Bus, Shortway Charter, and Shortway Lines are also successors to Airport.

On the basis of all the testimony on the subject, I find that the following was said to the employees in the early evening on January 24, 1978: Margolies told them that the court had that afternoon declared Airport bankrupt, so that it was out of business; and either Dell or Margolies then said that any employees who wished to work could drive crews for him under Maintenance and Manpower, while Margolies would only operate charter work under the name Shortway. Dell (rather than Margolies) then informed the employees of the rates they would be paid (less than they had been paid under the Local 875 agreement) and that there would be no union representing them. Some of the employees accepted this proposition and began working for Maintenance and Manpower; others refused to accept, and left.

In making the above finding, I have generally credited the testimony of the employees over that of Margolies, Dern, and Strauss. The most difficult point in that regard was the finding that Dell told the employees that there would be no union in their future employment at Maintenance and Manpower. Maintenance and Manpower might argue that Dell could not have said that because of the existence of the collective-bargaining agreement dated January 16, 1978, between Maintenance and Manpower and Local 522, which was a continuation of the longstanding collective-bargaining relationship between Dell Bus and Local 522 going back to, at least, 1971, as

testified to by Dern. However, I do not credit Dern and, based on the testimony of the employees (but not Clifton), I would find that Dell Bus did not have any collective-bargaining relationship with Local 522 between the expiration of the 1971 through 1974 agreement and the agreement dated January 16, 1978. I would discredit Clifton's testimony as it relates to Local 522 being his collective-bargaining representative after 1974; there were conflicts in this testimony and it was unsupported by the testimony of any other employee.

A more difficult problem inherent in this finding is that a number of the Local 522 authorization cards are dated prior to January 24, 1978; therefore, it might be argued, if the General Counsel is alleging that Dell directed Gibson to solicit these cards,[113] and some of the cards (as well as the Local 522 agreement) are dated prior to January 24, 1978, how can the General Counsel also allege that Dell said at the January 24, 1978 meeting that there would be no union to represent the Maintenance and Manpower employees? Timing is the important factor here, and Gibson testified that it was sometime in January 1978, about 2 weeks to a month after he received his first check from Maintenance and Manpower, that Dell asked him to solicit the cards on behalf of Local 522. He also testified that over the next month he gave the Local 522 cards to his fellow employees. Based on Gibson's testimony, it is still not clear whether Dell approached Gibson before or after January 24, 1978, as it is not clear when Maintenance and Manpower issued its first paycheck, although Bertart testified that he did not receive his first Maintenance and Manpower check until January 24, 1978. However, six of the Local 522 authorization cards contain dates prior to January 24, 1978; these are the cards signed by Gibson, Neubra Smith, Hubert Howie, Johnny Eagle, Johnny Boyd, and Samuel Reilly. The dates on the cards of Gibson and Smith are clearly in the same handwriting, and that handwriting is different from the handwriting throughout Gibson's and Smith's authorization cards. The handwriting on the other cards, as well, does not appear to match the writing where the card is dated, although the difference is not as clear as on the cards of Gibson and Smith. Despite these cards, I would maintain my prior credibility determination that Dell told the employees on January 24, 1978, that there would be no union representation for them at Maintenance and Manpower. By thus conditioning the employees' continued employment on their acceptance of wages lower than those provided in the Local 875 agreement, and working without union representation, these Respondents violated Section 8(a)(1) and (3) of the Act. *Finger Lakes Plumbing Co.*, 253 NLRB 406 (1980).

On January 24, 1978, and thereafter, Airport, Shortway Charter, Shortway Lines, Maintenance and Manpower, and Dell Bus withdrew recognition from Local 875, refused to enforce the collective-bargaining agreement between Airport and Local 875,[114] unilaterally changed its terms and conditions, and refused to recognize or bargain with Local 875. At the hearing herein, these Respondents did not allege any good-faith doubt of Local 875's majority status among its drivers and mechanics; they therefore have violated Section 8(a)(1) and (5) of the Act.[115]

B. *Fugazy of Connecticut as Alter Ego*

I have made the findings, supra, that Holland, Maintenance and Manpower, Dell Bus, Shortway Lines, and Shortway Charter are alter egos of Airport despite the fact that there was no common ownership interest between Airport and the others. As stated, I make this finding because, in my view, the degree of the control that these companies exercised over Airport made the actual purchase of Airport's stock unnecessary. The situation with Fugazy of Connecticut is somewhat similar in that there was no common ownership between Fugazy of Connecticut and of these other companies; however, because the degree of control present with Airport and the other Respondents is not present with Fugazy of Connecticut and Airport, I do not make such a finding herein. To be sure, there are many factors herein that satisfy the requirements set forth in *Crawford Door* and *Morton's*, supra; Fugazy paid no rent for its occupancy of New York Boulevard from about June 1978 through January 1979, and made some unexplained payments to Shortway in the amount of almost $50,000; it employed Dern from May 1978 to the present time and Margolies and Dell for a shorter period as consultants on their entry into the bus business. During the period from about June until about October 1978, there was some mixture of buses between Fugazy and Shortway Charter, and, during this period and continuing through part of 1979, Fugazy was leasing buses from Holland (Shortway Lines). In the June 13 and October 6, 1978 agreements, Fugazy of Connecticut purchased Holland's ICC rights and appears to have purchased all of Holland's New York operations, but there is no evidence that these agreements were anything other than arm's-length transactions; Holland, after all, made $200,000 profit on the ICC rights after holding them for less than 5 months. Finally, there is the progression of telephone numbers often beginning with Airport, being changed to Shortway Charter, and then later being changed to Fugazy of Connecticut. However, this is not necessarily proof of alter ego status; rather, it appears more as a business decision

[113] Clearly, Dell's direction to Gibson to obtain signed Local 522 authorization cards from the employees, and his execution of the collective-bargaining agreement with Local 522 (whether it took place before or after the cards were signed), constitutes assistance to Local 522 in violation of Sec. 8(a)(2) of the Act. *Sav-on Drugs*, 227 NLRB 1638 (1977). As this agreement contains a union-security clause it likewise violates Sec. 8(a)(3) of the Act.

[114] As this agreement was never disaffirmed by the bankruptcy court, the bankruptcy cannot be used as a defense herein. In re *Handy Andy, Inc.*, 109 LRRM 3298, 97 LC ¶ 10,265 (Bankr. W.D. Tex. Mar. 15, 1982).

[115] Although I find that these Respondents violated Sec. 8(5) of the Act by refusing to recognize and bargain with Local 875, I will not issue an order requiring them to do so. Shortly after January 24, 1978, Stolfi informed Petta that because another Teamsters Local was involved Local 875 would not demand recognition of Maintenance and Manpower-Dell Bus-Shortway Charter-Shortway Lines, and in August 1980 Local 875 informed the Board that it had no interest in representing these employees. I will therefore not engage in the futile act of ordering these employers to recognize and bargain with Local 875 due to its unwillingness to participate in such actions, and the General Counsel is in agreement with this.

to continue the telephone number being used by another bus company in the hope of acquiring some business from customers calling that company, unaware that they were no longer is existence.

On the other hand, there is substantial evidence that Fugazy was a company separate and distinct from the others; prior to June or July 1978, Fugazy had its operation at Jamaica Avenue, rather than New York Boulevard, and between that time and October 1978, they were each engaged in bus charter operations, competing on a minor scale (as Shortway Charter was then winding down its operation). In addition, while Fugazy and Shortway Charter were both located at New York Boulevard there was a substantial separation of their operations, both maintenance and driving, and one interesting result of that separation was the friction that developed between the Shortway Charter drivers and the Fugazy drivers over the superior condition of the Fugazy buses. Finally, Fugazy of Connecticut operated the line run to Connecticut, the Atlantic City run (which accounts for a substantial amount of its total business), and charter work for professional athletic teams—work that neither Airport nor the others ever performed. I therefore find that Fugazy of Connecticut is not an alter ego of Airport, Holland, Maintenance and Manpower, Dell Bus, Shortway Charter, or Short-way Lines.

C. *Fugazy of Connecticut as Successor*

In *NLRB v. Burns Security Services*, 406 U.S. 272, 281 (1972), the Supreme Court stated:

> But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union.

Since *Burns*, the Board and courts have attempted to determine whether the "employing industry" remained substantially the same. *Border Steel Rolling Mills*, 204 NLRB 814 (1973). Clearly, the most important factor in this regard is whether a majority of the alleged successor's work force had previously been employed by the predcessor. *Stewart Chevrolet*, 262 NLRB 362 (1982).

In *Pacific Hide & Fur Depot v. NLRB*, 553 F.2d 609 (9th Cir. 1977), the court, although refusing to enforce a Board Order, stated:

> The decisions require that, in such a case [allegation of successorship], and absent a refusal to hire because of union animus, a majority of the work force of the purchasing employer in the unit be former employees of the seller in that unit. If that is the case, there is a duty to bargain, it being assumed that the holdover majority continues to desire representation by the union.

Additional factors to be considered are whether the business itself has remained substantially the same and at the same location, basically, with the same supervisors, machinery, and product. *Blazer Industries*, 236 NLRB 103 (1978); *Stewart Chevrolet*, supra.

The General Counsel has initially sustained his burden by establishing that a majority of the employees of Fugazy of Connecticut on its October 15, 1978 payroll (which is reasonably representative of its payrolls in that period) had previously been employed by Airport or its alter ego Maintenance and Manpower and Shortway Charter. The remaining additional issue, therefore, is whether the employing industry remained substantially the same between Airport and Fugazy of Connecticut.

In *Woodrich Industries*, 246 NLRB 43 (1979), the alleged successor reopened the plant after a 3-week hiatus with 59 employees, 40 of whom had been employed by the predecessor when it ceased operations. At the time the alleged successor reached its full complement of employees, 3 weeks later, 95 employees were employed; either 43 or 53 of them had been employed by the predecessor when it ceased operating. Neither the administrative law judge nor the Board reached the issue of whether a majority of the successor's employees had previously been employed by the predecessor; rather, they found that there was no successor obligation, reasoning: "Based on the foregoing factors, we conclude that, on balance, the nature and character of the employing industry has been sufficiently altered so that Respondent is not a successor to Murcel." The "foregoing factors" the Board considered were whether there was substantial continuity in operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, product, and services.

On Airport's last payroll, the dispatchers are listed as Wurth and Gaynor; in addition, there was testimony that Stokes (who is listed on this payroll with the drivers) and Dern also dispatched for Airport. Neither Wurth nor Gaynor is listed on the Fugazy of Connecticut payroll for the week ending October 15, 1978; Stokes and Dern were dispatching for Fugazy of Connecticut at that time, as was Canady.

Fugazy of Connecticut is operating out of New York Boulevard, the same location as Airport; when Fugazy of Connecticut commenced operations, it operated with some of its own buses (the P&W buses) and some of the buses previously used by Shortway Charter and Airport, which it leased from Holland. It was not until the delivery of the Motorcoach Industry buses in mid-1979 that Fugazy of Connecticut operated entirely with buses that had never been used by Airport. The testimony of a number of employees regarding the friction between the Shortway Charter and Fugazy drivers due to the better quality buses the Fugazy drivers were operating indicates that the working conditions at Fugazy of Connecticut may have been somewhat better than the conditions at Airport. Finally, a comparison of the operations of the two reveals that Airport performed charter work, crew work, and work for the airlines transporting passengers to hotels or other locations at the Airport. Fugazy of Connecticut also performs this type of work, but, unlike Airport, this does not constitute its entire operation. Most importantly, it operates the Atlantic City line run, which Airport never operated; for 10 months in 1979 it

operated a Connecticut line run from the airports, which Airport never operated; and it performs charter work for professional athletic teams, which Airport never performed.

On the basis of all of the above factors, most especially the fact that a majority of the Fugazy of Connecticut employees on October 15, 1978, had previously been employed by Airport or its alter egos I find that the nature and character of the employing industry has not been sufficiently altered for Fugazy of Connecticut to evade its successorship obligation. *Woodrich Industries*, supra. Although there are differences between the operation of Fugazy of Connecticut and Airport, these differences are not substantial enough. Although Fugazy of Connecticut at one time operated the line run to Connecticut, now operates the line run to Atlantic City, and since mid-1979 has operated a fleet of buses completely different from Airport, the employment responsibilities of its drivers and mechanics is substantially similar to what it was when they were last employed by Airport on January 24, 1978. I therefore find that Fugazy of Connecticut is a successor to Airport.[116]

Having found that Fugazy of Connecticut is a successor to Airport, it was bound to recognize and bargain in good faith with Local 875. *Burns*, supra. It did not do so and therefore violated Section 8(a)(5) of the Act, although no remedy will be ordered to remedy this as Local 875 has disclaimed any interest in these employees, supra. Being a successor, rather than an alter ego, of Airport, Fugazy did not violate the Act by its refusal to comply with the terms of the Airport-Local 875 collective-bargaining agreement. *Burns*, supra.

D. *Fugazy of Connecticut's Responsibility for Unfair Labor Practices Committed by Airport*

Having found that Fugazy of Connecticut is a successor to Airport, it must next be determined if it is obligated to remedy the unfair labor practices found herein.[117] In *Perma Vinyl Corp*, 164 NLRB 968 (1967), enfd. sub nom. *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968), the Board stated (164 NLRB 968):

> [W]e are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

This was followed by *Golden State Bottling Co. v. NLRB*, supra, where the Supreme Court affirmed the court of appeals decision which affirmed the Board Order (at 187 NLRB 1017 (1971)) which held that a successor employer, which purchased the predecessor's operations with knowledge of its unfair labor practices, was bound to remedy those unfair labor practices.

In *Am-Del-Co., Inc.*, 234 NLRB 1040, 1041 (1978), the Board stated: "It is well settled that the responsibility of establishing that a new employer was without knowledge of its predecessor's unfair labor practices at the time it took over the latter's operation rests with the alleged successor."

On the basis of the above, the burden is on Fugazy of Connecticut to establish lack of knowledge; as *Perma Vinyl*, supra, refers to "under circumstances which charge him with notice," this need not be actual knowledge; it is enough if the successor knew or should have known.

The strongest evidence of knowledge by Fugazy of Connecticut are the three notations in the bankruptcy docket, dated May 9 and 16 and June 8, 1978, referring to actions by the Board in the proceeding. Fugazy Jr. testified that he had his attorneys search the bankruptcy court's documents prior to June 13, 1978, for any claims against Airport, and he was sure they used due diligence, but did not advise him of any such claim. As stated, supra, I did not find Fugazy Junior to be a credible witness and would find that, even if his attorneys did not catch them, these pre-June 13, 1978 notations were adequate to put Fugazy of Connecticut on notice of the unfair labor practices committed by Airport. In addition, a month prior to its purchase of the ICC rights, Fugazy hired Dern, who was present at New York Boulevard during the period when the unfair labor practices occurred, and, in fact, was present at a number of the meetings conducted on January 24, 1978. Although I do not impute knowledge to Fugazy simply by its employment of Dern in a managerial position, it is not unreasonable to assume that, in the month Dern was employed by Fugazy prior to the June 13 agreement, he discussed the earlier events that occurred at New York Boulevard with representatives of Fugazy. I do not consider herein Fugazy's subsequent employment of Dell, Margolies, or others previously associated with Airport as imputing knowledge to Fugazy as these events occurred subsequent to the purchase of Airport's ICC rights.

I therefore find that Fugazy of Connecticut has not met its burden herein, and is therefore liable for remedying the unfair labor practices committed by its predecessor, Airport.

XVI. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth above in sections IV through XV, occurring in connection with the Respondents' operations described above in section I, have a close, intimate, and substantial relationship to

[116] The collective-bargaining agreement between Fugazy of Connecticut and Local 819 was executed on June 14, 1978, at a time when it had no employees. Although this would ordinarily be a clear violation of Sec. 8(a)(2) of the Act, no unfair labor practice charge was filed against Fugazy of Connecticut until May 7, 1979, almost 11 months later. In addition, no evidence was adduced by the General Counsel that the existence of this collective-bargaining agreement was concealed by the parties. *Hot Bagels & Donuts*, 227 NLRB 1597 (1977). Nor is there a continuing violation herein, such as an allegation of a members-only contract. *Schurr Stern Food Corp.*, 227 NLRB 1650 (1977). This allegation is therefore barred by Sec. 10(b) of the Act and is dismissed. *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960).

[117] Having found that Holland, Maintenance and Manpower, Dell Bus, Shortway Lines, and Shortway Charter are alter egos of Airport, they are liable to remedy its unfair labor practices.

trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondents are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 875, Local 522, and Local 819 are each labor organizations within the meaning of Section 2(5) of the Act.

3. Holland, Shortway Charter, Shortway Lines, Dell Bus, and Maintenance and Manpower are alter egos of Airport.

4. Airport, Holland, Shortway Charter, Shortway Lines, Dell Bus, and Maintenance and Manpower constitute a single integrated business enterprise.

5. Fugazy of Connecticut is a successor to the business operation of Airport.

6. Respondents Airport, Holland, Shortway Lines, Shortway Charter, Dell Bus, Maintenance and Manpower, and Cross County violated Section 8(a)(2) of the Act by:

(a) Assisting Local 522 in obtaining signed authorization cards from its employees.

(b) The execution of the collective-bargaining agreement dated January 16, 1978, with Local 522, at a time when Local 522 did not represent an uncoerced majority of the employees.

7. Respondents Airport, Holland, Shortway Lines, Shortway Charter, Dell Bus, Maintenance and Manpower, and Cross County violated Section 8(a)(3) of the Act by:

(a) The execution of the collective-bargaining agreement dated January 16, 1978, with Local 522, said agreement containing a union-security clause requiring membership in Local 522 as a condition of employment.

(b) Conditioning employment of Airport's employees upon the employees' accepting wages, and other terms and conditions of employment, lower than those provided by the Airport-Local 875 collective-bargaining agreements dated December 29, 1976, and by the employees' relinquishing their right to union representation.

8. Respondents Airport, Holland, Shortway Lines, Shortway Charter, Dell Bus, Maintenance and Manpower, and Cross County have violated Section 8(a)(5) of the Act by failing to recognize and bargain with Local 875 on January 24, 1978, and thereafter, by refusing to enforce the terms and conditions of employment as specified in the collective-bargaining agreements dated December 29, 1976, between Airport and Local 875, and by unilaterally changing the terms and conditions of employment of the employees in the bargaining unit covered by these agreements.

9. Respondent Fugazy of Connecticut violated Section 8(a)(5) of the Act by failing and refusing to recognize and bargain with Local 875.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondents Airport, Holland, Shortway Lines, Shortway Charter, Dell Bus, Maintenance and Manpower, and Cross County have, inter alia, violated Section 8(a)(3) of the Act by failing to employ certain of Airport's employees on or after January 24, 1978, because they refused to accept terms and conditions of employment less than those provided in the Airport-Local 875 collective-bargaining agreements dated December 29, 1976. I have also found that these Respondents conditioned continued employment on the employees' relinquishing the right to union representation; employees who refused to accept employment on this basis are also 8(a)(3) discriminatees. As regards these two classifications of employees, I shall recommend that the Respondents each be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings suffered as a result of the discrimination by payment of a sum equal to that which they would have earned, absent the discrimination, with backpay and interest computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[118]

As to those employees who accepted the employment offer of January 24, 1978,[119] I shall recommend that all of the Respondents reimburse them for the difference between what they received in their employment with Maintenance and Manpower or Shortway Charter and what they lawfully should have been paid pursuant to the collective-bargaining agreements dated December 29, 1976, between Airport and Local 875, also with interest computed as stated supra. As discussed supra, although I have found that these Respondents unlawfully refused to recognize or bargain with Local 875, no order will be entered in that regard as Local 875 disclaimed any interest in these employees.

I have found that the execution, maintenance, and enforcement of the collective-bargaining agreement dated January 16, 1978, between Maintenance and Manpower and Local 522 violated Section 8(a)(2) and (3) of the Act. As the employees paid dues to Local 522 pursuant to the union-security clause of this agreement (the 8(a)(3) violation), I will recommend that all the Respondents be ordered to reimburse the employees for the dues paid to Local 522.

[Recommended Order and fns. 120 through 123 omitted from publication.]

---

[118] The names of these individuals are attached hereto as "Appendix A." The list was compiled from the General Counsel's further response to the Respondents' demand for a bill of particulars, as "the names of employees discharged by Respondents on January 24, 1978."

[119] Due to the absence of Maintenance and Manpower and Shortway Charter at the hearing, the parties were unable to determine the names of these individuals; this will be left for a supplemental proceeding.

SUPPLEMENTAL DECISION IN BACKPAY SPECIFICATION

Consolidated with the above matter was the backpay specification to determine the amount of backpay due to Holrick White which would make him whole for his losses resulting from his discharge on August 13, 1976. This discharge was found to be unlawful in a decision of Administrative Law Judge Karl H. Buschmann dated September 20, 1977,[124] which decision was affirmed by the Board (no statement of exceptions having been filed) by Order dated November 1, 1977. The Board's Order was enforced by the court on September 19, 1978.[125]

I. BACKGROUND

White had been employed as a bus mechanic for Airport from 1969 through July 2, 1972, when he was laid off by Airport. During that period Airport subcontracted a number of its smaller crew jobs to Clayton Wynn, d/b/a Wynn V.I.P., herein called Wynn, among others; during this period Wynn also performed repair work, exclusively for Airport, utilizing Airport's facilities at Building 69. On August 1, 1976, Wynn employed White as a mechanic.

On August 9, 1976, White filed an unfair labor practice charge with the Board alleging his discharge by Airport as unlawful. The administrative law judge found that Wynn discharged White on August 13, 1976, at the demand of Margolies, in retaliation for White's filing the charge with the Board in violation of Section 8(a)(1) and (4) of the Act.

II. FACTS AND ANALYSIS

White was the only witness testifying in this portion of the proceedings, and he testified credibly, often supported by forms, pay stubs, or letters provided by his employer or former employers. While employed by Wynn he performed mechanical work for 40 to 50 hours weekly and was paid approximately $180 for this work. During the same period he performed crew work for Wynn as well; the hours worked varied depending upon the flight schedules, but White averaged about $125 a week in earnings for this work.

From the date of discharge (August 13, 1976) through early 1977 White was unemployed. White testified that except for a 1-month period in about September 1976, when he was unavailable for work due to his mother's illness, he made a diligent search to obtain employment during this period. He testified regarding visits (once or more than once) to approximately 17 employers in an effort to obtain employment. He obtained employment at Chad Operating Corp. (Chad) during the first quarter of 1977 and he continued his employ at Chad until early in the fourth quarter of 1977, at which time he was discharged. Approximately a week or two later[126] White obtained employment at Mala Industries, Inc. (Mala). Sometime about the end of December 1977, Mala ceased its business operations and within a few days White obtained full-time employment with Salem Transportation Co. (Salem). About January 1978 White obtained additional employment at Servair Maintenance, Inc. (Servair) where he was employed for approximately 32 hours a week.[127] At that time, and throughout the period that White was employed by both Salem and Servair, his hourly rate of pay at Salem was approximately 20 percent higher than that of Servair. When White began this period of employment at both Servair and Salem his hours at Servair were 7 a.m. to 3:30 p.m., while his hours at Salem were from 4 p.m. to midnight. Thereafter, about June 1979 Salem changed White's working hours to midnight through 8 a.m. When this conflict arose White chose to remain at Servair because they "had more to offer to me. It had better benefits . . . coverage and everything."[128] About a week later (the week ending June 17, 1979) White obtained additional employment at Schenck/Universal Bus Corp. (Schenck); he was employed there through the week ending September 16, 1979, working from 10 to 22 hours a week. From the fourth quarter of 1979 through the fourth quarter 1980, White was employed only by Servair.

Respondent Fugazy of Connecticut in its brief here did not cite any specific defenses to this backpay specification; however, from its cross-examination of White during the hearing it appears that its defenses are that White did not make a reasonable effort to obtain work between the time of his discharge and his employment at Chad, and that he was not sufficiently diligent in attempting to locate a high-paying job.

The applicable legal principles, as stated in *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976), are as follows:

> An employer may mitigate his backpay liability by showing that a discriminatee "wilfully incurred" loss by a "clearly unjustifiable refusal to take desirable new employment." (*Phelps-Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 199–200 (1941)), but this is an affirmative defense and the burden is upon the employer to prove the necessary facts. *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (C.A. 5, 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings; rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575–576 (C.A. 5, 1966). Moreover, although a dis-

[124] Wagner was counsel for Airport in the matter.

[125] The court's Order is addressed to "Respondents, Airport Bus Service, Inc., and Clayton Wynn d/b/a Wynn V.I.P. Limousine Service, their officers agents, successors, and assigns."

[126] Since his employ with Chad, this is the only period during which White has been unemployed.

[127] The compliance officer for the Region testified that because White worked 20 to 25 hours overtime for Wynn they established a 5/8 ratio and determined that Wynn and the other Respondents were entitled to a credit of 5/8 of White's earnings at Servair while he was also employed at Salem. Therefore, during the period of the first quarter of 1978 through the second quarter of 1979, 5/8 of White's earnings at Servair are credited to the Respondents as interim income.

[128] At the time of the hearing White's salary at Servair was $6.06 an hour, and he was paid time and a half for overtime and holidays.

> criminatee must make " reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable exertions in this regard, not the highest standards of diligence." *N.L.R.B.* v. *Arduini Manufacturing Co.*, 394 F.2d 420, 422–423 (C.A. 1, 1968). Success is not the measure of the sufficiency of the discriminatee's search for interim employment; the law "only requires an honest good faith effort." *N.L.R.B.* v. *Cashman Auto Company*, 223 F.2d 832, 836 (C.A. 1, 1955). And in determining the reasonableness of this effort, the employee's skill and qualifications, his age, and the labor conditions in the area are factors to be considered. *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962).

Fugazy of Connecticut has not met this burden; White credibly testified to visiting numerous employers in his attempts to obtain employment from the date of his discharge to his employment at Chad. These attempts clearly represent, at the least, a reasonable effort to obtain employment.

Fugazy of Connecticut also appears to defend on the ground that White is working fewer total hours than he did at Wynn and that since he commenced full-time employment at Servair he has not looked for higher paid employment elsewhere, nor has he looked for additional employment to supplement his earnings at Servair. Fugazy might defend that since White, while employed by Wynn, had worked approximately 70 hours a week, and that is the amount of hours worked that his gross backpay is computed on, he is obligated to obtain employment working a comparable number of hours in order to mitigate backpay; i.e., that since he was credited with this amount of hours he should be required to obtain employment involving the same number of hours worked. I find it unnecessary to decide this question; for a period of almost a year and a half White did work at two jobs simultaneously—Salem and Servair—one full time and one almost full time, and the Respondents were given credit for a portion of these overtime hours. It was only after Salem changed his working hours, so that they conflicted with his hours at Servair, that he terminated his employment at Salem. In what I find is an illustration of White's good faith, at that time, June 1979, he obtained part-time employment for the next 3 months with Schenck. Since that time he has been employed solely by Servair full time, working overtime when available.

An employee is held only to "reasonable exertions" in his duty to mitigate backpay and is not held to the "highest standards of diligence." *NLRB v. Arduini Mfg. Corp.*, supra; *McCann Steel Co.*, 224 NLRB 607 (1976). Clearly, White satisfied that standard and should not be penalized because he was not able to locate an additional regular job.

I find that Respondents have not shown that White incurred a willful loss of interim earnings.

CONCLUSIONS OF LAW

The backpay formula as propounded by the General Counsel is appropriate in determining the moneys due White[129] to make him whole for losses incurred by him as a result of the discrimination practiced against him on August 13, 1976, until the final period covered by the amended backpay specification, the fourth quarter of 1980.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[130]

ORDER

The Respondents, Clayton Wynn d/b/a Wynn V.I.P. Limousine Service, and Airport Bus Service, Inc., New York, New York, their officers, agents, successors, and assigns,[131] shall make whole Holrick White by paying him the sum of $16,238[132] for the period August 13, 1976, through the fourth quarter of 1980, plus interest thereon in the manner heretofore prescribed in this case.

---

[129] Because White testified that he was unavailable for work for a month about September 1976, I would alter the gross backpay figure for the third quarter of 1976 from $1,224 for 4 weeks to $612 for 2 weeks.

[130] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[131] Or alter egos, as discussed and decided above.

[132] The net quarterly amounts are:

1976	
3d Qtr.	$ 612
4th Qtr.	3,978
1977	
1st Qtr.	3,210
2d Qtr.	1,185
3d Qtr.	1,282
4th Qtr.	1,752
1978	
21st Qtr.	328
2d Qtr.	328
3d Qtr.	328
4th Qtr.	328
1979	
1st Qtr.	-0-
2d Qtr.	-0-
3d Qtr.	250
4th Qtr.	884
1980	
1st Qtr.	738
2d Qtr.	305
3d Qtr.	-0-
4th Qtr.	730
Total	$16,238

APPENDIX A

James Ebron
William Reed
Arthur Davis
Richard Rivera
Miguel Munoz
Charles Williams
Otis Creighton
Mayonsaki Giovanni
Alan Dern
Walter Lynch
Helen Harly
Charles Gillard
Robert Duggan
Ralph Cronenberg
Ted Pritchett
Heriberto Guiterrez
Carlos Gonzales
Herminzul Ayala
Major Darlington
Sherlock Ridley
Louis Lyons
Leroy Andrews
Ditza Linero
Eddie Segal
Willie Quick
Elton Lee Nock
Charles Palmer
William Pearson
Frank Cavanaugh
Earl Autry
Gennes Council, Jr.
Devon Wing
Joseph Polermo
Arcadio Larrotta
Ada Tucker
Jeff Turner
Louis Fasano
Billy Davis
Will Tonco
Anthony Rodnite
Roy Seller
Robert Seymour
Peter Petta
Jose Morale
Donald Mortis
William Moser
Arthur Johnson
Peter Mallo
Lavon McLean
George Deangelico
Peter Cumpel
Carlos Barragan
Victor Diaz
Lennox Skeete
Mark Perlmutter
George Gaynor
Denise Boudria
Charles Hay

R & K Caterers, Inc. *and* Local Union 274, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 4–CA–13726

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 April 1984 Administrative Law Judge John H. West issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed a cross-exception, supporting brief, and response to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's failure to reach its contention that the recognition clause in the proposed contract was unlawful under Sec. 8(e) of the Act. In light of our decision to dismiss the complaint, we find it unnecessary to pass on the Respondent's cross-exception.

DECISION

JOHN H. WEST, Administrative Law Judge. Upon a charge filed May 19, 1983, against R & K Caterers, Inc. (R & K or Respondent) by Local Union 274, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) a complaint was issued July 15,[1] alleging that R & K violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing since late April the Union's request to execute a written contract embodying a full and complete agreement, with respect to terms and conditions of employment of a described unit, reached about March 15. Respondent denies the allegation.

A hearing was held in Philadelphia, Pennsylvania, on December 1. On the entire record in this case, including my observation of the demeanor of witnesses and consideration of the briefs filed in March 1984 by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation, is engaged in the business of kosher catering with its principal place of business in Merion, Pennsylvania. The complaint alleges, Respondent admits, and I find that at all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also found that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

R & K began operating in January 1981 after Rosenthal & Kaufman ceased doing business. The latter was in business for 20 years as a kosher catering partnership. In 1980 it was managed by Kenneth Kaufman who is now president of R & K.[2] Since 1955 Rosenthal & Kaufman belonged to an association, along with five other kosher caterers. Originally the Union negotiated contracts with the association. However, in 1980 the involved caterers contracted separately with the Union even though their contracts were the same. The last agreement between Rosenthal & Kaufman and the Union was effective January 15, 1980–January 14, 1983. (G.C. Exh. 2.) As indicated above, in midterm of the contract Rosenthal & Kaufman ceased doing business. R & K advised the Union of this along with its, R & K's, desire to discuss a contract. Subsequently, a dispute arose between R & K and the Union as to whether the former was an alter ego or successor to Rosenthal & Kaufman and whether R & K was, therefore, responsible for health and welfare and pension payments. Eventually the matter was settled.

In January 1981 Kenneth Kaufman was also president of Warken Caterers, Inc. which was the banquet caterer at the Warwick Hotel (Warwick) in Philadelphia. This nonunion caterer was sold by Kenneth Kaufman in January 1982 to Hospitality Investments Inc. (Hospitality). Subsequently, when dealing with catered banquets at the Warwick, R & K would send the food, the necessary equipment (i.e., dishes and silverware), and a chef, who would oversee the heating up of the food, to the hotel and all else, including personnel to serve, etc., would be provided by the Warwick or Hospitality. Before Warken was sold, R & K would send the food and equipment to the Warwick and Warken supplied (1) chefs, (2) waiters

[1] Unless indicated otherwise, all dates are in 1983. On brief, the General Counsel points out that par. 6 of the complaint through inadvertence refers to Respondent rather than the Union as being the exclusive representative of the unit and moves for an amendment of the complaint to correct this mistake. The unopposed motion is granted.

[2] Rosenthal of Rosenthal & Kaufman was Kenneth Kaufman's grandfather. The other partner was Kenneth Kaufman's father, Henry Kaufman. Unless indicated otherwise, all references, infra, to Kaufman will be to Kenneth Kaufman.

from its normal complement (referred to as its "chain gang"), and (3) dishwashers. If additional waiters were required by Warken, they were obtained from the Union. Warken paid the equivalent of union wages to its bartenders, waiters, and waitresses but did not have a dues checkoff.

After Warken was sold the Union challenged the method utilized at the Warwick for handling catered banquets. Among other things, i.e., filing charges with the National Labor Relations Board, the Union on June 15, 1982, made a demand for arbitration to R & K alleging that there was "[u]nlawful subcontracting of bargaining unit work and breach of recognition and successorship clauses of the contract through arrangements at the Warwick Hotel."[3] Such demand was resisted by Einhorn, who in his June 21, 1982 response to the American Arbitration Association stated that R & K was not "a party to any agreement or contract that required it to arbitrate alleged claims such as made by [the Union]." (R. Exh. 3(t).) Subsequently, without waiving R & K's objections to the submission of the claim to arbitration, Einhorn participated in a choice of arbitrators. (R. Exh. 3(bb), dated July 28, 1982, et al.)

In early December 1982, while the above-described arbitration matter was still not resolved. Harvey Young of the Philadelphia office of the Federal Mediation and Conciliation Service contacted Kaufman about a meeting the Union requested with the involved caterers to negotiate a contract since the involved catering contracts were expiring on January 14. Kaufman told Young that he had some "personal problems regarding . . . [his] catering at the Warwick" and he did not think that he was going to attend. Kaufman then spoke with Einhorn who in turn also advised Young that Kaufman would not attend the joint meeting between the involved caterers (one other caterer did not attend) and the Union.

Einhorn testified that after speaking to Young he went away on vacation "and for reasons unknown to me, Mr. Kaufman chose to go down to the meeting, as I later found out because he felt it was industry wide bargaining on the wages"; and that prior to negotiations with the Union in December 1982 he advised Kaufman as follows:

> I told Mr. Kaufman that when they get into negotiations on the new contract, that this subcontracting issue had to be resolved in that new contract, and I also told him, if he wanted, I would involve myself in that portion of the contract to try to negotiate it, and I told him that it was an absolute must, that that issue had to be settled in this new contract.
>
> . . . .
>
> Because if that issue wasn't resolved I knew what percentage of Mr. Kaufman's income came from the kosher work at the Warwick, and I knew that if it was not resolved, favorably to him, so that he could continue to operate there, as he did in the past, he probably was going to go out of business.[4]
>
> . . . .
>
> What I said to him was, that we had to have language inserted into that contract, that specifically allowed us to do what we had been doing in the past. And that is why I felt ultimately, that I was going to be involved in drafting the language.

Although he had almost no negotiating experience, Kaufman decided to attend the joint negotiating sessions at the office of the Federal Mediation and Conciliation Services. With respect to the first session, which was held late in December 1982, Kaufman testified as follows:

> [Young] said to me, I'm surprised to see you here, your attorney said that you were not going to partake of these joint discussions. I told him that my disputes with the union had to do with a working condition at the Warwick Hotel, and it is something that I felt that I could iron out or negotiate with them as an individual, but since the wage package, whatever was to be arrived at in wages, at these meetings I would be forced to take, because they are not going to give one caterer a lesser price than someone else, and I thought it was to my advantage to be here to be part of this wage discussion since I was going to pay it.[5]

---

[3] The demand was made of Edgar Einhorn as attorney for R & K. As pertinent, the above-described agreement between Rosenthal & Kaufman, G.C. Exh. 2, reads as follows:

ARTICLE I

RECOGNITION

Section 1.1 EMPLOYER recognizes the UNION, Local 274, as the sole and exclusive collective bargaining representative of the Employer's Cooks, Kitchen Employees, Bartenders, Waiters, Waitresses, Busboys, Captains, Head Waiters, working in the establishment or on a job hereafter operated or being serviced by the Employer or in any other establishment where the Employer may cater in all matters relating to collective bargaining such as employing employees, wages, hours of work, working conditions and adjustment of grievances. The designated representatives of the UNION shall constitute the UNION representatives in all negotiations as to matters of bargaining which shall be conducted. All clauses of this agreement shall apply to the EMPLOYER and their successors and assigns, partners, supervising employers and associates. The word "successors" as above applies only to a successor for the kosher catering business of a caterer to this agreement. In the event that a caterer sells his business to a non-kosher caterer then this clause will not apply to the new non-kosher caterer.

[4] Kaufman testified that in December 1982 between 20 and 25 percent of R & K's business involved situations where other employers provided service personnel for functions; that different hotels have different arrangements and R & K abides by the wishes of the owner of the hotel; that other kosher caterers used the employees of the hotels to serve; that in many specified cases in the Philadelphia area the situation was the same as at the Warwick, namely, the caterer provided the food and the hotel provided the personnel; and that this situation existed for years and was not challenged by the Union until 1982.

[5] James Washington, a business agent for the Union who attended this session, testified that Kaufman said:

> . . . that we are not here to negotiate anything with the Warwick Hotel or some words to that effect, but we weren't there for that purpose, and we of course, didn't discuss anything with reference to the Warwick Hotel.

James Small, president of the involved local, also attended this session. He testified:

> Before we sat down at the negotiating table, Ken Kaufman said to me, in front of everybody, that he wanted to make it perfectly clear,

Continued

At another point, Kaufman testified that he advised Young at the first session that "my Warwick issue was a private issue, and I would get involved in that after we discussed wages." Further, Kaufman testified that while everybody else was there to try to reach a contract, he believed his opening remarks to Young "eliminated the possibility of [R & K and the Union] reaching a contract, at anytime during those negotiations."

There were four negotiation sessions with the last one held on March 3, 1982. Washington, Small, and Kaufman attended all of them. Regarding the sessions, Washington testified that the first was merely a presentation and a review of what the proposals were; that the second session dealt with a review of health and welfare, pension, and other economic issues, and the employers offered a counterproposal regarding wages; that at the next session wages and a most favored nations clause was discussed; that at the second or third session it was agreed that the "language remain the same throughout the contract, with the only change being there was wages as far as the numbers was concerned"; that at the fourth session wages were discussed with the employers making a proposal; that at that point there were no other outstanding issues; and that at this last session Small advised the employers that he would not recommend the final offer but he would take it back to the membership for ratification.[6] Kaufman's testimony regarding what was discussed at the negotiation sessions did not differ materially from Washington's.[7] The former testified that as he left the last session

> [i]t was . . . [his] understanding, number one, we would find out if the wage package was accepted, and number two, the union and I would sit down and get the language straight on my operating in the Warwick and other places.

With respect to the above-described recognition clause, Washington testified that it was never discussed during the above-described negotiating sessions; that the issue of what it covered was never raised during the negotiating sessions; and that there was no change proposed in the recognition clause.[8] Kaufman testified that he did not advise the Union before or during negotiations that he wanted the above-described recognition clause modified because he did not even know that the above-described difference of opinion was based on this clause; that since he did not know what, if any, clause the Union was relying on in challenging the operation at the Warwick, he did not indicate to the Union that the terms of the proposed agreement should be modified to remedy the Warwick situation; and that he "wanted something added to the contract that said I could continue doing what I have been doing for thirty years."

During the course of the above-described negotiations Kaufman did not request private or side-bar meetings with the Union. Small testified that after the last negotiation session and up to the ratification described below (1) neither the Union nor any of the involved caterers made additional proposals, and (2) R & K did not notify the Union that it had a problem with the contract.

On March 10, the members ratified the agreement. Kaufman was notified of this by Young and Washington.

In the beginning of April Washington contacted Kaufman and brought a typed contract to Kaufman at his office for him to sign. Kaufman told Washington that Kaufman wanted to review it. Washington testified that Kaufman then indicated that the name typed on the front cover of the agreement, Rosenthal & Kaufman, was incorrect and it should be R & K Caterers, Inc. Washington left the agreement and Kaufman, according to the testimony of Washington, stated that he would "get back to . . . [Washington as to] when . . . . [he] could come back to pick it up." Washington also testified that Kaufman indicated that he wanted to have his attorney look at the agreement, which—according to Washington—was a common practice.[9] Kaufman testified that when

> Washington called and said that he wanted to bring the contract out to me to be signed . . . I told him he could bring it out. I could not sign it at that point, as I wanted to show it to my attorney, as we had some non-wage issues, and I want to go over them with the attorney.[10]

Einhorn testified, regarding the agreement, that Kaufmann

> . . . either . . . told me that they settled the wage issue, or he called me when the contract was delivered to him, and I said you now must settle the problem at the Warwick, and that that contract is not to be signed until the Warwick problem is settled.

Later in April Washington returned to Kaufman's office with corrected contracts which read "R & K Caterers, Inc." (G.C. Exh. 3.)[11] Washington testified that

---

before we started any negotiations, wages was the only thing to be discussed, the only purpose there was to negotiate a kosher caterers contract. That nothing else would be discussed, no Warwick, no Warwick situation, and whatever.

[6] Washington's testimony regarding the last negotiating session was corroborated by Small.

[7] As indicated by the testimony and Kaufman's notes on the negotiations, G.C. Exh. 4, a number of the items included in the proposed agreement were discussed.

[8] Assuming that R & K was the successor to or the alter ego of Rosenthal & Kaufman, it was Washington's understanding in 1981 and 1982 that under the above-described recognition clause, "if R & K serviced a kosher luncheon at the Warwick, and the Warwick and some other employees served the food, that this contract required that those employees that served the food be covered by this contract." Washington was aware of the above-described arbitration matter before negotiations commenced in December 1982 and he was aware that R & K did not agree with the Union's position regarding the Warwick.

[9] Small testified that he would not say that as a general rule in negotiations in the involved industry both sides traditionally submit drafts of contracts to their attorneys and "[i]n this instance, with the caterers it is surprising because it is the same contract, after contract, after contract."

[10] While Kaufman recalled pointing out to Washington that the name of the Company on the cover of the agreement was not correct, Kaufman believed that he made this observation at the second meeting with Washington later in April but he was not sure. At one point Kaufman testified that at this meeting "[a]ll I did was accept the contract, and I told him I would get back to him."

[11] The agreement was already signed by union representatives. Washington testified that Kaufman had left a message at Washington's office that Kaufman would like to meet with Washington.

to the best of his recollection Kaufman said "that he would only sign this contract if we would remove actions taken against him with reference to the Warwick Hotel"; and that then Washington

> . . . [told Kaufman] I couldn't understand what one thing had to do with the other . . . and then I picked up the contracts that I had brought at that time, and I never left them with him.

While Washington laid the contracts on Kaufman's desk Washington did not show Kaufman the contract nor, as indicated above, did he leave a copy with Kaufman. Regarding the second meeting with Washington, Kaufman testified:

> I think he [Washington] called up a short time, a week or later whatever. I don't remember the exact time, and asked me if I was ready to sign the contract, and I said I hadn't gotten together with my attorney yet. He called me again, and I at that time told him he could come out, but I did have some problems with the contract and I would like to discuss them with him.

With respect to what was said during his second meeting with Washington, Kaufman testified as follows:

> I mentioned to him that the word association was used in the contract, and we are no longer associated. I also mentioned that the contract should be made out to R & K Caterers, not Rosenthal and Kaufman. He said he had no objection to that, he would make that change . . . . To my knowledge it happened in the second. To be honest, I don't recall if I objected in the first or second meeting. I also said to him that we have an outstanding issue, in regards to the Warwick Hotel, and for the way I am operating there, and I said, I voiced that in the beginning of the negotiation. I didn't pursue it further at that time, because I didn't think it was anybody's business, but between the union and I, and I said that I wanted to sit down with the union and our attorney and see if we could iron out the language to finish the contract. He said that he would take the—You know,—He didn't say no, he said that he would take the information back, speak with Jimmy Small, and speak with Ira Silverstein, and he would get back to me. No one ever got back to me. About a week later, my attorney got a letter from Ira Silverstein that if I didn't sign the contract immediately, they were going to start a proceeding with the NLRB.

Later Kaufman testified as follows regarding his second meeting with Washington:

> When I . . . [returned Washington's call], I told him I wanted to see him because I had to go over some things with this contract that—You know, I couldn't sign it, but I would like to meet him, you know, in my office to go over with him why.
>
> . . . .
>
> To my recollection, at that time we talked about the names, but I could have mentioned the name the first time. Then I told him, that we still had the open issue regarding operations at the Warwick Hotel, and I told him that this issue should be negotiated before we signed this contract, so that we can go on and live with this contract and we should sit down and have a meeting with the lawyers and settle this point.

Finally, Kaufman testified that he would have signed the contract at the second meeting with Washington if they were able to resolve the Warwick Hotel problem at that time.

All of the other kosher caterers who participated in the group negotiations signed individual contracts which were the same as that offered to R & K.[12] Kaufman testified that he thought the recognition clause has been in contracts agreed to by other Philadelphia area kosher catering companies for years, and that other caterers in that area handle kosher functions at hotels where employees of someone other than the caterer serve the food.

Einhorn testified as follows about a conversation he had with Silverstein about Kaufman not signing the contract:

> I said to him, let's get the whole problem at the Warwick resolved, both in the past and for the future with the new contract, and will you talk to the union to see if we can't resolve it, because I said I want to get rid of the arbitration; and I want to settle the problem for the future with a new contract, and he said I will get back to you after I talk to the union.

By letter dated May 13, 1983, Silverstein advised Einhorn:

> I have reviewed the 274–R & K situation with my client and I have been advised that the negotiations between Local 274 and R & K were finalized and an agreement reached and that your client is simply refusing to sign the agreement because of a pending arbitration. My client is unwilling to withdraw the arbitration and it is our position that your client's refusal to sign the contract in this situation is an Unfair Labor Practice. We would appreciate your returning to us a signed contract within one (1) week or we shall be forced to proceed with whatever remedies are available to us before the National Labor Relations Board.

Regarding the last sentence of the above-described letter, Einhorn testified that he did not at that time have in his possession an unsigned copy of the contract; and that he "never had the contract until we got involved in all these proceedings." Subsequently, Einhorn testified (1) that he remembered Kaufman telling him "that there

[12] They were as follows: Barclay Caterers, Cohen Caterers, and Norm the Caterer. While another kosher caterer, Pressman the Caterer, did not attend any of the sessions, he signed the contract. And while Betty the Caterer negotiated individually with the Union, it was concerned with a pension question.

was a problem that they had the names all mixed up, that they had the wrong—that they had the association in, and that they had the wrong name for his corporation"; and (2) that he requested a copy of the contract, which was delivered to Kaufman, and that his "best recollection . . . [was] that . . . [he] got it before Ira Silverstein's letter to . . . [him], so Ira wrote . . . [him] in May of this year, and . . . [he] would assume that . . . [he] got it sometime towards the end of April, beginning of May."

R & K has honored all of the economic terms of the contract.

B. *Contentions*

On brief, the General Counsel argues that it has long been settled that where an employer and union have reached agreement as to the terms and conditions of employment either party is required by law, on the request of the other, to sign a written collective-bargaining agreement embodying such understanding; that the question in these types of cases often turns on whether the objective facts indicate that there has been an agreement on the terms of the collective-bargaining agreement; and that either party's good-faith belief that a contract has or has not come into existence is irrelevant. It is the General Counsel's contention that Respondent, by refusing to sign unless the Union withdrew the arbitration demand it had filed against Respondent with respect to Respondent's operation at the Warwick, has conditioned its execution of the contract on a nonmandatory subject of bargaining. Assertedly Kaufman had earlier agreed to the contract and specifically stated just before the first negotiating session that he was not there to discuss the Warwick situation. It is pointed out by the General Counsel that at no point either before or during the negotiations did Kaufman indicate to the Union that he wanted the recognition clause of the contract changed to accommodate his situation. Also the General Counsel contends that the fact that Respondent has honored all of the economic terms of the contract strongly suggests that Respondent believed and still believes that it has an agreement with the Union.

Anticipating that Respondent would argue that the instant case is analogous to *Checker Taxi Co.*, 228 NLRB 639 (1977), the General Counsel asserts that that case is distinguishable since in *Checker* a union representative knowingly misled respondents there regarding the content of the proposed contract and the Board refused to bind respondents to the agreement finding instead that there is a statutory obligation of mutual good faith. The General Counsel submits that in *Checker* from the very beginning of the negotiations there was a sharp disagreement on respondents' demand that it be allowed to lease taxicabs to nonemployees, a position which the union members opposed. Here, the General Counsel contends, there was no such sharp disagreement on the recognition clause of the contract during the involved negotiations, there was an agreement among the parties at the session held in the latter part of January and at the final session that the contract's language would remain the same, at no point either before or during the negotiations did Kaufman indicate to the Union that he wanted the recognition clause of the contract changed to accommodate his situation, Kaufman did not request during the course of the negotiations a separate meeting with the Union to negotiate Respondent's problems at the Warwick, and the Union, unlike in *Checker*, did not at any time mislead Respondent.

Respondent's argument, made at the hearing herein, that it was relieved from executing the contract because it was illegal under Section 8(e) of the Act in that the recognition clause of the contract as it was applied was designed to force Respondent to cease doing business with another employer because that employer was not union, is, according to the General Counsel, without merit and should be rejected for even assuming, arguendo, that the clause was an issue in the instant proceeding or that Respondent could properly raise its legality as a defense to its refusal to sign, it is clear that the clause does not violate Section 8(e) of the Act because (1) the clause is ambiguous and as such the Board will not presume unlawfulness, (2) Respondent must come forward, which it failed to do, with extrinsic evidence that the clause was intended to be administered in an unlawful manner, and (3) the clause does not violate Section 8(e) because Respondent is resisting the Union's alleged unlawful interpretation of the clause.

Respondent, on brief, contends that at the first negotiating session Kaufman advised the Union that while he would participate in negotiations concerning economic issues that would apply to all caterers, there would remain issues between the Union and his company that would have to be resolved "before any final agreement could be reached." (R. Br. 16.) Assertedly Kaufman's version of what was said is consistent with the history of parties' positions taken prior to the negotiations and is certainly more probable than the testimony as related by the union negotiators. Furthermore, Respondent argues that it is unlikely that Kaufman would have failed to indicate his intent to separately negotiate an unresolved issue that affected a substantial portion of his business particularly after having been instructed to do so by his attorney.

It is pointed out by Respondent that it is well settled law that where there is no "meeting of the minds" as to essential terms of an agreement and where parties differ as to their understanding of such terms, there is no contract which the parties can be directed to sign; and that this principle applies even when the failure to achieve a meeting of the minds or the misunderstanding can be traced to an ambiguity for which both parties are equally to blame. Respondent contends that

> . . . [t]he ambiguity present in the instant case is not only a misunderstanding as to the meaning of the agreement but also the Union's alleged failure to understand that Kaufman intended to continue separate negotiations with the Union to resolve this misunderstanding after conditional approval of the wage portion of the agreement was reached in group negotiations. [R. Br. 18.]

Assertedly approval of the agreement even if expressed in an unconditional form does not create an agreement

when the approval was conditioned *in fact* or where the party accepting the agreement did so with an understanding that differed from the understanding of the party seeking to require execution.

Respondent contends that there was no meeting of the minds here since allegedly the Union was aware that Respondent objected to the Union's interpretation of the agreement as it had attempted to apply the agreement at the Warwick, the Union was told that Kaufman entered the group negotiation for the purpose of discussing economics only and that he intended to discuss the Warwick problem in separate discussions, the terms of the new agreement as they might relate to outstanding legal issues had been the subject of discussions between the parties' attorneys before negotiations started and the practice of the parties had been to submit drafts of final agreements for approval by attorneys, and there could have been no meeting of the minds even if a final agreement had been reached at the group negotiations as it is undisputed that the Union attempted to force Respondent to execute a contract that was significantly different from the contract it submitted to other caterers for signature and this fact is undisputed as the Union does not deny that it allows other caterers to use customers' employees to serve food but, based on the same language allegedly agreed to at the same negotiations, asserts that the contract does not permit Respondent to do so.

Industrial Engineering Co., 173 NLRB 77 (1968), is cited by Respondent for the proposition that a union would not be allowed to indirectly force an employer to agree to language for which it knew it had not bargained. *Checker*, supra, is cited by Respondent for the proposition that the Board will not allow a union to bind an employer to an agreement despite the employer's misconception as to how the union would construe a clause of the agreement, and for the proposition that the argument that the language could be clarified in arbitration is without merit since the function of arbitration is to interpret an agreement reached rather than alter, avoid, rescind, or create an agreement.

With respect to the General Counsel's contention at the hearing herein that Respondent had no right to refuse to sign the agreement by insisting on a nonmandatory subject of bargaining—the withdrawal of an arbitration case—Respondent asserts that the issue is not this simple since

> . . . the primary reason for the refusal to sign the agreement was not the arbitration matter itself but rather whether the Union would agree *for the future* under the *new agreement* to permit Kaufman to operate as he had in the past and as it permitted all other employers to operate under the same contract language. [R. Br. 24–25.]

Assertedly, it was not a nonmandatory bargaining demand to request (1) to discuss whether the Union would permit Respondent to sell food without the added requirement that the purchaser's employees be union and be covered under the terms of the agreement, and (2) to ask for an explanation and for relief from an arbitrary position taken by the Union that singled out Respondent as the only employer having a specific burden under the contract when the same language applied to all caterers. Respondent contends that even assuming the Union had no obligation to drop an arbitration case which assertedly was initiated in bad faith to exert pressure on a third-party employer, the Union nevertheless was obligated to attempt to address for the future contract the difficulty caused Respondent by the Union's subjecting it to a special set of rules that admittedly had never applied in the past. But, allegedly it was obvious that the Union had no intent to negotiate in good faith on this issue and its failure to do so was the primary reason for the failure to obtain a signed agreement. It is submitted by Respondent that the fact remains that Kaufman wanted an agreement under which he could operate as he had in the past and the Union was unprepared to give him such an agreement. Assertedly it follows that no agreement was reached with Respondent.

Finally, Respondent contends that Union Representative Washington admitted that the Union's interpretation of the recognition clause of the agreement required the customer to honor the agreement with respect to the customer's employees; that the language of the clause itself supports such an interpretation; that the law does not permit the parties to enter into an agreement that creates any such obligations; and that, therefore, Respondent cannot be found guilty of an unfair labor practice by its failure to commit an unfair labor practice by entering into an illegal agreement. Respondent contends that since the recognition clause in the agreement Respondent was asked to sign and the Union's interpretation of that clause was clearly directed to achieve its objectives at the Warwick with respect to employees of another employer and were not designed to preserve work for Respondent's employees, the agreement was illegal and Respondent should not be ordered to sign an illegal agreement. Respondent also contends that the Union's efforts to force Respondent to sign the agreement and its refusal to modify its arbitrary interpretation of that agreement was a continuation of the Union's illegal activity found unlawful by the administrative law judge in Cases 4–CP–355, 4–CB–4477, and 4–CB–4478.[13]

---

[13] In *Hotel & Restaurant Employees*, 269 NLRB 482 (1984), the Board remanded those cases to the administrative law judge for the purpose of considering the effect, if any, of a specified defense of the union. As here pertinent, portions of the Board's decision read as follows:

> As found by the judge, Warwick Caterers is a banquet and catering operation owned and operated by Hospitality Catering, Inc. . . . . Warwick Caterers is not a party to any collective-bargaining agreement with the Respondent [Union]. . . .
>
> On 22 February [1982], the Union filed 8(a)(5), (3), and (1) unfair labor practice charges against Warwick Caterers, Elan, and Hospitality Investments, Inc., alleging, in essence, that these employers were successors to, or an alter ego of, R & K Caterers (Kosher Catering) and Warken Banquets, Inc. (non-Kosher catering), employers which, prior to the sale of assets to Warwick Caterers, had verbally agreed to pay union wage rates to their employees. The Union claimed that Warwick Caterers had a successorship or alter ego duty to recognize it. The charge also alleged discriminatory terminations of Warwick employees because of their union affiliation.
>
> These charges were dismissed by the Regional Director, and the dismissal was later upheld by the General Counsel on appeal. In upholding the dismissal of the complaint, the General Counsel observed that there was no evidence that Warwick Caterers "was an alter ego

Continued

C. *Analysis*

For the reasons stated below, it is my opinion that Respondent did not violate Section 8(a)(1) and (5) of the Act as alleged.

For years, notwithstanding the above-described recognition clause, the Union did not challenge the way service was provided at the Warwick by Rosenthal & Kaufman in conjunction with Warken, which, as indicated above, was a nonunion operation. (As noted above, certain of Warken's employees received the equivalent of union wages.) But when Kaufman sold Warken the Union asserted rights it believed it had in its agreement with Rosenthal and Kaufman and the alleged successor or alter ego, R & K. Long before negotiations began on the involved contract the Union notified R & K's attorney in the above-described June 15, 1982 demand for arbitration that the Union believed that R & K was breaching the "recognition and successorship clauses of the contract through arrangements at the Warwick Hotel."

Initially Kaufman refused to participate in the group negotiations between the Union and the other kosher caterers because of the pending arbitration matter over Respondent's service at the Warwick. When he did appear at the first negotiating session he qualified his participation indicating that he was there to discuss wages only, and that the situation involving R & K at the Warwick would not be a matter which would be dealt with at those group negotiations. Small's testimony that Kaufman, after stating that he was only there to discuss wages, said "the only purpose there was to negotiate a kosher caterers' contract" is not credited. This might have been Small's purpose but in my opinion Kaufman did not utter these words for they would have contradicted his declaration that he was there to discuss wages only. While Kaufman did not explicitly indicate that the resolution of the problem at the Warwick was an issue on which resolution of a collective-bargaining agreement was contingent, and while Kaufman never specifically requested negotiations over the recognition clause inasmuch as he did not appreciate the basis of the Union's assertions, Washington testified that when the involved negotiations began he fully understood what was being asserted in the arbitration proceeding. The dispute centered on language in the Rosenthal & Kaufman bargaining agreement, which language was also included in the contract being negotiated. Kaufman lacked the sophistication to fully appreciate his situation. And it is my opinion that while at some point Einhorn may have told Kaufman what the mechanics were for remedying the problem with respect to the contract which was being negotiated, either the message was not conveyed before Kaufman attended the first negotiating session or when the message was conveyed Einhorn failed to impress on Kaufman the advisability of explicitly making this known to the Union at the outset. It would appear that even though Einhorn had notice of the basis of the Union's claim, inasmuch as he refused to acknowledge any bargaining relationship between R & K and the Union based on the Rosenthal & Kaufman agreement, and since he did not expect Kaufman to attend the group negotiation (as noted above he learned of Kaufman's participation upon returning from vacation) most likely he did not specifically advise Kaufman about the mechanics before the first negotiating session. In any event, Kaufman did not explicitly state at the first negotiating session that he would seek a modification of what had become a standard contract between the involved entities before he would sign it. Nonetheless, the assertion that a great deal of R & K's business involves functions at the Warwick was not contradicted. In my opinion the Union fully appreciating the situation realized that Kaufman would not wittingly perpetuate the Warwick problem. Consequently, when Kaufman declared that he was there only to discuss wages the Union could not reasonably believe that Kaufman was there to negotiate a complete contract. Notwithstanding assertions to the contrary, it was not demonstrated that Kaufman knowingly exceeded his limitation to discuss only wages during the group negotiations. And, in my opinion although Kaufman did not explicitly state at the outset that the contract was contingent on the resolution of the Warwick situations, the Union, under the circumstances, could not have reasonably understood otherwise.

As pointed out in *Industrial Engineering Co.*, supra, the alleged violation contemplates a consciously arrived at understanding and a refusal, as here pertinent, to execute the written agreement. When Kaufman limited his participating and indicated that while he had problems with the Union regarding operations at the Warwick he would not deal with that matter in group sessions, the Union, which fully appreciated the situation, could not reasonably conclude that there would be a meeting of the minds during the involved negotiation sessions on that language in the contract being negotiated, which was the basis of the Union's contentions that R & K was acting unlawfully at the Warwick. The General Counsel contends more than once on brief that here, unlike *Checker*, supra, the Union did not mislead Respondent. As pointed out by Respondent, on brief, however, it was concluded in *Checker*, supra at 44 that "[t]he result would be the same even if . . . [the Union] had not been guilty of misrepresentation."

Two other portions of *Checker*, supra at 643 and 645, respectively, cited by Respondent, on brief, bear repeating:

> This contention, placing a "pound-of-flesh" technicality above justice and equity, has been soundly re-

---

of any of the parties who might arguably have had a bargaining relationship with the Union."

Contemporaneous with the filing of the charge, the Union invoked the arbitration provisions of its collective-bargaining agreement with Elan, "seeking to enforce the contractual obligation of recognition [on Warwick Caterers] as set forth in the collective-bargaining agreement [between the Union and Elan]."

On 24 February [1982] the Union began picketing which continued until it was enjoined on 14 June [1982].

On 13 May [1982] Warwick Caterers filed a charge against the Union alleging violation of 8(b)(7)(C). A complaint issued, forming the basis for the instant case.

Although the Union took the position that it is an incumbent collective-bargaining representative by virtue of the alter ego or single-employer status between Elan and Warwick Caterers, such defense was not considered. After overruling the authority the administrative law judge relied on, the Board, by Order dated March 28, 1984, directed the judge to consider the defense.

jected by the Board, which recognizes the statutory obligation of mutual good faith as a cornerstone of labor-management relations.

. . . .

Brief notice may be taken of the Union's apparent argument that Respondent must execute the contract and rely on arbitration thereunder to seek relief. Such contention is manifestly untenable. Arbitration is not available to avoid, rescind, or alter an agreement, which is what Respondents would need if they were to sign the agreement in its present form.

In view of the above, it is not necessary to deal with the above-described contentions regarding the legality of the contract.

The complaint should be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed in its entirety.

[14] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Eastman Interiors, Inc. d/b/a Eastman West *and* Local Freight Drivers, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 208, Petitioner. Case 21–RC–17339

14 December 1984

DECISION ON REVIEW, ORDER, AND DIRECTION OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 25 January 1984 the Regional Director for Region 21 of the National Labor Relations Board issued a Decision and Direction of Election in the above-entitled proceeding in which he found appropriate a unit consisting of all full-time and regular part-time maintenance employees, truck drivers, helpers, dispatcher, customer service representative (CSR), and warehouse employees, including pickers, shippers, and receivers, employed by the Employer at its facilities located at 7545 Telegraph Road, Montebello, California, and at 19840 Hamilton, Torrance, California; excluding all other employees, office clerical employees,[1] salespersons, cashiers, guards, professional employees, and supervisors as defined in the Act.[2] In so finding, the Regional Director rejected the Petitioner's contention that the unit as petitioned for, limited to warehouse employees at Montebello, excluding the CSR and dispatcher, was an appropriate unit for bargaining. The Regional Director also rejected the Employer's contention that the appropriate unit must encompass all employees at all 9 of the Employer's facilities, approximately 67 to 70 employees.[3] Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review in which it contended, inter alia, that in not finding an overall unit appropriate the Regional Director made erroneous findings of fact and departed from official Board precedent.

By mailgram dated 23 February 1984 the request for review was granted. Pursuant to the Board's Rules and Regulations, the election was held on 23 February 1984 in the unit found appropriate by the Regional Director and the ballots were impounded pending the Board's decision on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issue under review and for the reasons stated below finds that only an overall multifacility unit is appropriate.

The Employer is engaged in the warehousing and retail sale of furniture. Its operation consists of two warehouse/showrooms (Montebello and Torrance) and seven retail outlets (Thousand Oaks, Lakewood, Sherman Oaks, Buena Park, West Covina, Culver City, and Arcadia) situated in shopping malls, all within southern California. Each of the retail outlets maintains a stockroom which holds merchandise not yet displayed and extra stock. These stockrooms vary in size between 200 and 1500 square feet. Except for the facility in Thousand Oaks, all of the locations are within a radius of approximately 20 miles. Corporate headquarters are located adjacent to the warehouse/showroom facility at Montebello. A. Mizrahi is the corporate president of the Employer. Below Mizrahi in the corporate structure are D. Leyner, the corporate comptroller; B. Sparks, the warehouse operations manager; and P. Linder, the vice president and general manager. Mizrahi, Leyner, and Linder are located at Montebello corporate headquarters. Company policies, personnel decisions, advertising, purchasing, and payroll are handled centrally at Montebello corporate headquarters. In addition, all merchandise from vendors is received at the Montebello facility and thereafter distributed to the Employer's other locations.

There are approximately 34 warehouse employees in the petitioned-for unit at the Montebello facility. The 8–10 warehouse employees who work the day shift receive and store merchandise from vendors, deliver the merchandise to customers at the Employer's "will-call" dock, maintain the warehouse, and assist the salespeople in rearranging and setting up new displays of furniture in the showroom. The eight employees on the night shift are responsible for picking the orders, organizing them according to destination, and loading the goods on trucks for delivery the following day.

Deliveries to customers, the Torrance facility, and the Employer's stores are handled by the Employer's seven truckdrivers, each of whom is paired with one of seven helpers. All delivery teams work out of the Montebello facility. At the beginning of each workday, each team picks up its delivery schedule and invoices from the dispatcher and spends the rest of the day making deliveries.

[1] At the hearing, the parties agreed that any unit found appropriate should exclude the Employer's office personnel who work at the corporate headquarters at Montebello.

[2] There are approximately 36 employees in the unit found appropriate by the Regional Director.

[3] The Regional Director also rejected the Employer's alternative contentions that: (1) all employees in the Employer's combined warehouse/showroom operations in Montebello and Torrance comprise an appropriate unit; (2) the salespersons employed in Montebello should be included in the petitioned-for unit; or (3) at the very least, the unit also should include all employees who perform general warehousing duties in Torrance.

After the drivers leave, the dispatcher takes calls from customers and on occasion contacts the drivers regarding problems with deliveries or delivery instructions. The dispatcher also keeps in contact with the Employer's various retail outlets and receives their orders for delivery of merchandise.

The CSR takes calls from customers who have complaints regarding merchandise purchased at any of the Employer's facilities, as well as about deliveries. The CSR is situated in the warehouse and is in constant contact with the warehouse employees. On occasion the CSR will have warehouse employees assist her when she is tagging items (e.g., "hold" tags, delivery instruction tags, etc.). Finally, the CSR schedules the "repair truck," which the Employer operates for the purpose of performing minor repairs on furniture sold to customers.

The Employer also employs three to four salespeople at its Montebello facility. These individuals are responsible for making sales to customers and keeping the showroom in order.[4] When the will-call dock is closed, the salespeople will load the merchandise into the customer's car. This occurs on a daily basis. In addition, the salespeople frequently assist warehouse employees in loading furniture onto customers' cars from the will-call dock.

The Employer's work force at the Torrance facility consists of one full-time warehouse employee, one regular part-time warehouse employee, and three to four salespeople. Virtually all of this location's business is will-call. However, except for Saturdays, there is only one warehouse employee working in the warehouse. As a result, the sales employees frequently handle the warehousing aspect of will-call, i.e., pulling merchandise and loading it onto the customers' vehicles. In addition, the salespeople regularly assist in keeping the warehouse in order and with moving and rearranging furniture.[5] The Torrance employees (sales and nonsales) have at least weekly contact with the Employer's drivers and helpers from Montebello. Every week a 45-foot trailer is loaded at Montebello and then driven to Torrance. Drivers and helpers, or on occasion warehouse employees from Montebello, will go to Torrance and assist the Torrance sales and warehouse employees in unloading and checking the merchandise received from Montebello. In addition to handling the weekly transfers from Montebello, driver/helper teams transport merchandise from Torrance to Montebello when there is a depletion of inventory at Montebello.

Each of the seven retail stores has three to four salespeople. In addition, three or four of the stores employ part-time cashiers.[6] As there are no warehouse employees at any of these stores, the salespeople perform all necessary warehousing duties. Thus, in addition to making sales and maintaining the stores, the sales employees are responsible for handling all aspects of will-call and for receiving and inspecting all items shipped from Montebello. As a result of their receiving duties, salespeople have regular weekly contact with the Employer's drivers and helpers, who spend from 2 to 4 hours each week at each store while unloading and arranging merchandise. The salespeople help with this work about half of the time. In addition to performing their regular duties, the cashiers receive commissions for selling accessories to the customers. The cashiers have regular contact with the drivers but, due to working only part-time, on a less frequent basis than the sales employees. When the cashiers are not working, and in stores not employing cashiers, the sales employees perform the cashiering duties.

The transfer of employees among the nine facilities often is dictated by the demands of the Employer's business. When a facility is planning a major move or a new store is opened, employees from throughout the Employer's organization are transferred temporarily to that location to assist. In addition, all employees (sales and nonsales) at the facility in transition participate in the move. Although there is no regular rotation schedule, salespeople frequently are transferred between the showrooms and retail outlets when large sales are taking place or when employees are sick or on leave. Additionally, permanent transfers of salespeople are frequent and have been initiated both by the employee for personal reasons and by the Employer for business reasons. The record indicates that the average salesperson works at five to seven different stores at different times within any 1-year period.

The one full-time warehouse employee at Torrance permanently transferred to that facility from the Montebello warehouse. When he is absent for extended periods such as vacations, a Montebello warehouse employee is temporarily assigned to the Torrance facility.

The only permanent transfer of an employee from a nonsales position to a sales position, or vice versa, involved the transfer of a store manager to a

[4] Flores, the maintenance employee for Montebello headquarters and warehouse, on occasion will assist in showroom maintenance. He is the only employee employed by the Employer whose primary duty is maintenance.

[5] At the hearing, Sparks testified that, when he worked in Torrance sales, he spent 1–2 days a week in the warehouse.

[6] Three of the locations which have cashiers are Torrance, Lakewood, and Culver City.

higher managerial position. However, the record indicates that the Employer intends to use the warehouse as a training ground for sales positions. The Employer in fact hired two individuals as truckdrivers with such a plan in mind. However, the plan did not come to fruition because of problems with insuring these two potential trainees due to their poor driving records.

Regarding supervision of the warehousing operation, Sparks is in charge of the Employer's warehouse facilities at Montebello and Torrance.[7] He is responsible for shipping and receiving, management of warehouse personnel, and the security of both warehouses and the eight trucks operated out of the Employer's Montebello facility. All warehouse employees, drivers, and helpers, as well as the CSR and dispatcher, report to Sparks.

The Montebello warehouse employees on the day shift are supervised by R. Cortez, who is in charge of receiving operations. J. Moore is solely responsible for the Employer's night operation,[8] and all night warehouse employees report to him. Both Cortez and Moore have the authority to discipline employees. However, with regard to hiring, Sparks interviews and hires the applicants, but will send them to either Cortez or Moore for their approval. In addition, the record indicates that Moore has been allowed to interview applicants and then send them to Sparks for final approval before hiring. Regarding authority to recommend discharge, if Moore should decide to discharge someone he first must consult Sparks. If, in his opinion, there are no extenuating circumstances, Sparks will accept the recommendation. As of the time of the hearing, Moore had not discharged or effectively recommended the discharge of any night warehouse employee. Moore also evaluates employees and has effectively recommended wage increases for at least two employees on his shift. Torrance warehouse employees are supervised on a day-to-day basis by Store Manager M. Fisher. However, all issues concerning wage increases, disciplinary problems, transfers, etc., are Sparks' responsibility.

The Employer's sales operation is directed by its general manager, Linder. Each of the retail outlets has a store manager who is directly responsible to Linder.[9] Each store manager determines the schedules for his sales employees and has the authority to grant time off. Regarding hiring, the general manager interviews the prospective sales employees, and if he likes them will "bounce them off the individual store manager." Finally, a store manager can request that a sales employee no longer work in his store, but has no authority to terminate salespeople.

All warehouse employees (pickers, shipping, receiving, and maintenance), the CSR, and the cashiers are paid on an hourly basis. The CSR is paid approximately $8 per hour plus overtime. The dispatcher is paid a salary and earns no overtime. The Employer's drivers, helpers, and salespeople are paid on a salary-plus-commission basis. Drivers and helpers earn a base hourly rate of $4.25 to $7.50 per hour. With commissions they can increase their earnings up to approximately $9.50 per hour. The salespeople generally receive a base salary of $1000 per month. All employees receive the same fringe benefits.

Analysis

The Employer contends that a separate uni Montebello warehouse employees is inappropriate due to: (a) the high degree of functional integration between the sales and warehouse/shipping operation; (b) the centralization of administrative matters; (c) the significant amount of interaction among all of the Employer's employees; and (d) the fact that all employees perform similar job duties. We find merit in the Employer's contention.

In concluding that a unit limited to Montebello and Torrance warehouse employees is appropriate, the Regional Director relied on his findings that: (a) the salespeople are under a separate line of supervision; (b) there have been no instances of temporary or permanent transfer between selling and nonselling positions;[10] (c) contact between selling and nonselling employee on the day shift, although frequent, is solely in the performance of their functions; (d) there are separate lines of progression for the sales staff and nonselling staff; and (e) sales personnel generally are compensated at a higher level than nonsales employees.

Contrary to the Regional Director, we find that the highly interdependent nature of the Employer's operational structure compels the conclusion that a separate warehouse unit is inappropriate, whether it consists of the Montebello warehouse employees alone or the Montebello and Torrance warehouse employees, and that only a wall-to-wall multifacility unit is appropriate. Explication of this finding involves a four-step analysis which begins with the petitioned-for unit of Montebello warehouse employees. A unit limited to this group of employees is inappropriate as it fails to include the two re-

[7] Sparks goes to the Torrance facility three to four times a month.

[8] The parties stipulated that Cortez and Moore are statutory supervisors.

[9] At Montebello, sales personnel report to the facility sales manager, H. Martin.

[10] This does not include instances where salespersons have been promoted to supervisory positions.

maining warehouse employees in the Employer's operation. These two employees, who work at the Torrance facility, share a strong community of interest with the Montebello warehouse employees. The Montebello and Torrance warehouse employees perform similar functions, share common supervision, earn similar wages, and receive the same fringe benefits. Montebello warehouse employees frequently assist employees at Torrance with the performance of warehouse work. In addition, the one full-time Torrance warehouse employee was permanently transferred to that facility from Montebello and, when this employee is absent for extended periods of time, a Montebello warehouse employee is temporarily assigned to the Torrance facility. Based on this strong community of interest which exists between the Employer's warehouse employees, we find, in agreement with the Regional Director, that a unit limited to warehouse employees at Montebello is inappropriate and that any appropriate unit must include both the Montebello and Torrance warehouse employees.

Our decision to include the Torrance warehouse employees mandates the inclusion of the Torrance sales employees in the unit found appropriate. We are compelled to take this action based on the highly integrated nature of Torrance's sales and warehousing operations. As noted above, the small number of warehouse employees and the high volume of will-call business at Torrance inevitably result in the performance of warehousing functions by the Torrance sales employees. Sales personnel regularly assist in keeping the warehouse in order and with moving and rearranging the furniture. In addition, the sales employees frequently handle the warehousing aspect of will-call, i.e., pulling merchandise and loading it onto the customers' vehicles. This high level of integrated effort by the Torrance warehouse and sales employees makes clear that the disputed classifications should not be treated as two distinct groupings. Therefore, our decision to include the Torrance warehouse employees necessitates the inclusion of the facility's sales employees in the unit.

Taking this analysis one step further, we note that the Employer's average salesperson works at five to seven different stores at different times within any 1-year period. As a result of this frequency of temporary transfers, and our finding that the Torrance sales employees must be included in the unit found appropriate, we deem it necessary to evaluate the possibility of including all of the Employer's sales employees in the unit. In other words, we must determine whether an overall multifacility unit is appropriate.

When dealing with a multifacility unit, the well-established Board policy is to find a single-facility unit presumptively appropriate. This presumption only can be overcome by a showing of functional integration so substantial as to negate the separate identity of the single-facility unit. In making findings on this issue, the Board looks to such factors as central control over daily operations and labor relations, skills and functions of the employees, general working conditions, bargaining history, employee interchange, and the geographic location of the facilities in relation to each other.[11]

Here, we find that the presumption favoring a single-facility unit has been rebutted by the pervasive centralized control of all labor relations and personnel matters, the high degree of functional integration, the frequent temporary and permanent transfers of sales employees among all nine facilities, the similarity of job responsibilities at the Montebello warehouse/showroom and the other facilities, and the proximity of the facilities. We further find that these factors establish that a multifacility unit including the warehouse/showroom employees and all retail outlet employees is the only appropriate unit.

Control over the Employer's operations and personnel matters is highly centralized. All purchasing of merchandise, as well as receiving of the items from vendors, is performed at Montebello. Payroll and advertising for all nine facilities are handled at corporate headquarters in Montebello. All final personnel decisions regarding the hiring and firing of employees are handled by central management. For example, store managers may be asked what they think of an applicant, but the decision to hire is made by Linder, the general manager. Moreover, a store manager may request that a particular employee not work at his store, but he may not fire him.

The centralized nature of the Employer's operation compels the interdependence or integration of the retail outlets and the Montebello and Torrance facilities. When a customer chooses a piece of merchandise which he wishes to pick up later in the week, and the particular store does not have it in stock, the sales employee fills out a merchandise requisition form and sends it to the purchasing department at Montebello. If it is stock merchandise available at Montebello the order is entered in the computer, which prints out a listing of the merchandise to be transferred from the Montebello warehouse to the various outlets. These listings go to the night crew at Montebello, who pull and load the merchandise for delivery to the stores.

[11] *Napa Columbus Parts Co.*, 269 NLRB 1052 (1984).

Also supportive of a finding that only a multifacility unit is appropriate is the fact, noted above, that the average salesperson works at five to seven of the Employer's facilities within a 1-year period. Because of this frequency of transfer, it is only logical that, because the Torrance sales employees are to be included in the unit, then all sales employees at the other facilities also are to be included. Moreover, the retail store employees and the warehouse and sales employees at Torrance have similar job responsibilities. All employees do some degree of warehousing, and the salespeople working at the retail outlets must handle any warehousing responsibilities which might arise. The cashiers assist in the selling process and, similar to the sales employees, receive commissions for accessories they provide for the customers. All employees receive the same fringe benefits. Finally, all facilities are within a 20-mile radius except for Thousand Oaks.

Based on the above factors, in particular the centralized administration, the high degree of functional integration, and the interchange of sales employees among the Employer's various facilities, we find that only an overall multilocation unit is appropriate for bargaining.[12]

[12] See generally *Napa Columbus Parts Co.*, supra; *Sol's*, 272 NLRB 621 (1984).

As the unit found appropriate is substantially larger than the warehouse unit found appropriate by the Regional Director, the election conducted on 23 February 1984 must be vacated. However, as the Petitioner has indicated a willingness to proceed to an election in the broader unit found appropriate, we shall direct that the election be held in the following unit which we find to be appropriate:[13]

> All full-time and regular part-time maintenance employees, truck drivers, helpers, dispatcher, customer service representative, warehouse employees, including pickers, shippers and receivers, salespersons, and cashiers employed by the Employer at all of its facilities; excluding all other employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

ORDER

The election conducted on 23 February 1984 is vacated.

[Direction of Election omitted from publication.]

[13] As the unit found appropriate is larger than that requested, the Petitioner is accorded a period of 10 days in which to submit the requisite showing of interest to support an election. In the event the Petitioner does not wish to proceed to an election herein, it may withdraw its petition without prejudice by notice to the Regional Director within 7 days from the date of this decision.

International Paper Company *and* United Paper Workers International Union, AFL–CIO, Petitioner. Case 16–RC–8592

14 December 1984

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBER ZIMMERMAN, HUNTER, AND DENNIS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on 21 July 1983 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 24 for and 47 against the Petitioner, with 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the hearing officer's findings and recommendations only to the extent consistent herewith.

The hearing officer recommended sustaining the Petitioner's Objections 1 and 5,[1] which contended respectively that the Employer made unlawful threats to reduce wage rates, and that the Employer conveyed to the employees the futility of selecting the Petitioner as their collective-bargaining agent. We find that the Employer engaged in no objectionable conduct.

The Petitioner seeks to represent a unit of employees at the Employer's lumber mill in New Boston, Texas. The Employer also operates other mills, including unionized plants at Coushatta, Louisiana, and Nacogdoches, Texas.

During the Petitioner's organizing campaign, the Employer's officials conducted a series of meetings with the employees. At the first meeting or meetings held on or about 27 June 1983, the Employer's regional manager Ben Smith addressed the employees. Smith's remarks commenced with an introduction:

> Let me take a few minutes here and discuss what the law is and how collective bargarning [sic] really works.
>
> First, I hope everyone understand [sic] that collective bargaining does not mean that a company must agree to anything a union asks for or to sign a contract at all, if the company does not think the contract is in the plant's or the employees' best interest. The labor laws require the parties to bargain in good faith, but it [sic] does not require them to agree with each other . . . . Even if they do agree, that does not necessarily mean wages or benefits will improve . . . . After negotiations, things may go up, they may stay the same . . . or they may go down . . . .

Smith informed employees that within the last several years at various plants operated by the Employer

> . . . there have been a number of unionized operations where pay has been negotiated frozen or reduced . . . . While most of these freezes and reductions were in paper and converting plants at IP, it shows you that through good faith bargaining, wages and benefits are frequently reduced.

Additional meetings were held about 6 and 7 July 1983, with Plant Manager Glenn Haddox and Smith as the speakers. In these remarks the officials compared the wages of the New Boston employees with those at other lumber mills across the South. The New Boston wages were higher. The Employer's spokesmen continued:

> We have discussed what the law says about wages and benefits changing in a contract. And, if need be, we will bargain in good faith at New Boston. You need to understand, however, that we will not agree to anything in a union contract which we believe is not in the best interest of the company. Take, for example, wages and benefits. It is clear to me that we would have a strong argument in any negotiations that wages and benefits are already too high here. Now, I am not threatening you people; you have a legal right to have a union represent you. But because we care about you as employees, you need to understand that we have a legal right to bargain hard for what we believe is best for the business. Now we have some further information which we will discuss with you before you vote which leads us to believe that this union will agree to lower wages and benefits than we have right now in New Boston.

Further meetings were held during the weeks of 13 and 19 July 1983. Assistant Plant Manager Henry Conly spoke for the Employer at a meeting held during this time. As found by the hearing officer, Conly indicated that the Employer would bargain for lower wages like those at the Employer's union-represented plants, i.e., Coushatta and Nacogdoches. Conly compared the wages at New

[1] In the absence of exceptions thereto, we adopt, pro forma, the hearing officer's recommendations that Objections 2 and 6 be overruled.
At the hearing the Petitioner withdrew Objections 3 and 4, with no opposition by the Employer. The hearing officer thereafter declined to consider these objections in her report.

Boston and Coushatta, pointed to Coushatta's wages on a bulletin board, and said, "These wages are the ones we are shooting for." Conly also spoke of his participation in prior negotiations at one of the unionized mills, noted that he was a hard negotiator, and stated, "You better bring a big lunch, because it could take a long time to negotiate a contract."

A chart comparing the wages of New Boston with Coushatta and Nacogdoches was posted in the plant shortly before the election. Several employees noticed these wage comparisons, including the higher New Boston figures.

The hearing officer treated Objection 5 together with Objection 1 because both objections involved conduct of the Employer which occurred in the same series of employee meetings. She concluded that this conduct created an "atmosphere of apprehension in the voters' minds," inculcated a sense of futility, and interfered with the employees' choice. We conclude to the contrary that the Employer's speech and actions were consistent with the requirements of the Act.

In evaluating whether an employer's statements during a union organizing campaign have a coercive effect on employees, the focus of our inquiry is whether the totality of the employer's statements have created an atmosphere preventing a free and untrammeled choice by the employees, thereby disrupting the intended laboratory conditions.[2]

The present case is barren of such coercive circumstances. Contrary to the hearing officer, we discern no basis to warrant a conclusion that the Employer improperly warned employees of a decrease in wages and benefits and thereby "inculcate[d] in employees a sense of futility." Consistent with our recent decision in *Caradco Corp.*, 267 NLRB 1356 (1983), the statements made by the Employer regarding the possibility of lower wages and benefits cannot, in context, reasonably be construed as a threat to reduce employee wages or benefits if the Petitioner won the election. Thus, as in *Caradco*, the comments of the Employer's representative emphasized repeatedly that any reduction in wages and benefits could only be undertaken through collective bargaining with the Union.

In the meetings held about 27 June, Regional Manager Smith stressed the Employer's commitment to good-faith bargaining and remarked that as a result of *negotiations* "things may go up, they may stay the same . . . or they may go down." Although Smith referred to unionized plants operated by the Employer where wages had been reduced, he specifically informed employees that this occurred "through good faith bargaining." In the meetings held about 6 and 7 July, Smith and Plant Manager Haddox referred to possible wage and benefit reductions only in the context of collective bargaining. Indeed, they expressly stated to employees that the Employer had reason to believe that "this union will agree to lower wages and benefits," thereby emphasizing the collaborative nature of any reduction through negotiations. In addition, Smith and Haddox assured employees in these meetings that they had a legal right to choose union representation and expressly disavowed any threat of retaliation. Assistant Plant Manager Conly's remarks at the later meetings reiterated the Employer's adherence to the bargaining process. The statements attributed to Conly contain express or clearly implied references to negotiation: the Employer would bargain for wages like those at its unionized plants; he was a hard *negotiator*; "these wages are the ones *we are shooting for*," and "it could take a long time *to negotiate* a contract" (emphasis added). Viewed in their entirety, these remarks convey no indication that the Employer would initiate unilateral changes in the employees' terms and conditions of employment or retaliate against employees because they selected the Union.

It bears emphasis that we view the later meetings, as the employees viewed them, in the light of the initial sessions held only 2 to 3 weeks earlier. Hence we interpret Conly's gesture to the bulletin board, as well as his remarks, in the light of Smith's and Haddox's repeated expressions of their willingness to comply with the requirements of collective bargaining. Neither Conly's gesture, nor his remarks, can be considered in this context to have disrupted the laboratory conditions for the election, or to have inculcated a sense of futility. The Employer's subsequent posting of the chart containing wage comparisons is not objectionable. We have upheld the use of similar charts in the past.[3] Further, employees clearly were aware that the Employer's statements regarding its commitment to collective bargaining were not merely idle words but had been demonstrated by negotiated agreements at its other unionized plants.[4]

[2] *General Shoe Corp.*, 77 NLRB 124 (1948).

[3] *Viacom Cablevision of Dayton*, 267 NLRB 1141 (1983).

[4] Our dissenting colleague contends that the Employer, through Assistant Plant Manager Conly, made "an explicit declaration . . . of an adverse consequence of unionization" by allegedly indicating that the Employer would "insist" on lower wage levels. The hearing officer found in her concluding analysis, however, that Conly stated only that the Employer "would bargain for" wages like those at its unionized plants and that those were the wages the Employer "was shooting for" and "wanted to negotiate." Although the term "insist on" appears in Employer's Exh. 13, Conly testified he did not read this speech word for word, but used the text as an outline, and no credited union witness claimed to have heard "insist on." It is clear that the Employer's statements regarding

Continued

Accordingly, as the record does not support the Petitioner's objections that the Employer's speeches constituted a threat of retaliation or inculcated a sense of futility among the employees, the objections are hereby overruled. Because the tally of ballots shows that the Petitioner failed to receive a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Paperworkers International Union, AFL–CIO and that it is not the exclusive representative of these bargaining unit employees.

MEMBER ZIMMERMAN, dissenting.

For the reasons expressed in the hearing officer's report attached hereto, I would sustain the Petitioner's Objections 1 and 5 and set the election aside. The Employer's campaign statements can only be interpreted as threatening retaliation against the employees in the event that the New Boston plant became unionized. I agree with the hearing officer that the Employer's references to "bargaining" and "negotiations" are insufficient to mask the intended coercive tone of the Employer's speeches and conduct.

Indicative of the tone of the entire campaign is this excerpt from Assistant Plant Manager Conly's remarks to the employees on 13 and 14 July: "I can assure you . . . that if we are required to negotiate wages and benefits with *this* union, these . . . are the wages we will insist on in a lumbermill contract at New Boston" (Emp. Exh. 13). (emphasis in the original). It could not be clearer that the Employer signaled the employees in this sentence that it would seek a lesser wage level precisely because the Union was present. Thus if the employees voted for the Union, they were "assured" of the Employer's insistence upon the lower wage levels of Coushatta and Nacogdoches. If the employees voted against the Union, according to the clear implication of Conly's remarks, the existing, higher wage levels would remain undisturbed—wage levels which the Employer set and therefore clearly found acceptable. The Employer's transparent indication of its intent to administer differential treatment to its employees depending on the outcome of the election creates an atmosphere of apprehension and a sense of futility in the minds of voting employees, and warrants setting aside the election. Accordingly, I dissent.[1]

[1] The present case is distinguishable from three recent cases in which I found an employer's remarks to its employees unobjectionable. I have agreed to the certification of election results where an employer made no express or implied promise that the employees' wages would be increased if the union were voted out, and where the employer made no suggestion that the employees' wages or benefits would suffer if they voted the union in. *Viacom Cablevision of Dayton*, 267 NLRB 1141 (1983); *Caradco Corp.*, 267 NLRB 1356 (1983). I have also voted to certify the election results where the employer's predictions as to the effects of unionization referred to "demonstrably probable" consequences beyond its own control. *International Harvester Co.*, 258 NLRB 1162 (1981) (Member Zimmerman, dissenting). In the instant case, the Employer *told* the employees that, if required to bargain with the Union, it would *insist* on a fixed, lesser wage rate. Far from implication or suggestion, this was an explicit declaration by the Employer of an adverse consequence of unionization well within its own control.

APPENDIX

Findings of Fact

Objections 1 and 5

Since these two objections involve statements allegedly occurring on or about the same dates and in the same series of employee meetings held by Assistnat Plant Manager Henry Conly, they will be treated together, for the purporse of this Report.

Petitioner's Position:

The Petitioner, in support of these objections (regarding the threat to reduced wages and the futility of selecting the Petitioner as collective-bargaining agent), offered employee witnesses Ronald Lofland, George Conway,[2] and Ricky Almand.

It was undisputed that during the Petitioner's organizing campaign, the Employer, through various management personnel, held a series of employee meetings for the purpose of explaining its positon. These meetings occurred between June 27 and July 19 on a weekly basis, at varying times and places, and involved employees grouped by departments and/or by their union sentiments. The meetings lasted between 15 to 60 minutes and were held during work hours.

The first series of employee meetings was held primarly by Ben Smith, Regional Manager of the Arkansas Wood Products Division, around June 27. Glenn Haddox, Plant Manager, and Henry Conly, Assistant Plant Manager, were present and participated in lesser degrees. There were no allegations that objectionable statements were made during this first series of meetings; they are mentioned for background purposes. The employees were told of other companys and unions agreeing to pay cuts and reductions in benefits, after bargaining. A copy of excerpts from Smith's speech was supplied as Employer's Exhibit 4 and it stated therein:

> At IP within the last several years, there have been a number of unionized operations where pay has been negotiated, frozen or reduced. In fact, after

wages and benefits, taken as a whole, neither indicated that it would undertake unilateral action nor implied that it would retaliate against employees by administering differential treatment depending on the outcome of the election. Thus, we find that the Employer did not exceed the limits of permissible campaign conduct. *Caradco Corp.*, supra.

[2] Conway's employment was terminated 7/18/83.

> bargaining with the same union, IP has frozen wages in several operations and actually reduced wages in others where the employees were represented by the UPIU. While most of these freezes and reductions were in paper and converting plants at IP, it shows you that through good faith bargaining, wages and benefits are frequently reduced.

The second series of employee meetings occurred around July 6 and 7. Again Ben Smith was the primary spokesperson, with Glen Haddox participating. Petitioner's witness Ron Lofland recalled that at the meeting he attended, Company personnel explained why they didn't need a union, with emphasis on strikes and "lots of emphasis on wages being reduced to possibly the national average wage." Lofland recalled this latter statement occurring around July 7 and 13 and that Glenn Haddox and Ben Smith were the speakers.

The third and fourth series of employee meetings occurred the weeks of July 13 and 19. At the fourth meeting Lofland recalled Conly making wage comparisons between New Boston and Coushatta, La. on a bulletin board. He said Conly went to the board, pointed to Coushatta's wages, which were consideraby lower than New Boston's, and said "these wages are the ones we are shooting for." He later testified that the wages were from $1.50 to $1.75 lower for the same type jobs at Coushatta than those at New Boston.

Lofland stated that Conly also spoke of the negotiations he had been involved in before, that he was a hard negotiator and that:

> You better bring a big lunch, because it could take a long time to negotiate a contract.

And after this meeting Lofland testified there were wage comparisons posted throughout the saw mill area for people to view, up until the election. Lofland recalled the wage comparisons being posted on a chalkboard in the saw mill area and in an office in the breakroom.

Petitioner's witness George Conway testified as follows:

> The third meeting, the fourth meeting, Henry said that if the union came in, he would do everything he could to get the wages lowered to what they was at other mills and—it was the third meeting because he said that he was negotiating contracts at the mill that he came from and that he wanted to negotiate this contract and they would get their wages down.

Conway also recalled the Coushatta wage rates being posted on the bulletin board on a rack.

As Conway had been discharged on July 18, and had a charge pending dismissal in the National Labor Relations Board Regional Office at the time of the hearing, the Employer requested and received (for cross-examination purposes) a portion of Conway's affidavit[3] relating to the objection issues mentioned under direct examination. Under cross-examination Conway testified that Conly had referred to a chart showing average wage differences between union and non-union plants, and Conley recalled no specific columns on Coushatta's wages. He guessed, it was not clear, that Coushatta was included in those average union wages.

A part of Conway's affidavit was read into the record, under cross-examination, and it stated that during the week of July 11, Conly had said: "he has a very experienced contract negotiator and he would bargain our wages down, and our benefits cut down . . ." But in earlier direct testimony, Conway had said Conly would get their wages down. When asked which of his statements was true, Conway replied "both." Petitioner's witness Ricky Almand testified that he attended five of the Employer's meetings and that the fifth was held the day before the election. Almand recalled that at one of the meetings there was a little "board-like deal" on a three-legged pedestal. It had the wages on certain jobs for Nacogdoches and Coushatta and New Boston and the differences between the pay, and that Conly and Smith were always saying "how much better, how much more we was making than Nacogdoches and Coushatta."

Almand's recollection was similar to Conway's in that he recalled being told that the reason Conly was brought to New Boston was because he negotiated contracts at other plants and that Conly would:

> "try to negotiate the contract with the—whenever it come time, when and if the Union made it, come time [sic] for negotiation to get our wages down with Nacogdoches and Coushatta."

He recalled the kiln operator classification showing a difference between New Boston and Coushatta and Nacogdoches of about 38 cents.

Under cross-examination Almand said that he assumed the chart containing the comparisions between New Boston and the United Paperworkers International Union average wages included Coushatta and Nacogdoches. And he restated that a chart was posted which included Coushatta and Nacogdoches in front of the mill breakroom and on a three-legged pedestal in the office conference room.

Employer Position:

The Employer, in defense of these two objections, offered Ben Smith, Henry Conly, and John Clary as witnesses. Smith testified that at the first meeting on June 27, it was his objective to inform the employees that it could be hard bargaining and that wages could be reduced. He referred to a newspaper article telling the story of unions which had agreed to pay cuts and reductions in benefits . . . with the point that "these unionized companies bargain with the unions for less money and less fringe benefits for their employees.[4]

[3] Employer's Exhibit 2.

[4] Excerpts from Smith's speech were provided as Employer's Exhibit 4, with the Employer refusing to put the entire speech into the record, advising that the other portions did not deal with the objections raised herein.

At the second series of meetings (July 6 and 7) Smith testified that he read from Employer's Exhibit 5 and "referred to the chart" on a tripod but did not put on a display of it. The chart reflected the differences between average industry wages and New Boston wages for certain job titles.[5] It was noted in his speech that New Boston wages were anywhere from $1.89 to 24 cents an hour above the average industry wage. A copy of excerpts of Smith's speech as provided, as Employer's Exhibit 5, and therein he stated:

> . . . And, if need be, we will bargain in good faith at New Boston. You need to understand, however, that we will not agree to anything in a union contract which we believe is not in the best interest of the company. Take, for example, wages and benefits. It is clear to me that we would have a strong argument in any negotiations that wages and benefits are already too high here. Now, I am not threatening you people; you have a legal right to have a union represent you. But because we care about you as employees, you need to understand that we have a legal right to bargain hard for what we believe is best for the business. Now we have some further information which we will discuss with you before you vote which leads us to believe that this union will agree to lower wages and benefits than we have right now in New Boston.

Smith appeared to reluctantly admit that he was aware wages were basically higher at New Boston than at Nacogdoches, and that Coushatta was mentioned in the meetings and "it may have been Nacogdoches too." He believed Coushatta and Nacogdoches were included in the survey's figures (chart referred to in his speech and previously identified as Employer's Exhibit 17.)

Henry Conly testified that he spoke from a prepared statement on July 13 and 14, using the statement as an outline, and that he utilized a chart comparing UPIU average wages with New Boston's. Ultimately, he advised he spoke with everyone in the plant's conference room of the office building, everyone who was logistically available. A copy of excerpts[6] from his speech was provided as Employer's Exhibit 13. And a copy of the chart was provided (minus the wages and differences in wages) as Employer's Exhibit 18. An excerpt from the excerpts of the speech reads:

> . . . Now, if you were bargaining for the Company, and you found cut that the Union had never negotiated wages and benefits as good as what you had paid before the union was voted in, what kind of hard bargain would you demand? *Of course*, the Union does not want you all to think about union wages and benefits. The union would like to forget about these wages, too. I can assure you, however, that if we are required to negotiate wages and benefits with *this* union, these [chart] are the wages we will insist on in a lumbermill contract at New Boston.[7]

Conly's testimony regarding the posting of Nacogdoches and Coushatta wages was contradictory. In earlier testimony Conly answered:

> Q. In fact, you posted the wage rates from Coushatta at one point, didn't you?
>
> A. Not any meetings that I delivered.
>
> Q. I mean after the meetings, do you have knowledge that the Coushatta wage rates were posted in the plant?
>
> A. As an official posting on a bulletin board?
>
> Q. That the company put it up somwhere where employees could see it.
>
> A. We had an information room where the wage rates were available at any of several mills.
>
> Q. I am going to ask this question again. Were the wage rates from Coushatta posted someplace in the plant where employees could see them?
>
> A. Not that I recall.

Later Conly admitted the Coushatta wages were posted in the plant on July 19; but insisted they were not posted during his speeches on July 13 and July 14. Conley advised that he told employees he had been "involved in" the negotiations of the contract at Coushatta, that he was on the negotiation committee. In other testimony, he denied ever mentioning Coushatta or Nacogdoches in his comments.

Conely recalled making a statement on July 13 that if the Paperworkers were certified and they started contract negotiations, that "they should pack a lunch" (perhaps stating this in three or four of the employee meetings). He specifically denied saying he was a hard bargainer but said that "they would insist on bargaining for competitive rates."

John L. Clary, Manager of Employee Programs, testified that he prepared the chart containing the average wages paid by the UPIU represented lumber mills and the differences in the wages (to New Boston's). No specific references were made on the chart to Coushatta or Nacogdoches. He did not recall Conly mentioning Coushatta or Nacogdoches but he recalled responding to a question of an employee in one of the meetings that Coushatta's wages were included in the averages on the chart.

Discussion, Analysis and Recommendation:

In *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969) the standards for evaluating an employer's prediciton of the possible effects of unionization are measured as follows:

> (The employer) may . . . . make a prediciton as to the precise effect he believes unionization will have on his company. In such case, however, the prediction must be carefully phrased on the basis of objec-

[5] Employer's Exhibit 17.

[6] The Employer refused to furnish the entire speech, advising that other portions did not deal with the objections raised herein.

[7] Conly stated he was aware that wages were higher at New Boston than at Nacogdoches and Coushatta—varying from 20 cents an hour on some jobs to $2.00 on other jobs.

> tive fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . . If there is any implication that an employer may or may not take action soley on his own initiative for reasons Unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coerion, and as such without the protection of the First Amendment . . . .

The employees who listened to the Employer's speeches were not aware of the legal terms which can make a speech either coercive or non-coercive, but were average-type production workers. Almand recalled Conly stating[8] that he would try to negotiate New Boston's wages down with those at Coushatta and Nacogdoches (both UPIU represented mills). Almand recalled Conly stating they were being paid too much. Lofland also testified that Conly made wage comparisons between New Boston and Coushatta and pointed to Coushatta's wages on a bulletin board and said "these wages are the ones we are shooting for." Similarly, Conway stated that Conly told the employee group he attended that he (Conly) would do everything he could to get wages lowered to that of other mills; that he wanted to negotiate and they would get their wages lowered. Whether the terms used were "bargain" or "negotiate" the wages down, the effect was the same to these employees.

One of the issues of fact was whether the Employer's charts used in the meetings contained wage comparisons between Coushatta, Nacogdoches, and New Boston. While the charts provided as exhibits by the Employer (after the close of the hearing) do not indicate any reference to Coushatta or Nacogdoches, the undersigned concludes that this is not pivotal because the chart containing Coushatta and Nacogdoches wages compared to New Boston wages was posted shortly before the election. Conly himself, finally, testified that the Nacogdoches and Coushatta wages were posted on July 19 (transcript pages 183–184). Lofland, Conway and Almand all concurred in their testimony of seeing these wage comparisons and seeing that the New Boston wages were higher. Further, both employer witnesses Smith and Clary recalled "Coushatta" and "Nacogdoches" being mentioned in the meetings. It would not be difficult for anyone to get confused, after a series of meetings where charts were shown, and to believe that the figures recalled were on one set of charts rather than another, especially as these figures were posted (and the speeches referring to UPIU wage averages all occurred) within a short span of time in July.

While the petitioner's witnesses may not have been knowledgeable on dates of speeches, the undersigned specifically credits the testimony of Almand, Conway, and Lofland regarding the Employer negotiating or bargaining their wages down, or "shooting for Coushatta's wages." Both Almand and Lofland were direct and careful in their testimony. Lofland had made some notes of Conly's remarks some time after the speeches, voluntarily obtained them from his vehicle upon request of Employer's counsel, and testified consistently with those notes thereafter. While Conway was credible, he appeared to be easily led by both the petitioner and Employer's counsel, and his recall was not as accurate as Lofland's and Almand's. Further, the excerpts from the Employer's speeches confirmed many of the ideas expressed by these witnesses.

Conly, on the other hand, was not as credible, especially with respect to his testimony concerning the posting of the Coushatta wage rates. He appeared to be knowledgeable but reluctant, and at times he was evasive in his answers. While some of this could be explained by the "critical" position in which he was placed during this campaign, the undersigned does not believe this was the reason for his lack of forthrightness.

As seen by all of the Employer's literature (excerpts provided) and by the testimony of Smith and Conly, the campaign was obviously designed to emphasize and reemphasize the Employer's higher wage rates vs. the Union's lower wage rates at other IP lumber mills. While Section 8(c) of the Act permits an employer to portray its practices (and furnish specific details) with respect to its represented employees so that the voters can be completely informed, the employer is not free to predict and/or warn of wage and benefit decreases if the employees do not vote against the union representation.

The undersigned concludes that the general tone of the Employer's meetings was negative and left the impressions that: (1) the employees were making more money than the Employer's union-represented mills; (2) the UPIU had not been able to negotiate wages as good as those currently enjoyed in New Boston; (3) Conly had negotiated (or been involved in the negotiations (at Coushatta) and would be involved in negotiations in New Boston if the UPIU were elected; (4) Conly indicated the bargaining could be long (bring a sack lunch) and that they would bargain for wages like those at the other union-represented mills, i.e. like Coushatta and Nacogdoches. The undersigned further conludes that the reasonable effects upon the employees of such an employer campaign (with Coushatta's wages being posted two days before the election), could only be inhibitory, inculcate in employees a sense of futility, create an "atmosphere of apprehension in the voters' minds" and interfere with the employees' choice in the election to come. *Mohawk Bedding Co.* 204 NLRB 277. *North American Car Corporation* 253 NLRB 958.

Accordingly, it is recommended that these objections be sustained and a second election directed.

[8] While it was not clear at which meeting in July he heard this statement, this did not cause his recollections to be lacking in credibility.

Emporium-Capwell, a Division of Carter Hawley Hale Stores Inc.; Seligman & Latz, Inc.; and Kree Institute of Electrology, Inc. ***and*** **Department Store Employees Union Local 1100, affiliated with United Food and Commercial Workers International Union, AFL–CIO–CLC, Petitioner.** Case 20–RC–15594

14 December 1984

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 27 September 1983 the Acting Regional Director for Region 20 issued his Decision and Direction of Election finding appropriate two single-store units consisting of beauty salon employees of the Employers at stores located in downtown San Francisco, California, and in the Stonestown shopping center in San Francisco, California. The Employers filed timely requests for review and supporting briefs contending, among other things, that the only appropriate unit would include beauty salon employees in 21 Emporium-Capwell stores located in the San Francisco Bay area. The Petitioner filed a statement in opposition.

By telegraphic order dated 28 October 1983, the Board granted the Employers' request for review with respect to the appropriateness of the two single-store units.[1] That same date, the Regional Office conducted elections in the two single-store units and impounded the ballots.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the requests for review and supporting briefs and has decided to affirm the Acting Regional Director's findings and conclusions as modified.

Emporium-Capwell operates 21 retail stores in the San Francisco Bay area, where it provides beauty salon services in conjunction with its lessees Seligman & Latz and Kree Institute of Electrology. The Union petitioned to represent in a single unit the beauty salon employees at Emporium-Capwell's stores in downtown San Francisco and in the Stonestown shopping center in San Francisco, California. Alternatively, the Union indicated that it would represent the beauty salon employees in two separate single-store units. The Employers contended that the only appropriate unit would include the beauty salon employees at all 21 Emporium-Capwell stores in the San Francisco Bay area. As noted, the Acting Regional Director found appropriate the two single-store units alternatively requested by the Union, and we affirm.

There are a total of about 190 beauty salon employees in the 21 store unit sought by the Employers. The greatest distance between any two of these stores is about 170 miles. Downtown San Francisco and Stonestown, the two closest stores, are located only about 8 miles apart.[2] Nonsupervisory employees in the beauty salons at the downtown San Francisco store total about 30 (including employees in the Soul Scissors salon) and nonsupervisory employees in the Stonestown salon total about 20.

There is no history of collective bargaining among the Employers' beauty salon employees in the units here involved. But the Union has long had collective-bargaining agreements with Emporium-Capwell covering retail employees in the downtown San Francisco and Stonestown stores.

The Employers proffered evidence of some transfers among beauty salon employees in the 21 stores. However, there is no evidence of temporary transfers among nonsupervisory employees, and the only reason shown in the record for permanent transfers of nonsupervisory employees was the personal convenience of the employees involved.[3] Management does not encourage transfers because employees are expected to establish their own clientele and the salons would lose business if employees shifted frequently from salon to salon. The Acting Regional Director found that the record disclosed about 35 instances where employees at one of the Employers' beauty salons transferred to another over a period of almost 20 years. But in many instances the record merely shows that employees who worked in one of the Employers' salons had also worked in one or more other salons.[4] The record also shows that at the time of

[1] The requests for review were denied with respect to the Acting Regional Director's findings: (1) that Emporium-Capwell, Seligman & Latz, and Kree Institute of Electrology are joint employers of the beauty salon employees here involved, and (2) that the Union is not disqualified from representing these employees because it admits to membership owner-operators of beauty shops who are in competition with the Employers and who may be elected to the Union's executive board. On this latter point, the Acting Regional Director found that the record does not establish that any of the owner-operators with whom the Union has collective-bargaining agreements are on the Union's executive board or have any role in determining the Union's bargaining strategy.

[2] The average distance between the downtown San Francisco and Stonestown stores and the other stores is 35 or 40 miles, and the greatest distance between the downtown San Francisco/Stonestown stores and any of the other stores is a little over 100 miles.

[3] The Employers do not contest the Acting Regional Director's finding that "[w]ith the exception of supervisory and managerial personnel, the record discloses no instance of a temporary assignment or transfer of an employee" (Decision and Direction of Election, p. 6). Nor do the Employers contest the Acting Regional Director's finding that "[w]here reasons [for transfers] were given . . . the record reflects that the transfers were for the personal convenience of the employee involved." Id.

[4] The Employers' evidence on this point consisted of the testimony of Seligman & Latz Account Executive Barry Kinder who named about 40

Continued

the hearing 3 of approximately 190 employees in the 21 salons worked part time in 2 or more of the salons.[5]

Salon employees in all 21 stores are subject to the same general work rules and employment practices and are paid according to a uniform wage scale, but some employment benefits differ. Salon employees at Capwell stores receive vacation benefits based on average pay; those at Emporium stores receive benefits based on base pay. Employees at the downtown San Francisco and Stonestown salons pay less for benefit coverage than do employees at other salons. Account Executive Barry Kinder testified that the lower benefit cost to these employees is probably related to the Union's collective-bargaining agreement covering retail employees at the downtown San Francisco and Stonestown salons.

All salons in the 21 stores are under the central management of Account Executive Kinder.[6] He makes final decisions on whether employees are hired, fired, transferred, or promoted. He also approves wage increases and vacation schedules and may consult with local salon managers on vacation schedules or scheduling changes. Kinder may visit a salon once a month or once every other month.[7] He or his assistant is in daily telephone contact with almost all the salons.

Each salon is supervised on a daily basis by the local manager.[8] Salon managers may recruit and interview applicants for employment and make recommendations regarding hiring. After Kinder has authorized the hiring of an employee for a given number of hours a week, the salon manager schedules the hours the employee will work. Salon managers are also responsible for training and developing new staff. They are required to keep accurate personnel records and to evaluate employees monthly. Salon managers counsel employees on their work performance and may sign reprimands called counseling memos. According to the manager's manual, an employee may be discharged after three counseling memos. But, as noted, Kinder has authority to make the final decision to discharge.

Employees at each salon have basically the same work rules and employment practices. Kinder testified that salon managers are expected to see that employees live up to the rules, but that some managers are tougher in policing the rules than others.[9] Salon managers deal with employee conflicts within the salon and normally handle first-step employee grievances. They authorize employees time off for sick leave and may approve scheduling changes. Additional responsibilities listed in the sample job description for salon managers in the manager's manual include "[m]ak[ing] decisions/-recommendations on personnel changes," establishing rapport with the manager of the store where the salon is located, attending store management meetings, and ensuring that the salon meets its assigned sales goals. With Kinder's approval, salon managers may offer specials during slow time in their salons and the timing of these specials is largely up to the salon manager.

Despite the centralized administration of the Employer's beauty salons, we find that the single-store units at downtown San Francisco and Stonestown, California, are appropriate. See *NLRB v. Lerner Stores*, 506 F.2d 706, 708 (9th Cir. 1974); *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1014 (9th Cir. 1981); *Renzetti's Market*, 238 NLRB 174, 175 (1978). In our view, the local salon manager exercises a sufficient degree of autonomy in day-to-day supervision of the salon employees to support the single-store units. See *B. Siegel Co. v. NLRB*,

---

of the Employers' beauty salon employees, past and present, who had also worked at one or more other beauty salons. Kinder acknowledged that in some instances there may have been gaps between the periods of employment at the different salons, and he included in the employment histories work in beauty salons in stores outside the 21-store unit sought by the Employers. In many instances, Kinder did not specify the times when the employees worked in different salons, but he testified that one of the instances occurred in the 1960s and another about 12 years before the hearing. Fewer than 10 of the cited employment histories involved nonsupervisory employees who worked in the downtown San Francisco or Stonestown salons and in another salon within the 21-store unit sought by the Employers. Some of these employees were no longer employed at downtown San Francisco or Stonestown; others have had uninterrupted service at downtown San Francisco or Stonestown since the 1960s or early 1970s.

Emporium-Capwell contests the Acting Regional Director's finding that 15 of the transferees were supervisors, urging that no more than 13 of the transferees were supervisors and that not all were permanent supervisors. We accept the truth of this assertion, but do not view it as altering the overall picture of insubstantial interchange of unit employees.

[5] One of these three employees had recently moved to San Francisco and was apparently attempting to build up a clientele there before terminating work in his old salon. Another employee supervised electrolysis in salons providing that service. The third did not work in the downtown San Francisco or Stonestown salons. A fourth employee is erroneously listed in the Acting Regional Director's decision as currently working a split week in three salons. That employee was a salon manager at the time of the hearing. She had previously worked as a cosmetician, dividing her time among three salons, but had never worked at downtown San Francisco or Stonestown.

[6] Kinder also has responsibility for nine other salons at Liberty House stores. But he testified that his involvement in those salons is not as detailed as his involvement in the 23 salons (including the 2 Soul Scissors facilities) at the 21 Emporium-Capwell stores.

[7] Kinder testified that he visits the Stonestown salon at least once a month and that his visit might be brief or might last half a day. An employee at the Stonestown salon testified that he saw Kinder at the store maybe every other month and that Kinder or his assistant occasionally watches the salon function.

[8] In four salons (including the main San Francisco and Stonestown salons), the manager performs only supervisory duties. In other salons, the manager is a working manager who also performs hair care services for customers.

[9] The record shows, for example, that one salon manager told employees they need not wear ties despite published dress guidelines that at the time required men to wear ties.

670 F.2d 64, 65 (6th Cir. 1982); *Renzetti's Market*, supra, 238 NLRB at 175–176. The Employers have not shown that the day-to-day supervision of unit employees is "done solely by central office officials." *NLRB v. Lerner Stores*, supra, 506 F.2d at 708. On the contrary, day-to-day supervision is necessarily performed, in large measure, by the local salon managers. Nor have the Employers shown a sufficient degree of employee interchange involving the downtown San Francisco/-Stonestown salons so as to destroy their status as "identifiable units." Id. Rather, there were no temporary transfers among unit employees and such permanent transfers as occurred within the unit were not shown to be for any reason other than the personal convenience of the employees involved. See *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 578–579 (1st Cir. 1983); *NLRB v. Pan American Petroleum Corp.*, 444 F.2d 328, 578–579 (10th Cir. 1971), cert. denied 404 U.S. 941 (1971); *Buehler's Food Markets*, 232 NLRB 785, 786 (1977).[10] The significant distances among the stores, although not conclusive, provide further support for single-store units. See *Victoria Station v. NLRB*, 586 F.2d 672, 675 (9th Cir. 1978); *Buehler's Food Markets*, supra, 232 NLRB at 786. Finally, there is an absence of any bargaining history on a broader basis or any request for representation on a broader basis. See *NLRB v. Lerner Stores Corp.*, supra, 506 F.2d at 708; *Renzetti's Market*, supra, 238 NLRB at 176.

Cases cited by the Employer where single-facility units were rejected are factually distinguishable.[11] For example, in *Super X Drugs of Illinois*, 233 NLRB 1114 (1977), the 5 stores were much closer than the 21 stores here involved, the store managers could not reprimand employees without prior approval of the district manager, the latter spent more time in the individual stores than does the account executive here, and there was significant temporary employee interchange.

In *Petrie Stores Corp.*, 266 NLRB 75 (1983), the union had petitioned for 10 single-store units and had excluded other stores of the employer's that were located in the same shopping malls with the petitioned-for stores. The closeness of these stores was reflected in a substantial interchange of employees on a temporary basis, local managers were not involved in scheduling, branch supervisors visited each store at least once every 2 weeks, and the employees had companywide seniority.[12]

In short, the employers in the cited cases made a persuasive rebuttal to the presumptive appropriateness of a single-facility unit that was not made by the Employers here.

Accordingly, on the facts presented here, we find the following units appropriate for collective bargaining:

> All receptionists, electrologists, cosmetologists, manicurists and cosmeticians employed by the Employers at the Emporium-Capwell facility located in downtown San Francisco, California, including the Soul Scissors department, excluding all other employees, guards and supervisors as defined in the Act.
>
> All receptionists, electrologists, cosmetologists, manicurists, and cosmeticians employed by the Employers at the Emporium-Capwell facility located in the Stonestown Shopping Center, San Francisco, California; excluding all other employees, guards and supervisors as defined in the Act.

Accordingly, we shall remand the case to the Regional Director with directions to open and count the impounded ballots, to issue tallys of ballots, and to take further appropriate action.

[10] Emporium-Capwell expresses concern that if employees in the downtown San Francisco and Stonestown salons are permitted to organize, the employees could no longer work part time in two or more salons because continuation of that practice would pose "some virtually unresolvable issues concerning Union jurisdiction over individual employees." (Br. 16.) This concern seems unwarranted since out of the approximately 50 salon employees at downtown San Francisco and Stonestown only 1 employee was performing nonsupervisory work in another salon at the time of the hearing and he was apparently attempting to build up a sufficient clientele in San Francisco so that he could stop work at his old location. In any event, no serious issue of union jurisdiction would be presented by employees' continuing to work part time in two or more salons. Regular part-time or dual-function employees would be in the unit and covered by any collective-bargaining agreement only when performing a substantial amount of unit work. See *Ocala Star Banner*, 97 NLRB 384, 385–386 (1951); *Berea Publishing Co.*, 140 NLRB 516, 519 (1963); *Marine Petroleum Co.*, 238 NLRB 931, 932 (1978). They would be out of the unit when performing nonunit work.

[11] Unit determinations, by their nature, are highly fact specific. See *NLRB v. WKRG TV*, 470 F.2d 1302, 1311 (5th Cir. 1973) ("determination of a unit's appropriateness will invariably involve factual situations peculiar to the employees and unit at issue").

[12] Similarly, in *White Castle System*, 264 NLRB 267 (1982), district supervisors made daily visits to each restaurant to check on the employees' performance, there were hundreds of temporary transfers in a year, and there was a history of collective bargaining in a Detroit-area unit. The district supervisor in *Kirlin's Inc.*, 227 NLRB 1220 (1977), visited each of the six stores on a weekly or biweekly basis, handling any problems that might occur in day-to-day operations; there were temporary and permanent transfers to meet management's needs; hourly scheduling of employees was performed by the home office; and two of the six stores were located only 100 yards apart in the same shopping mall. In *ITT Continental Baking Co.*, 231 NLRB 326 (1977), the local store managers were so lacking in authority that they were found not to be statutory supervisors and in *Second Federal Savings*, 266 NLRB 204 (1983), the local branch offices did not have managers. Finally, in *NLRB v. Chicago Health & Tennis Clubs*, 567 F.2d 331, 337–338 (7th Cir. 1977), cert. denied 437 U.S. 904 (1978), the court rejected the Board's approval of a single-store unit on the grounds that the union had previously sought representation in the Chicago metropolitan area unit urged by the employer; there were temporary transfers on almost a daily basis, as well as significant permanent transfers; and the store managers lacked authority to perform many functions, including authority to handle grievances or post weekly work schedules without prior approval by the district manager.

ORDER

It is ordered that this case be remanded to the Regional Director for Region 20 to open and count the ballots cast in the elections conducted in this proceeding on 28 October 1983, to issue tally of ballots thereon, and to take further appropriate action.

St. Louis Telephone Employees Credit Union *and* Office and Professional Employees International Union, Local No. 13, AFL–CIO. Case 14–CA–15991

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 20 April 1983 Administrative Law Judge Thomas E. Bracken issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in opposition to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The issue presented is whether the Respondent failed to bargain in good faith with the Union over its decision to create new supervisory positions, and to staff those positions by promoting unit employees. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally removing 21 employees from the bargaining unit; by refusing to honor and apply the terms of the current collective-bargaining agreement to those employees; by failing and refusing to withhold from the promoted employees' wages dues authorized to be deducted by dues checkoff and failing to remit those dues to the Union; and by failing and refusing to bargain with the Union over the impact of the promotions. We disagree.

The operative facts begin with the Union's certification on 19 September 1979 in the following unit:

> All office employees employed by the Employer at its facilities located at 4650 Hampton Avenue, St. Louis, Missouri, and 1111 Woods Mills Road, St. Louis County, Missouri, EXCLUDING managerial employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

Negotiations for the parties' first contract commenced in April 1980. At that time the Respondent employed approximately 16 employees plus General Manager Mitchell, Manager Mann, Assistant Manager Reese, and four persons—Hoepfinger, Beal, Ukena, and Harster—who were called supervisors by the parties. The latter four individuals had asked Mitchell if they could be included in the bargaining unit. Consequently, during the negotiations, Mitchell told union representative O'Toole that the Respondent would include the supervisors in the bargaining unit. There was never any discussion as to whether the supervisors met the definition of a supervisor within the meaning of Section 2(11) of the Act.

The Union submitted a proposed recognition clause which read as follows: "The Company agrees to recognize the Union as sole collective bargaining agent for all office and office clerical employees including supervisors, excluding the manager and assistant manager." The Respondent offered a counterproposal, which was accepted by the Union, recognizing the Union in a unit "of all employees working as office employees and excluding managers." The parties then agreed to classify Hoepfinger, Beal, Ukena, and Harster as "administrators" and to include them in the bargaining unit. The parties reached agreement on a contract which was effective from 16 July 1980 through 15 July 1983.

From the summer of 1980 until the end of 1981, the Respondent experienced a phenomenal growth in its operations which resulted in the augmentation of its two facilities with four new branch offices. Also, the employment complement grew from a total of 23 to 60 employees.

Throughout this time, General Manager Mitchell, Manager Mann, and Assistant Manager Reese were the only individuals not covered by the collective-bargaining agreement. Only Mann and Reese had the power to hire, fire, discipline, and process grievances during that period of time. Additionally, Mann was the only person who established employee breaktimes or authorized overtime, and he, together with Reese, approved scheduled vacations and float days.

The four administrators did not have the authority to hire, fire, discipline, effectively recommend the same, or to assign work to employees. In fact, they performed bargaining unit tasks in addition to having responsibility for the administration of their respective departments. Accordingly, it does not

[1] The General Counsel's motion to strike the Respondent's first exception for lack of clarity is hereby denied.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with his colleagues that the facts of the instant case distinguish it from those relied on by the judge, Member Hunter expresses no view on the merits of those cases.

appear that the administrators were supervisors within the meaning of Section 2(11) of the Act.

In November 1981, the Respondent initiated plans for a reorganization in response to its accelerated growth. Effective 1 January 1982, the Respondent established a new management hierarchy and promoted 22 employees into the new supervisory and managerial positions. Hoepfinger, Ukena, Krems, and Stinnett, the administrators at that time, were among those promoted.[3] Assistant Manager Reese, also among the 22, was given the additional responsibility of branch office operations.

The Respondent effectuated its reorganization without notice to or prior bargaining with the Union. Moreover, the Respondent announced that those promoted would no longer be covered by the collective-bargaining agreement and therefore would not be required to pay union dues. Accordingly, the Respondent ceased to deduct dues from their paychecks.

The parties subsequently met on 10 February 1982 to discuss the reorganization. O'Toole complained to Manager Mann that the new managers were still performing bargaining unit work. Mann responded that he needed more time to hire additional people to fill the bargaining unit vacancies created by the promotions and the Union raised no objections. In fact, between 31 December 1981 and mid-July 1982, the Respondent opened two more branch offices and its work force was increased from approximately 60 to 135 employees, supervisors, and managers.

The Respondent contended that it had no obligation to bargain with the Union because those who were promoted became Section 2(11) supervisors who occupied positions not intended by the parties to be included in the bargaining unit. Consequently, the Respondent felt justified in ceasing to deduct union dues from the employees' pay.

The General Counsel argued, and the judge concurred, that the parties had agreed to include supervisors in the bargaining unit, that whether those promoted in January 1982 were actually Section 2(11) supervisors was irrelevant, and that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally promoting the employees and refusing to bargain with the Union thereafter. Both the General Counsel and the judge relied on *Arizona Electric Cooperative*, 250 NLRB 1132 (1980), and *Carolina Telephone Co.*, 258 NLRB 1387 (1981). Further, the judge relied on *Kendall College*, 228 NLRB 1083 (1977), in holding that the Respondent's promotions had a significant impact on the bargaining unit such that the Respondent had an obligation to bargain with the Union over the Respondent's reduction of the bargaining unit.

First, we disagree with the judge's conclusion that the parties agreed to include supervisors in the bargaining unit. The parties did agree to include four employee administrators, but it is clear that these individuals were not supervisors within the statutory definition. This is especially true in light of the very small work force in existence at the time the contract was negotiated. Furthermore, the Respondent objected to the Union's specific reference to "supervisor" in the recognition clause proposed by the Union and instead included only office employees and excluded managers.

Second, we reject the notion that it is irrelevant whether or not the promoted employees were statutory supervisors. In this regard the judge has misplaced his reliance on *Arizona Electric*, supra and *Carolina Telephone*, supra. In *Arizona Electric*, supra, the Board held that the respondent had violated the Act by unilaterally removing certain employees from the bargaining unit during the midterm of the contract, and reclassifying them as supervisors. The Board found it irrelevant to determine whether the promoted individuals were supervisors but focused on the fact that the parties had previously agreed to the inclusion of these employees in the bargaining unit and that there had been no change in either the employees' job duties or in the Respondent's operations. Similarly, the Board held in *Carolina Telephone*, supra, that the Respondent violated the Act by unilaterally excluding a group of secretaries from the unit when the parties had initially agreed to their inclusion and their duties had not materially changed before their removal from the unit.

In the instant case, unlike the factual settings in *Arizona Electric* and *Carolina Telephone*, supra, the duties of the unit employees who were promoted had changed. The Respondent did not merely retitle bargaining unit employees who, but for a classification change, would have continued to perform bargaining unit work. Instead, the Respondent required the promoted employees to perform supervisory tasks and imbued them with the authority of statutory supervisors and managers—powers and responsibilities that they had not previously enjoyed when performing strictly bargaining unit work.

In particular, 12 of the individuals named in the complaint—Vivian Harster, Karen Schmidt, Pat Schmidt, Cheryl Hood, Ron Bull, Dennis Cook, Jo Ellen Voss, Pauline Hill, Claire Louis, Barbara Stimac, Charlotte Jones, and Joyce Bell—are either branch managers or assistant branch managers. The

[3] The General Counsel initially alleged that the promotion of these administrators was violative, but amended the complaint at trial to delete them.

parties stipulated that the managers and their assistants have the same powers. The evidence establishes that these powers include the authority to discharge, to schedule working hours, and to resolve first-step grievances. On this evidence, we find that the branch managers and assistant branch managers are supervisors within the meaning of Section 2(11) of the Act.

The remaining alleged discriminatees are Pat Voss, supervisor of loans and collections; Jackie Hamra, assistant supervisor in charge of collections; Norman Gericke, assistant supervisor in charge of mortgage loans; Sharon Wright, supervisor of certificates, new accounts, and daily action funds; Terry Cartwright, supervisor of share drafts and VISA; Bill Rogers, assistant supervisor of IRA accounts; Jo Ward, supervisor of accounting; Karen Aronoff, assistant supervisor in charge of tellers; and Dennis Manning, manager of supplies.

Union representative O'Toole testified that he considered Jackie Hamra, Norman Gericke, Sharon Wright, Terry Cartwright, Jo Ward, and Karen Aronoff to be supervisors. He further testified that he viewed Pat Voss and Dennis Manning as managers but did not consider Bill Rogers to be either a supervisor or manager.

Jackie Hamra assists Pat Voss in the loan and collection department. In his absence, she is in charge of the department but, otherwise, she is responsible for the work of the two or three clerks in the division. Hamra also evaluates job performances of employees and has effectively recommended the discharge of an employee.

Norman Gericke also reports to Pat Voss and is responsible for the work of several clerks dealing with real estate loans and first and second mortgages. Gericke evaluates the job performances of the clerks in his department and trains them in their areas of deficiencies.

Karen Aronoff schedules working hours and assigns work to the tellers in the main facility. She reports to Jo Ward who evaluates clerks and tellers, assigns work, and has discharged an employee. Both Ward and Voss report to Shirley Ukena, manager of operations, who reports directly to General Manager Mann.

Sharon Wright is responsible for the work of between 11–25 employees who handle new accounts, certificates, and the daily action fund. Terry Cartwright has the responsibility for the work of about seven employees in the share draft and VISA department. Bill Rogers heads the newly formed IRA accounts division, staffed with two or three clerks. He is also responsible for all the IRA accounts generated by the branches and he trains the IRA personnel at the Respondent's various locations. Rogers, Wright, and Cartwright report to Jan Stinnett, manager of new accounts/certificates and investments, who reports directly to General Manager Mann.

Finally, Dennis Manning assists Donna Krems, assistant supervisor of administration. Krems reports to Dale Hoepfinger, manager of administration, who reports directly to General Manager Mann. The parties stipulated at trial that Hoepfinger has the authority to process grievances for the Respondent, has access to employee personnel files and records, and that Krems possesses Hoepfinger's responsibilities and authorities in his absence. Manning is responsible for the physical management of the main facility and its branches including handling tenant complaints, securing and monitoring janitorial and security services, managing equipment and maintenance contracts, and overseeing courier services.

It is clear that Hamra, Gericke, and Aronoff are statutory supervisors by virtue of their respective authorities to recommend discharge, to evaluate employees, and to schedule and assign work. Aronoff reports to Ward who occupies a position in the Respondent's hierarchy at the same level as Voss, to whom Hamra and Gericke report. Ward has exercised the authority to discharge an employee, and she also has the authority to evaluate employee performances. Thus, Ward too is a statutory supervisor. It can safely be inferred that Voss, Rogers, Wright, and Cartwright possess at least as much authority as do Hamra, Aronoff, and Gericke, who are on the hierarchical rung below them, and that they must share Ward's authority to discharge. Accordingly, we find that Voss, Rogers, Wright, and Cartwright are supervisors within the meaning of Section 2(11) of the Act.

Union representative O'Toole testified that in his opinion Dennis Manning was a manager and should be excluded from the bargaining units. Prior to the reorganization, Manager Mann performed the tasks for which Manning is now responsible. Consequently these duties had never been considered to be bargaining unit work and Manning is accordingly excluded from the unit.

Having determined that the Respondent promoted these individuals into true supervisory positions, the crucial issue is whether the Respondent violated Section 8(a)(5) and (1) of the Act by promoting them without bargaining with the Union. We emphasize first that neither the decision to create new supervisory positions nor the selection of individuals to fill these positions is a mandatory subject of

bargaining.[4] Under the Act, neither party may dictate to the other its choice of representatives and, therefore, an employer need not bargain with a union over its selection of supervisors. However, an employer may have an obligation to bargain with a union if it reduces bargaining unit work. For instance, if an individual promoted to a supervisory position continues to perform former bargaining unit work, that loss of work to the bargaining unit may be a change in the terms and conditions of employment that could give rise to a bargaining obligation under Section 8(d) of the Act.

Unlike the situation in *Kendall College*, supra, where the Board found that the respondent had violated Section 8(a)(5) and (1) by removing a substantial number of employees from the bargaining unit unilaterally and thereby abolishing bargaining unit jobs, the Respondent's personnel action here was not sufficient to give rise to any duty to bargain with the Union. The Respondent immediately began hiring replacements to fill the bargaining unit vacancies temporarily created by its decision. Although some of the promoted individuals continued to perform a degree of bargaining unit work while new employees were being hired, the Respondent could not have been expected to have exactly 21 new employees waiting in the wings at the same time it promoted another 21 employees. Ultimately, no unit jobs were lost; in fact, more were created. The Respondent is accorded a reasonable period of time during the transition within which to fill its bargaining unit vacancies, thus eradicating any temporary job losses and negating a duty to bargain over the reduction of bargaining unit work. Accordingly, we find *Kendall College*, supra, inapposite to the instant case and find, contrary to the judge, that the Respondent did not have an obligation under these circumstances to bargain with the Union over its reorganization.

Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

[4] Consequently, the Respondent also did not violate the Act by ceasing to make dues deductions from promoted employees' wages or by exempting them from coverage of the collective-bargaining agreement.

DECISION

STATEMENT OF THE CASE

THOMAS E. BRACKEN, Administrative Law Judge. This case was tried at St. Louis, Missouri, September 13, 14, and 15 and November 29, 1982.[1] The charge was filed by the Union on June 11 (amended July 9 and September 1), and the complaint was issued July 13. The original complaint alleges that the Respondent, St. Louis Telephone Employees Credit Union, violated Section 8(a)(1) and (5) of the Act, as to employees Charolotte Jones, Karen Aronoff, Jackie Hamra, Norman Gericke, Karen Schmidt, Cheryl Hood, Dennis Cook, Claire Louis, Joyce Bell, Jo Ward, Sharon Wright, and Bill Rogers. On September 1, an amendment to the complaint was issued which added the names of 13 additional employees, alleging that their rights had been violated, just as those set forth in the original complaint. These additional employees were Dale Hoepfinger, Donna Krems, Shirley Ukena, Pat Voss, Jan Stinnett, Terry Cartwright, Vivian Harster, Pat Schmidt, Ron Bull, Jo Ellen Voss, Pauline Hill, Barbara Stimac, and Dennis Manny.[2] The violations alleged were for unilaterally changing job classifications, wages, benefits, and other terms and conditions of employment of employees; by refusing to apply the collective-bargaining agreement with the Union to these employees; by requiring these employees to withdraw from the Union, canceling their dues-checkoff agreements, and failing to withhold dues from the wages of these employees, and not remitting to the Charging Party dues consistent with valid employee authorization checkoff provisions; by refusing to bargain with the Charging Party, on request, as the exclusive collective-bargaining representative of all employees of Respondent; and failing to bargain in good faith with the Charging Party by reneging on an agreement to waive all time periods for the filing of grievances regarding the aforementioned charges.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Employer, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Missouri corporation, has been engaged in the operation of a credit union for approximately 47 years, with its main office in St. Louis, Missouri. During the 12-month period ending July 30, 1982, Respondent loaned money to and secured deposits from individuals, valued in excess of $500,000, of which an amount in excess of $50,000 represents deposits from and/or loans to individuals located outside the State of Missouri. Respondent admits, and I find that it is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are in 1982, unless otherwise indicated.

[2] During the course of the hearing, the General Counsel's motion to withdraw the complaint as to Hoepfinger, Krems, Ukena, and Stinnett was granted. The parties stipulated that from and after January 1, 1982, these four employees have the power and have exercised such power to evaluate Respondent's branch managers as to the personnel relations and branch operations, that Hoepfinger has the authority to process grievances for the Respondent, that these employees have had access to employee personnel files and records, and that Krems possesses Hoepfinger's responsibilities and authority in his absence.

II. THE LABOR ORGANIZATION INVOLVED

The Union, sometimes referred to as Local 13, or the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[3]

Respondent, sometimes referred to as Company, Employer, or Credit Union, commenced its operation as a credit union in 1935, operating from one office. The members of Respondent, each of whom must own one share of stock, are generally employees of Southwestern Bell Telephone Company, Western Electric Company, Inc., and American Telephone and Telephone Company, Long Lines Division.

Prior to 1980, Respondent employed 17 to 18 employees at its main office located at 4650 Hampton in St. Louis, and at a field office located on premises of the Western Electric Company. At this time it had approximately 13,000 members. From 1980 to September 1982, the membership had increased to approximately 27,000 to 28,000 members. To help service these members in September 1982, the number of Respondent's employees had grown to approximately 135, and it had opened up six additional branch offices.

The controlling body of Respondent is a board of directors consisting of 13 persons who are elected by the membership. All are volunteers, and receive no salary. Prior to 1980, these Board members were chiefly management employees of the cited telephone companies. After 1980, they were primarily members of the Communication Workers of America (CWA), as well as employees of the same companies as listed above. There were also two committees of three persons each, who were elected by the Credit Union membership. One was called the supervisory committee, and it was responsible for audits and compliance with state statutes. The other committee was the credit committee and it was responsible for following the Board's policies and practices regarding loans.

The highest official of Respondent is Thomas Mitchell, whose title was general manager/treasurer. Mitchell, a member of the CWA, was also a member of the Board, and reported directly to the Board. Respondent's manager for all times material hereto, and the key working official in the day-to-day operation of the Credit Union, was Orville Mann. Mann, who was hired on September 4, 1979, reported directly to the general manager/treasurer but, unlike him, was not a member of the board of directors, or a member of the CWA.

Prior to entering into the first and current collective-bargaining agreement in July 1980, the board of directors had established personnel policies which related to the wages and benefits received by the Credit Union employees. At that time there were no written personnel policies as to discipline, misconduct, or discharge, and the manager himself assumed these responsibilities as part of his duties.

B. *The Pre-1980 Events*

On September 19, 1979, an election was conducted by the National Labor Relations Board for certain employees of Respondent. On September 26, 1979, the Board certified the Charging Party as the exclusive collective-bargaining representative in the following unit:

> All office employees employed by the Employer at its facilities located at 4650 Hampton Avenue, St. Louis, Missouri, and 1111 Woods Mills Road, St. Louis County, Missouri, EXCLUDING managerial employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

At the time of the election there were 16 employees on the agreed-upon voter eligibility list. (R. Exh. 16.) In addition to these employees, the Respondent also employed, at that time, seven other employees, General Manager Mitchell, Manager Orville Mann, Maureen Reese, Joydean Bachelier, John Beal, Vivian Harster, and Dale Hoepfinger. Managers Mitchell, Mann, and Assistant Manager Reese did not vote. Also, the last four named employees did not vote, although the reasons for this are not clear in the record. O'Toole testified that he "believed" that at election time Reese was the supervisor of bookeeping, Hoepfinger was supervisor of accounts, and that Harster was the supervisor of the loan department. He did not remember Beal's title. According to Mann, Reese was the assistant manager, the only assistant manager he ever had,[4] Hoepfinger was the senior collector, Harster the senior loan counselor, Bachelier his secretary, and Beal a general all-around handyman.

Following the certification, contract negotiations were not pursued by Local 13 as a matter of strategy. Membership on Respondent's board of directors was coming up for an election, and Local 13 was looking forward to a new board, whose members would be more union oriented than management oriented. On December 6, 1979, the Union did forward to the Company a proposal consisting of various contract clauses. However, these proposals did not contain a recognition clause.

C. *The 1980 Negotiations*

About March or April 1980, 6 or 7 months after the certification, negotiations commenced. Local 13's negotiating team consisted of Business Representative Patrick O'Toole, employees Margaret Stoff and Shirley Ukena.[5] Respondent's four-person negotiating team was led by Treasurer Mitchell and his chief assistant manager, Mann.

---

[3] The testimony herein was substantially uncontradicted. There was one major issue of credibility, which concerns whether a company official agreed to allow the Union to waive time limits applicable to the filing of a grievance. A second issue was whether there was a meeting of company and union officials on January 15. I have resolved these credibility issues following the summation of the testimony related thereto.

[4] Reese was at no time a member of the bargaining unit.

[5] Ukena was promoted from an accounting department employee to administrator in that office sometime between the election, and the adoption of the collective-bargaining agreement.

At the first meeting one of the matters discussed was the status of Hoepfinger, Ukena, Harster, and Beal, none of whom had voted in the election. As testified to by Mann, these four employees had previously notified Mitchell that they wanted to be covered by the collective-bargaining agreement. O'Toole testified without contradiction that during the negotiations concerning a recognition clause, Mitchell stated "I'm going to give you something that you'll really like. We're going to include the supervisors in the bargaining unit.[6] O'Toole did not ask Mitchell why he was offering to do so, nor did he specifically name the employees he considered to be supervisors. O'Toole did testify that the Union considered Hoepfinger, Ukena, Harster, and Beal to be supervisors, because they had been excluded from voting in the election.

At the following meeting Local 13 submitted a proposed agreement to the Credit Union, in which the recognition Clause specifically provided that supervisors were to be in the bargaining unit. Article I, captioned "Union Recognition," read as follows:

> The Company agrees to recognize the Union as sole collective bargaining agent for all office and office clerical employees including supervisors, excluding the manager and assistant manager.

This recognition clause was not accepted by Respondent, and at the following session Respondent submitted its own clause, which contained both a recognition clause and management rights clause as follows:

> *Recognition*
>
> The Employer agrees to recognize the Union as the sole and exclusive Collective Bargaining Representative for and on behalf of all employees working as office employees and excluding Managers.
>
> It is agreed that nothing in this agreement shall limit the employer in the exercise of its functions of management to serve the needs of all members, and not limited to the direction of its working forces, the determination of the number of employees it will employ or retain, the right to employ, discipline, discharge, promote, classify, demote, transfer or release employees, determination of the hours of employment and working shifts, scheduling of the production of work to be performed and determination of the operations, methods, and processes being vested in and reserved by the Employer.

While the record does not disclose when the Employer's recognition clause was submitted, or specifically accepted by the Union, it was accepted, and appears in the collective-bargaining agreement that was entered into by the parties for the period of July 16, 1980, to July 15, 1983, inclusive. (G.C. Exh. 3.) O'Toole testified without contradiction that during the negotiations he discussed the matter of supervisors with Treasurer Mitchell, and Mitchell agreed that the persons referred to in the Union's original recognition clause as supervisors, would be classified in the agreement as administrators.[7] The executed agreement in article XII set forth wages for employees under four headings: (1) temporary and part time; (2) clerks, tellers, receptionist; (3) counselors, bookkeeper, secretary; and (4) administrators. This administrator classification covered Hoepfinger, Ukena, Beal, and Harster, and subsequently Jan Stennett, when Harster ceased being an administrator. The administrators' pay was substantially higher than that of the employees in the other classifications.

From the time of the signing of the bargaining agreement until December 31, 1981, the contract covered all wages, hours, terms, and conditions of all employees of the Company, including Hoepfinger, Ukena, Harster, and Beal, excepting only Managers Mitchell, Mann, and Assistant Manager Reese. Also, on several occasions following the signing of the agreement, the parties amended its terms through sound, basic collective bargaining. One matter involved an amendment that concerned holidays that fell on Mondays. The other involved the establishment of a "branch coordinator," and culminated in a letter agreement dated April 6, 1981, by which the Union agreed to the Company's proposal that such a person would receive an extra $3 a day for each workday. (G.C. Exh. 7.) This person was commonly referred to as "in-charge" but had no additional responsibilities and was a classification employee.[8]

D. *The Growth of the Credit Union and Changes in the Organizational Structure*

Chiefly because of the aggressive policies of Mann, the Credit Union grew tremendously in all aspects from the summer of 1980 through December 31, 1981. When Mann started as manager, the only services offered were loans and savings and checking accounts. He rapidly introduced real estate loans, second mortgages, cashiers checks, travelers checks, trust accounts, custodial accounts, daily action fund accounts, thrift accounts, and IRAs.

To handle this growth the work force grew from the 23 employees at the time of the election, to 60 by the end of December 1981. So also the number of members increased from 13,636 as of June 30, 1980, to 21,628 by December 31, 1981, and for the same period of time, the total assets increased from $26,545,278.83 to

[6] On the first day of the hearing Respondent had objected to the admission of this conversation based on the parole evidence rule. Respondent's objections were sustained, and the General Counsel moved for a reconsideration of this ruling. When the hearing resumed, the General Counsel's motion to reconsider was granted, and the conversation admitted into evidence. See *Joe Carroll Orchestras*, 254 NLRB 1158, 1162 (1981); *Federated American Insurance Co.*, 219 NLRB 200, 203 (1975); *Printing Industries of Northern California*, 204 NLRB 329 (1973).

[7] I credit O'Toole's testimony and note that Mitchell, Mann's superior officer, was not called to testify by the Respondent.

[8] Mann, in testifying, regularly referred to the clerks, tellers, and receptionists as classification 1 employees, and the counselors, bookkeepers, and secretaries as classification 2 employees, although they were not so designated in the contract. The term "in-charge" was apparently an old expression that had been used at one time by Western Electric employees, and had been absorbed into the language of the credit union employees.

$97,925,305.55. To service these members, the Respondent opened up four branch offices in the same period.[9]

Respondent's tremendous growth was nationally recognized in the credit union industry. A news release of the Credit Union National Association, Inc. located in Madison, Wisconsin, reported that "The CUNA report found the fastest growth among the large credit unions was experienced by St. Louis Telephone Employees Credit Union, St. Louis, Missouri which vaulted from 328th largest in 1980 to 58th in 1981." (R. Exh. 9.)

During this period of unprecedented growth Mann was making virtually all management and supervisory decisions, as well as performing many ministerial functions. He determined which employees should receive upgrades, assigned tellers, scheduled vacations, oversaw the filing of Federal reports and, along with Maureen Reese and John Beal, responded to branch office burglar alarms in the middle of the night. Throughout this period Mitchell, Mann, and Reese were the only employees not covered by the collective-bargaining agreement.

In October and November, Mann spoke with Mitchell and the administration committee about the necessity of reorganizing the operation of Respondent because of its growth and state financial regulations. Finally, in November 1981 the board of directors was convinced that a reorganization was necessary.

In the last week of November, Mann conducted a regularly scheduled staff meeting at the main office, which was attended by 40 to 50 employers. At this meeting Mann announced that the Credit Union was to open up "managerial" positions, that these positions would be posted on the bulletin board, that the employees should be thinking about it, and if any one was interested to contact him. This was the first notice that the employees received which informed them that there was to be a company reorganization. Prior to this meeting, Mann had not notified any representative of Local 13 of these planned changes.

Mann's statement that the new positions would be posted on the bulletin board was never carried out. Article IX of the parties' collective-bargaining agreement provided for posting as follows:

> Section 1—Promotions and transfer shall be on the basis of seniority, qualifications, ability and fitness to do the job. Job vacancies within the bargaining unit shall be posted by the company for a three (3) day period. The company may fill the position temporarily until bidding is complete.

In the first week of December 1981, Mann began to personally conduct interviews with the employees he had selected to fill the new positions. Margaret Stoff, who had been a bookkeeper for 3 years, was called in by Mann and informed she was to be promoted to the position of supervisor of accounting. Her duties would be the paying of bills, balancing the journal, preparing financial statements, and evaluating the employees in her department. She was further told that Mary Lowery was to be in charge of the tellers in the accounting department and that she would evaluate Lowery. The manager showed her a diagram setting forth the people to be promoted and the new positions they would occupy, telling her that she would be under Ukena. The manager also told her she would no longer be in the Union, and that she would be on probation for 9 months. Also, if she wished to return to her old job she could do so. Stoff asked if the jobs were to be posted on the bulletin board, and the manager advised that this would not be done as they were not union jobs, and therefore the Company had no need to post them.

Mann forthrightly testified that when he interviewed employees for promotions, "I explained to them that if they took the position of [Management] they would no longer be represented by the Union, that they would no longer be part of the Union." He did not recall telling anyone not to pay union dues, and there was no testimony that he did so.[10] Margaret Stoff, when asked if she knew of anyone who was required to cancel their dues-checkoff agreement, replied, "No. Mr. Mann just said that you would no longer pay your union dues. You didn't have to."

On Tuesday, December 15, 1981, the administrative committee recommended to the board of directors the salary structure for "the new management group." On the following night, all employees considered by Mann for promotions attended a meeting at a restaurant in St. Louis County which was conducted by Mitchell and Mann. Mann congratulated all present on their promotions and Mitchell introduced each person, stating his or her new title and duties. When he asked for questions, employee Vivian Harster asked if these people would be in the Union any longer, and Mitchell said no, because it was too hard for supervisors to evaluate fairly another union member, and therefore Respondent felt it would be better if supervisors were no longer in the Union.

On December 28, 1981, the board of directors formally adopted the reorganizational plan and approved the new salary schedule to be used "for the newly appointed management people." According to Mann, these new rates were approximately 50 cents an hour more than their union rates.

On December 30, 1981, a two-page written notice was placed on each employee's desk by Respondent. This letter began as follows: "I am very pleased to announce a new organizational structure and the promotions of various staff people into the management positions." The letter then went on to list the names of 22 employees, and to state briefly their new duties. The letter also stated that all of the people named in the letter were now part of the new management structure, and would henceforth "be working for the credit union outside of the Union Contract." (G.C. Exh. 8.)

[9] One in Hazelwood, Missouri, in October 1980; in Baldwin, Missouri in March 1981; in St. Louis in July 1981; and Fairview Heights, Illinois in August 1981. This increase in branches continued in 1982 as two more branches were opened up in April. As of the date of this hearing, the branch office in Hazelwood handled more volume and business transactions than the entire organization when Mann commenced employment in September 1979, and had in this branch almost as many employees as had been employed by all of the offices at the time Mann was hired.

[10] Art. VI of the parties' contract provided that Respondent would check off union dues from the wages of all union members, and remit this money to the Union on a monthly basis.

At no time prior to the December 30, 1981 notice to the staff of the new organizational structure had Mann or Mitchell discussed their plans with Local 13, or any of its officers or stewards. However, when Chief Steward Jo Ann Wattler received her copy of the December 30 memorandum, she called Business Representative O'Toole, informed him of the contents of the letter, and asked him if the Company could make those changes, and if the Union could do anything about it. Wattler was not an experienced steward, as she had only held that office since the previous October, and had not filed or processed any grievances. O'Toole advised her that he would set up a meeting with the Employer.

E. *The Events of 1982*

1. The January 5 letter

By a letter dated January 5, Dale Hoepfinger, the newly appointed assistant manager in charge of personnel, wrote to O'Toole, notifying him that "the credit union has established a new managerial team." (G.C. Exh. 9.) In the letter Hoepfinger advised that all the people who were to staff the team had been taken from the ranks of the Credit Union employees, and he then set forth 21 names. He also wrote that these people would no longer be covered by the union contract "and will therefore need withdrawal cards if possible."

O'Toole received Hoepfinger's letter on January 6, and this was the first time that he had been advised by Respondent that Respondent was making these organizational changes. He then started an investigation as to why these employees were being taken out of the bargaining unit, telephoning Respondent. According to O'Toole, he talked to either Mann or Hoepfinger, and scheduled a meeting for January 8. This meeting was subsequently canceled because of O'Toole's sickness, and another meeting was scheduled.

O'Toole testified that he and Steward Wattler met with Mann at the main office of the Credit Union on the afternoon of January 15. Wattler testified that she thought the meeting was around January 15. At the meeting they discussed the contents of the Company's January 5 letter, and O'Toole asserted that some of the employees named therein were still doing the same work that they had done prior to January 1. Mann advised him that these people would be doing strictly managerial work, and that other people would be hired to do the work that the new managers had formerly performed, but that he needed more time to hire additional employees. When O'Toole then asked Mann if he would waive the time period for filing grievances, if any such grievances should arise out of this situation, Mann replied yes to his request.

Wattler corroborated O'Toole's testimony that he asked Mann if he was willing to waive time limits for filing a grievance. Wattler was a hesitant, unsure witness, and impressed me as an advocate who was testifying for a cause, and not stating the facts as she remembered them, and I do not credit her testimony.

Mann admitted that a meeting had been scheduled for January 15, but denied that such a meeting was held. Mann fixed the date of his first meeting in 1982 with O'Toole as February 10.

O'Toole was a very busy union official who participated in many meetings with many employers, and he had difficulty in remembering dates throughout his testimony and never produced any written notes or records of meetings. Both Steward Wattler and Stoff testified that at a meeting of the parties on June 8 O'Toole advised Respondent that he had written records that would show that a meeting was held on January 15 and would furnish them to the company officials. The record does not show that he ever did so, nor did he produce any such records at the hearing. I credit Mann's testimony that there was no meeting on January 15, as he was an impressive, candid witness. He had previously checked his files, and found no record of such a meeting. It was Mann's policy to make notes of every meeting he attended.

2. The February 10 meeting

All parties agree that there was a meeting on February 10. O'Toole, Wattler, and Local 13's president Pat Douglas met at the main office with Mann and Hoepfinger. At this meeting the parties discussed essentially the same matters that O'Toole had testified were discussed on January 15. O'Toole testified that he brought up that managers were still doing bargaining unit work. Mann replied that he needed more time to hire more people. O'Toole also questioned the amount of time that employees would have to decide to return to their former job. The business representative also testified that he proposed that if a grievance needed to be filed in the future, Respondent waive "all time limits," and that Mann agreed to this. Finally, O'Toole asked Mann if the Company would consider opening and renegotiating the whole contract, so as to settle this problem of managers and assistant managers. Mann replied that he did not have authority to do that. O'Toole's desire to reopen the whole contract was based on a request of the union membership expressed at a union meeting in late January.

Mann testified that the meeting did concern the Union's claim that the Company had taken people from the bargaining unit, and that it was also O'Toole's position that the contract was too ambiguous. He also admitted that the Union wanted to open the contract and renegotiate it in its entirety. Mann acknowledged that he told O'Toole that he did not have the authority to reopen the contract, as only the board of directors has such power. Mann also denied that he agreed to any waiver of time periods for the filing of a grievance, and further maintained that it was not discussed.

I credit Mann's testimony that he did not agree to waive time periods for the filing of a grievance concerning the promotion of the employees. It is to be noted that O'Toole did not argue with Mann that he had previously agreed at a prior meeting that he would waive time periods. It is inherently probable that had Mann so agreed on January 15, and if several weeks later Mann reversed himself, O'Toole would have vigorously reminded him of his prior agreement, and would have demanded to know why Mann had changed his position.

O'Toole testified that prior to the meeting the relationship between the Credit Union and the Charging Party was congenial and informal. Whenever there had been a problem, he and Mann would sit down and "hash out" the problem. There had been very few formal grievances and no arbitration cases in the history of their relationship. The business representative also testified that he thought that Mann had the authority to waive time periods for filing grievances, but admitted that he had never been told by the Board of Directors that Mann had such power. O'Toole at no time requested Mann to put in writing an agreement to waive the time period.

3. The events of March

Sometime in March, the Union formulated its position as to the exclusion from the Union of the employees who had been promoted. On March 19, pursuant to instructions from O'Toole, Steward Wattler filed a written grievance with Assistant Manager Reese. The grievance, as drafted by O'Toole, read as follows:

> Nature of grievance *Management positions taken out of the union indiscriminately. Donna Krems, Karen Aronoff, Pat Voss, Jackie Hamra, Norm Gericke, Sharon Wright, Terry Cartright, Bill Rogers, Pam Reed, Jo Ward, Dennis Manning, Cheryl Hood, Karen Schmidt, Dennis Cook, Claire Louis.*

The remedy requested was that these employees be "Placed back in the Union." As to the caption "Clause of Contract Violated," no clause was stated, but typed thereafter was "Protection of the Contract." Reese denied the grievance stating that it was untimely, but advised Wattler that she would be willing to discuss it informally.

A meeting was then arranged by Wattler with Mann to discuss the grievance, and the two met on March 23. Wattler testified that she asked Mann why Reese had put on the grievance, that it was untimely, when at two different meetings she had attended with O'Toole and Mann it was agreed that the time limits would be waived. According to Wattler, Mann replied that Reese had not been at those meetings and was not aware that the time limits had been waived. During the balance of the meeting, Mann questioned Wattler as to Local 13's position regarding the jobs of the employees listed in the grievance.

According to Mann, he had Wattler state the reasons for the Union's objections for each employee promoted to management positions, which he wrote down. Mann did not recall if at any time Wattler said anything with respect to any prior waiver of time limits for filing a grievance. Mann prepared minutes of this meeting, which were signed by both Mann and Wattler. (G.C. Exh. 11.) The minutes did not contain any mention that Wattler had asked Mann why Reese had answered that the grievance was untimely, or any mention that it had been agreed at two previous meetings that time limits for filing grievances on the January changes would be waived. The minutes did state in the first paragraph "Disposition of this grievance from Maureen was that the grievance was filed outside of the time limit but she would be willing to discuss the grievance informally with the shop steward." Although Wattler was given a copy of these minutes, she did not ask Mann to make any changes.

4. The April 15 meeting

On April 15, O'Toole and Wattler met with Mitchell and Mann at the main office of Respondent, and discussed the employees who had been promoted on January 1. O'Toole testified that he asked Mitchell if he would open up the contract and renegotiate all matters contained in it, and Mitchell refused to do so. O'Toole then brought up the grievance filed on the promotions, and Mitchell stated that it was untimely. O'Toole then asked Mitchell if he knew that Mann had waived the time limits contained in the grievance procedure. According to O'Toole, Mitchell said he was not aware that Mann had waived the time limits, and that he had asked Mann if he had done so, and Mann replied that he did not remember. O'Toole then submitted a list of 12 people that he thought should be back in the Union, because they were doing bargaining unit work, and Mitchell promised to send him a list of the job description for those 12 employees.

Mann testified, after refreshing his recollection by means of notes he dictated immediately following this meeting (R. Exh. 18), that he told O'Toole that he had not and did not have the authority to waive any time limits and would not do so. As previously stated, Mitchell did not testify at any time during the hearing.

5. The June 8 meeting

On June 8 the parties had their last meeting to discuss the promotions made on January 1. By this time 20 to 30 new employees had been hired. Local 13 was represented by O'Toole, Wattler, and Margaret Stoff, a newly elected steward.[11] The Credit Union was represented by Mitchell and Hoepfinger. O'Toole again told Mitchell that the Union wanted to bargain over the positions that had been "pulled" out of the Union. When Mitchell replied that there was no reason to bargain because it involved management positions, O'Toole advised him that he would go the Labor Board. O'Toole also requested that the dispute be submitted to arbitration, but Mitchell refused, saying the request was untimely.

Steward Stoff also testified that O'Toole told Mitchell that the Union should have been notified before these promotions took place, and Mitchell replied that they were not union positions and therefore the Company did not have to contact the Union.[12]

F. *Contentions of the Parties*

The General Counsel's basic contention is that the parties in July 1980 agreed to the inclusion of all employees, except managers, in the bargaining unit regardless of their supervisory status, and that at midterm of the collective-bargaining agreement, in January 1982, when Re-

[11] Wattler and Stoff were sisters.

[12] The testimony of the three union witnesses as to this meeting was uncontradicted and is credited.

spondent removed approximately 21 employees from the unit without prior notice to or bargaining with the Union Respondent thereby violated Section 8(a)(5) of the Act. The General Counsel relies chiefly on the authority of *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1980).

Respondent, on the other hand, contends that *Arizona Electric Power* is not applicable to the facts of this case, and relies heavily on *Chemical Workers Local 1 v. Pittsburgh Glass Co.*, 404 U.S. 157 (1971).

G. *Analysis and Conclusions*

I do find that this case falls within the four corners of *Arizona Electric Power* and that when Respondent unilaterally removed the 21 employees from the bargaining unit in January 1982, it violated Section 8(a)(5) of the Act. In *Carolina Telephone Co.*, 258 NLRB 1387, 1388 (1981), the Board affirmed and summarized its holding in *Arizona Electric Power* as follows:

> In *Arizona Electric Power Cooperative, Inc.*, 250 NLRB 1132, 1133 (1980), we held that unilateral attack on the integrity of an agreed-upon bargaining unit would be disruptive of an established bargaining relationship, and that therefore the scope of a unit may be changed only by mutual agreement of the parties or by Board action. Consequently, we found that a respondent's unilateral action in withdrawing recognition from a union as representative of certain employees during midterm of a contract, the bargaining unit of which the parties had knowingly and voluntarily negotiated, violated the Act. We noted that our conclusion would not be altered by a finding that the employees affected by the respondent's action were supervisors or managerial employees. Id. at 1133–34.

There is no question but that Respondent had knowingly and voluntarily negotiated with Local 13 for a unit of "all employees working as office employees" and had solely excluded "Managers." It is true that this bargained-for unit was different from the certified bargaining unit. However, it is well settled that an employer and a union, by agreement, may alter the certified unit so long as one party does not insist on a change in the composition of the unit to the point of impasse. *Newport News Shipbuilding*, 236 NLRB 1637 (1978). There is of course, no claim by Respondent that the altered unit was in any way related to an impasse.

Thus, at the midterm of the collective-bargaining agreement, when on January 1 the Company, without prior notice or bargaining with the Union, removed approximately 21 employees from the agreed-upon bargaining unit and admittedly placed them in its "new managerial team,"[13] it unilaterally changed the job classification, wages,[14] benefits, and other terms and conditions of the employment of these same 21 employees.

Respondent states in its brief that none of the persons promoted into the "supervisory/managerial positions as a result of the December 30, 1981 reorganization were until that time supervisors." The Employer then goes on to argue that unless the General Counsel proves that these employees elevated into supervisory/managerial positions, they remained, in fact, only employees, as defined in the Act, and the law requires a dismissal. I do not find this to be the applicable law. Both *Arizona Electric* and *Carolina Telephone* hold that it does not matter if the employees removed from the unit were statutory employees, supervisors, or managerial.[15]

Both the General Counsel and Respondent cited *Dura-Vent Corp.*, 257 NLRB 430 (1981), in support of their cases. However, I find that it clearly supports the General Counsel's position. In *Dura-Vent* 12 working foremen were unilaterally transferred by the company out of the bargaining unit to the position of supervisors. Administrative Law Judge Clifford H. Anderson, who was affirmed by the Board, found that these transfers involved a significant amount of unit work. While Judge Anderson expressly did not find that the newly transferred employees became supervisors within the meaning of Section 2(11) of the Act, he did find that it made no difference:

> Were the employees in the supervisory position[s] not statutory supervisors, however, a violation would still occur and the remedy would be no less. This is so because when employees are unilaterally removed from the bargaining unit—whether they remain employees or are transmuted into statutory supervisors—the Union is denied its opportunity to bargain over changes having a significant impact on the unit it represents.

There can be no doubt but that there was a significant impact on the unit represented by Local 13, when the Company removed some 21 employees therefrom. At that time the Company had 60 employees, which meant that one-third of the employees that the Union had represented were suddenly and without notice removed from its protective mantle. While Manager Mann did assure O'Toole that the Company intended to hire more employees in the future to take the place of the displaced unit employees, this does not cure the sudden severance of 33-1/3 percent of the employees from the unit represented by the Union. See *Kendall College*, 228 NLRB 1083 (1977), wherein the Board found that the employer's reduction of the bargaining unit by 25 percent had a substantial effect on that unit.

For the above reasons, I find that Respondent's unilateral action in withdrawing recognition from the Charging Party as the exclusive collective-bargaining representative of the approximately 21 employees violated Section 8(a)(5) and (1) of the Act.

Mann's letter of December 30, 1981, to the staff (G.C. Exh. 8) clearly advised all employees that the employees being promoted into management positions, effective

[13] The definition used by Hoepfinger in his January 5 letter to Local 13. G.C. Exh. 9.

[14] Mann testified their wages were increased by approximately 50 cents per hour.

[15] I find *Pittsburgh Glass*, supra, inapposite as its thrust was on retired employees, and not currently employed employees.

January 1, would "be working for the credit union outside of the union contract." The record is undisputed that commencing with that date, these employees did work outside of their contract, as Respondent no longer applied the terms of the parties' collective-bargaining agreement to these employees promoted to the management team.

Paragraph 6,C of the complaint alleges that since January 1 Respondent has required these same 21 employees to withdraw from the Union, has canceled the contract's dues-checkoff provision, and has refused to withhold from the employees' wages and remit this dues money to the Union. Respondent contends that there was no violation because there were no threats or coercion to cause an employee to cease paying dues. While this is true as to threats, it is wide of the mark. The fact is that Respondent did unilaterally cease carrying out its contractual duty to deduct the dues from the employees' wages and to remit these monthly dues to the Union. This was clearly an interference with the employees' rights guaranteed in Section 7 of the Act, and thereby violated Section 8(a)(1). *Wilson & Sons*, 193 NLRB 350 (1971); *Cavalier Spring Co.*, 193 NLRB 829 (1971). Since this failure to check off and remit dues was done unilaterally, in midterm of the contract, it also violated Section 8(a)(5) of the Act. *Kraft Plumbing & Heating*, 252 NLRB 891 (1980); *Independent Stave Co.*, 248 NLRB 219 (1980).

Paragraph 6,D of the complaint alleges that since on or about January 1, 1982, and continuing to date, Respondent refused to bargain with the Union, upon its request. Respondent contends in its brief that the Union never asked to bargain about the "make-up rates, benefits, etc." of these supervisory managerial positions, and that the Union presented no legitimate demands to bargain until August when the Union filed a grievance on the issue of management employees doing bargaining unit work.[16]

It is true that the Union did not seek to bargain over the specific questions of makeup rates, benefits, and such for the promoted employees. However, it was not necessary for the General Counsel to prove such specific matters in order to support a refusal to bargain charge. Manager Mann admitted that the meeting of February 10 concerned Local 13's claim that the Company had taken employees from the bargaining unit and that the Union wanted to reopen the contract and renegotiate it in its entirety because it was too ambiguous. While the record does not show what parts of the contract O'Toole considered to be too ambiguous, it is a reasonable inference that he was talking about the wording of the parties unique union recognition clause, that excluded only "managers" from the bargaining unit.

At the meeting of the parties on April 15 they again discussed the employees who had been promoted on January 1, and O'Toole's repeated request that the Company agree to open the contract and renegotiate it in its entirety was once again rejected. Finally, at the June 8 meeting, O'Toole did tell Respondent in so many words that the Union wanted to bargain about the employees who had been taken from the bargaining unit and placed in the supervisory staff.

When O'Toole on February 10, April 15, and June 8 asked the Respondent to bargain over the entire collective-bargaining agreement, he was following the long-standing and the well-recognized bargaining technique of asking for a lot more than a union really expects to get. He wanted to bargain over the Union Recognition clause, and thereby force the Company to bargain over the employees it had unilaterally promoted out of the bargaining unit on January 1. Thus, I find that Respondent from February 10 on did refuse to bargain with the Union in violation of Section 8(a)(5) of the Act, as it refused to bargain about anything.

Paragraph 6,E of the complaint alleges that on or about March 23, and continuing to date, Respondent has refused to bargain with the Union, by reneging on its agreement with the Charging Party to waive all time periods for filing grievances regarding the changes it had made in the job classifications, wages, benefits, and other terms and conditions of employment of the employees promoted on January 1 to the management staff.

As testified to by O'Toole, the grievance was due to be filed by January 9.[17] To meet this deadline he had scheduled a meeting with Mann for January 8, which meeting had to be postponed because of his illness. Thus the deadline recognized by O'Toole had passed. However, this apparently did not seem a problem to the business manager, because of the past informal and congenial relationship of the parties. Undoubtedly, O'Toole expected that he would be able to sit down with Mann and informally work out the grievance just as he had done in the past. However, Respondent did not follow this pattern.

Since I have previously credited Mann's testimony that he did not agree to waive the time periods for filing grievances regarding the change in the status of the employees, listed in Hoepfinger's letter of January 5, it follows that Respondent did not unlawfully refuse to bargain on March 23, April 15, and June 8, when it refused to process the grievance filed by steward Wattler on March 19. I shall therefore recommend dismissal of this allegation of the complaint.

Conclusions of Law

1. St. Louis Telephone Employees Credit Union is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Office and Professional Employees International Union, Local 13, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees working as office employees and excluding managers is the unit for which the aforesaid Union is the exclusive bargaining representative.

[16] On August 19, Local 13 filed a formal grievance, which stated as the nature of the grievance "Supervisors doing bargaining unit work." R. Exh. 5.

[17] Art. XXVIII of the parties collective-bargaining agreement provided that a written grievance must be filed within 3 working days from the date that the employee has knowledge of the grievance. The Union received notice of the grievance on January 6, when O'Toole received Hoepfinger's letter of January 5.

4. By removing approximately 21 employees from the bargaining unit about January 1, 1982, without prior notice to the Union and without affording the Union an opportunity to bargain, Respondent refused to bargain with the aforesaid Union as the representatiave of employees in the bargaining unit for which the Union is the exclusive bargaining representative, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By refusing to honor and apply the terms of this collective-bargaining agreement with the Union since January 1, 1982, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By rendering the dues-checkoff provision contained in the collective-bargaining agreement ineffective, and failing and refusing to withhold from said employees' wages, and failing to remit to the Union the dues money required thereunder, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By failing and refusing to bargain with the Union, on request, since about February 10, 1982, Respondent has violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has committed no other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent, in violation of its duty under Section 8(a)(5) and (1) of the Act, withdrew recognition from and refused to bargain with the Union as the representative of employees, including those who were promoted about January 1, 1982, in the unit for which the Union is the exclusive bargaining representative, I shall order it to bargain collectively with the Union and to restore these employees to the unit, conditioned on the affirmative desire of these employees as expressed through their bargaining agent.

The record indicates that these employees received a pay raise when promoted out of the unit, and the General Council in her brief does not ask for any backpay. Also, it is not Board policy to request employees to relinquish increases in wages and benefits. *Dura-Vent Corp.*, supra. Since it is not now possible to determine if the unilateral changes have been detrimental or beneficial, I shall issue a restoration order conditional upon the affirmative desires of the affected employees as expressed through their bargaining agent. *Kendall College*, 228 NLRB 1083 (1977); *Herman Sausage Co.*, 122 NLRB 168 (1958).

If the Union elects such a restoration of benefits, a general order is issued below requiring Respondent to make the promoted employees whole for any loss of wages, benefits, or other rights and privileges they may have suffered as a result of Respondent's unfair labor practices. Backpay, if any, shall be computed with interest, as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[18]

The General Counsel in her brief, did request that the Union be made whole for dues not remitted to it by Respondent. Since I have found that such dues were not remitted, and that such failure to comply with the contract violated the Act, I will order Respondent to reimburse the Union for its losses due to Respondent's failure to so check off, and remit dues of the said employees, as required by the collective-bargaining agreement. *El Centro Health Center*, 266 NLRB 1 (1983); *J. F. Swick Insulation Co.*, 247 NLRB 626 (1980).

[Recommended Order omitted from publication.]

[18] See generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Commercial Cartage Company *and* Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 14–CA–15790 and 14–CA–15895

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 1 December 1982 Administrative Law Judge Michael O. Miller issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 1.

"1. By reprimanding and threatening its employees with discipline for filing grievances or engaging in other union and protected concerted activities, the Respondent has violated Section 8(a)(3) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Commercial Cartage Company, Fenton, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge indicated in his Conclusions of Law that the Respondent violated Sec. 8(a)(1) by issuing disciplinary warnings to employees for engaging in union and other protected concerted activities. As the judge indicated earlier in his decision, however, this conduct violated Sec. 8(a)(3) of the Act. We shall amend the judge's Conclusions of Law accordingly.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were heard in St. Louis, Missouri, on September 13, 14, and 15, 1982, based on unfair labor practice charges filed by Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 618 or the Union),[1] and complaints issued by the Regional Director for Region 14 of the National Labor Relations Board.[2] The complaints were consolidated for hearing. The complaints allege that Commercial Cartage Company (Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act), by issuing disciplinary notices to and discharging Samuel A. Williams because Williams had filed an unfair labor practice charge against Respondent and had engaged in other union and protected concerted activities and violated 8(a)(5) and (1) of the Act by unilaterally failing and refusing to implement scheduled wage increases. Respondent's timely filed answers deny the commission of any unfair labor practices and assert that the 8(a)(5) allegations should be deferred to arbitration.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered.

On the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a Missouri corporation engaged at Fenton, Missouri, in the interstate transportation of liquid freight, including petroleum and chemical products, by tank truck. Jurisdiction is not in dispute. The complaints allege, and Respondent admits, that during the calendar year ending December 31, 1981, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $50,000 from the interstate transportation of freight and, during that same period, performed services valued in excess of $50,000 for enterprises which meet the Board's retail, direct inflow or direct outflow jurisdictional standards. I find and conclude that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The charge in Case 14–CA–15790 was filed on March 9, 1982, and the charge in Case 14–CA–15895 was filed on April 23, 1982.

[2] The complaint in Case 14–CA–15790 issued on July 14, 1982. The complaint in Case 14–CA–15895 issued on June 3, 1982, and was amended on July 15, 1982.

The complaints allege, Respondent admits, and I find and conclude that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background—The Collective-Bargaining Relationship*

For more than 10 years, Local 618 has represented Respondent's employees.[3] Respondent is a member of the Labor Relations Advisory Association (LRAA), and is party to the Central States Area Tank Truck Agreement (CSATTA), between that association and the Central Conference of Teamsters, of which Local 618 is an affiliate.

The CSATTA which was in effect at the time of the events herein had a term of November 15, 1979, through November 14, 1982. That agreement was supplemented and amended by the Teamsters Local 618 Missouri Rider to the CSATTA, effective for the same term. As discussed in more detail infra, that rider was itself supplemented and amended by a further addendum, the Commercial Cartage Co. Local Petroleum Addendum, effective from November 15, 1980, through November 14, 1982.

B. *Case 14-CA-15895—The Alleged Refusal to Bargain*

1. Factual discussion

The wage rates for the employees represented by Local 618 were set forth in the Missouri Rider. However, in May 1981[4] Respondent and the Union negotiated a separate addendum for the purpose of providing economic relief to Respondent. Pursuant to that agreement, signed on May 5 by Lawrence Lewis, Respondent's vice president of administration, and on May 19 by Peter J. Cavatoe, the Union's assistant business representative, Respondent was obligated to increase its employees' wages by 43 cents per hour on November 15.

In the course of negotiations for the May relief agreement, Stanley Lewis, Respondent's president, told Cavatoe that he did not want to be in a position where subsequent relief granted to other carriers, different from that granted to Respondent, placed Respondent at a competitive disadvantage. Accordingly, the following language was proposed by the Employer and included as part of the relief addendum:

> IV. It is understood and agreed that any additional relief from the current Central States Area Tank Truck Agreement accepted by the Union membership will also affect this addendum.

Immediately on receipt of the relief addendum, Cavatoe responded, by letter dated May 20, addressed to Stanley Lewis, in an attempt to clarify his understanding of the above-quoted article IV. His letter stated:

> In regard to the re-negotiation of your company addendum at Commercial Cartage Co., your front letter sent to me attached to the addendum, Section IV, should be clarified. Any changes in the entire Central States Area Tank Truck Agreement that can be effective or less than our settlement, must be presented to your employees and our members, and voted on for approval in accordance with recognized Central Conference procedures.

Respondent received Cavatoe's clarifying letter and did not respond.

The May relief addendum had been presented to the Union's membership prior to its approval. At that meeting, Stanley Lewis addressed the members and urged their approval. According to employee Howard Guerber, Lewis promised the employees that if this relief proposal were accepted, Respondent would seek no further relief for the duration of the contract. Stanley Lewis denied giving the employees any such assurances. He testified that the drivers were told that Respondent would expect that relief granted to other employers would be granted to them. On balance, I am persuaded to credit Stanley Lewis. It would, I believe, have been highly improbable that Stanley Lewis would have assured the employees that no further relief would be expected when Respondent was simultaneously seeking language which would give it the opportunity, if not the right, to have additional relief granted if such relief were granted to Respondent's competitors. I note, additionally, the absence of any testimony corroborating that of Guerber notwithstanding that Cavatoe, Samuel Williams, who was the Union's steward, and other employees, some or all of whom were presumably in attendance at that meeting, testified on behalf of the General Counsel.

On September 14, the LRAA requested that the Central States Conference of Teamsters Tank Truck negotiating committee renegotiate the CSATTA because of the adverse efforts of industrywide deregulation, competition from nonunion and non-CSATTA carriers, and the general downturn in the economy. The request was predicated on article 33 of the CSATTA, which provides for reopening in the event of various circumstances, including "change in economic or competitive circumstances of the unionized tank truck industry on a local, state or area level, which has a significantly adverse effect on the financial structure of the tank truck industry."[5] On Sep-

[3] The applicable collective-bargaining agreement describes the bargaining unit thusly:

> Section 1.1—Operations Covered
>
> The execution of this Tank Truck Agreement on the part of the Employer shall cover all over-the-road and local tank truck operations of the Employer, within, into, and out of the Area and Territory contiguous thereto.
>
> Section 1.2-Employees Covered
>
> (a) The employees covered by this Agreement shall include any and all the employees of the Employer employed directly by and/or under the supervison and control of the Employer within the jurisdiction of the Union and who are represented by the Local Union or during the life of this Agreement may come to be represented by the Local Union.

[5] That article further provides: "Upon the failure of the parties to agree in such negotiations . . . either party shall be permitted all lawful economic recourse to support its request for revisions."

tember 28, George Vitale, chairman of the Central Conference of Teamsters Tank Truck negotiating committee, responded, rejecting the request for reopener negotiations but promising to discuss the proposed reopening at the November meeting of the Joint Area committee. Vitale further stated that local unions were not authorized, at that time, to conduct separate negotiations with individuals or groups of employers and that the employers covered by the CSATTA would be expected to pay the November 15 wage increases, as scheduled. On November 5, the Central States Tank Truck Joint Area committee met. The minutes of that meeting indicate that carriers would be permitted to seek relief on a state or local basis, subject to the approval of the Joint Area committee. Carriers would be expected to pay scheduled wage increases, it was noted, where local unions or state conferences rejected requested relief. Thereafter, at least two carriers, signators to the CSATTA, were granted some form of economic relief by Local 618.[6]

On November 14, Richard Norsen, Respondent's vice president of operations, addressed a letter to Cavatoe. In that letter, Norsen noted that the LRAA had reopened the contract on September 14. His letter stated:

> The Commercial Cartage Co. addendum dictates that any changes in the Central States Area Tank Truck Agreement could be applicable to our agreement if accepted by the Union membership.
>
> Inasmuch as pending negotiations with the Central Conference of Teamsters could result in additional relief from the current Central States Area Tank Truck Agreement which might be applicable to the Commercial Cartage Co. Addendum, Commercial Cartage Co. is suspending all wage increases until such time as the L.R.A.A. concludes negotiations with the Central Conference of Teamsters.

Respondent posted a copy of this letter on the employee bulletin board.

At some point shortly after the November 14 letter to the Union, Norsen verbally repeated to Cavatoe Respondent's desire for additional relief and, it appears, asked to meet with Cavatoe for negotiations toward such relief. Cavatoe informed Norsen that he had been voted out of office, effective January 1, 1982, and told Norsen that he was not in a position to negotiate for his successors. Cavatoe suggested that negotiations with those who would replace him would be more appropriate. Norsen repeated Respondent's position that it was not going to put the scheduled wage increase into effect and was told by Cavatoe that Respondent should honor their agreement.[7] Respondent did not put the scheduled wage increase into effect.

On February 17, 1982, Norsen met with the Union's new officers, including Robert Miller, its secretary-treasurer/business representative, at a grievance meeting. In the course of that meeting, Miller asked about the November 14 wage increase, stating his understanding that it had not been paid. Norsen referred to Respondent's November 14 letter, with which Miller was unfamiliar and acknowledged that Respondent had not put the increase into effect. Norsen asked Miller to negotiate additional relief on the basis of the relief which had been granted other employers. Miller requested Norsen to send him some specific proposals.[8]

Miller discussed Respondent's oral request for relief with the Union's stewards and, not having received any proposals from Respondent, wrote Stanley Lewis on March 5. In that letter, Respondent was advised that the Union did not desire to engage in negotiations to modify the current agreement prior to its expiration date. Respondent was requested to begin paying the scheduled wages and to pay the backpay due under the November 14 increase.

On March 9, 1982, Norsen replied. He disagreed with the Union's refusal to negotiate for modifications and referred to the LRAA reopening of the CSATTA on September 14, to the relief granted to Illinois employers by the Illinois Conference of Teamsters (which allegedly consisted of waiving November 15, 1981 scheduled wage and cost-of-living increases), and to relief granted to two employers in the St. Louis area. Respondent asserted that it "desperately needs additional relief in order to remain competitive and to survive in these most trying times." A reference was made to a proposal prepared by Respondent (but apparently no copy was attached). The letter closed with the following:

> We urgently request a meeting with Local 618 and our employees to present this proposal for your members' approval.
>
> Please advise the most convenient time and place we can meet.

Miller responded on March 11, 1982. He pointed out that the relief granted to the Illinois employers and that granted to at least one of the St. Louis employers only placed their wage scales at approximately what Respondent would be paying if it had put the November 15, 1981 increases into effect. Respondent's request for additional relief was rejected and the Union, once again, requested that Respondent comply with its agreement.

On March 12, Respondent sent the Union its proposals.[9] In those proposals, Respondent sought to eliminate certain workweek, seniority, overtime, uniform, and job classification provisions. In regard to wages, it sought to eliminate the November 15 wage increase and to maintain the then existing hourly wage rate and weekly guarantee.

Miller replied on March 16. Once again, Respondent's request for negotiations and a meeting with the employ-

[6] Slay Transportation Co. and Klipsch Hauling.

[7] Norsen's testimony is not materially different.

[8] At one point, Norsen testified that he believed that Miller had stated that he would take Respondent's proposal to the employees. He was, however, not sure that Miller had made any such commitment and postulated that he may only have drawn such an inference from Miller's agreement to look at Respondent's proposal. Norsen's pretrial affidavit states only that Miller told Norsen to put something down in writing which the Union would look at. It further indicates that Miller did not agree to negotiate or offer to set up a meeting.

[9] Respondent's letter was erroneously dated March 9, 1982.

ees was rejected. Miller pointed out that the major oil companies were paying considerably more than Respondent and that further relief given to Respondent would adversely affect its members employed by those employees. Compliance with the contract was demanded.

On April 24, 1982, Clifford Pyatt, the Union's steward, filed a grievance over Respondent's failure to pay the scheduled wage increase and the backpay since November 14. The record does not reflect what disposition was made of Pyatt's grievance.

On April 29, 1982, Respondent posted a memorandum to its Fenton drivers in regard to contract relief. The memorandum, to which were attached copies of the correspondence between the parties and the relief addendum signed by other local employers, reiterated Respondent's efforts to secure contract relief and refuted the Union's reference to wages paid by the major oil companies to their drivers. The letter urged the employees to review the circumstances and solicited their assistance by requesting their union representative to meet with the Employer.

It was stipulated that Respondent had requested that the relief issue be submitted for review and a vote by the employees and that the Union had declined to permit a vote on that issue. At hearing, Respondent stated that it was willing to arbitrate the question of whether it was obligated to pay the wage increase in the absence of such a vote and to abide by the decision of an impartial arbitrator. The CSATTA provides for the final resolution of all controversies by reference to Joint State or Joint Area Committees, composed of equal numbers of labor and management representatives. The decisions of these committees are final and binding on all parties.

2. Analysis of the refusal-to-bargain issue—applicability of *Collyer*

Respondent contends that the refusal-to-bargain allegations of the General Counsel's consolidated complaint must be dismissed pursuant to the Board's decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971), as modified by *General American Transportation Corp.*, 228 NLRB 808 (1977), and *Roy Robinson Chevrolet*, 228 NLRB 828 (1977), inasmuch as this is a dispute "arising over the application or interpretation of an existing collective-bargaining agreement" which should be decided by the method agreed upon by the parties, i.e., arbitration. *Collyer*, supra at 840; LMRA, Section 203(d).[10] The General Counsel argues that Respondent's conduct, about which there is little dispute, amounts to a clear midterm modification of the parties' collective-bargaining agreement, undertaken without securing agreement from the Union, and thus establishes a violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. The General Counsel asserts that the parties' collective-bargaining agreement, including the various addenda, does not lend itself to an interpretation which could arguably authorize Respondent's actions.

[10] Respondent essentially concedes that if its conduct is not supported by the contractual language, it has violated Sec. 8(a)(5) and (1) of the Act.

In *Collyer* (supra at 839), the Board, Members Fanning and Jenkins dissenting, held that where a "dispute in its entirety arises from the contract between the parties, and from the parties' relationship under the contract, it ought to be resolved in the manner which that contract prescribes." Under such circumstances, the Board found, dismissal of the complaint, with appropriate retention of limited jurisdiction, is the appropriate disposition. Adherence to *Collyer*, at least as to cases alleging violations of Section 8(a)(5), was reaffirmed by the Board majority in *Roy Robinson Chevrolet*, Members Fanning and Jenkins dissenting.[11]

In *Collyer* the Board, citing back to its earlier decision in *Jos. Schlitz Brewing Co.*, 175 NLRB 141 (1969), set forth four criteria for the application of *Collyer* deferral: (1) that the parties have a long-established and successful bargaining relationship; (2) that "no claim is made of enmity by Respondent to employees' exercise of protected rights"; (3) that Respondent demonstrate its willingness to submit the dispute to resolution under a final and binding grievance-arbitration procedure applicable to that dispute; and (4) the issue arise out of the confines of the collective-bargaining relationship. The General Counsel here raises no contention that the first three criteria have not been met. Indeed, the facts establish that there has been a long and presumably successful collective-bargaining relationship between Respondent and the Union, Respondent's conduct here, while unlawful if not authorized by the contract, does not appear to be motivated by an intention to disparage employee exercise of statutory rights, and Respondent has indicated its willingness to submit this dispute to the contractual grievance-arbitration machinery.[12]

Clearly, deferral is not warranted where contract language is clear and unambiguous and permits no construction which could legitimize the action taken. *Struthers Wells Corp.*, 245 NLRB 1170 fn. 4 (1979). The initial question, therefore, is whether, as Respondent contends, this is a dispute which presents questions concerning the interpretation of the collective-bargaining agreement or whether, as the General Counsel contends, no fair reading of the relevant contract language would authorize Respondent's actions.

The warrant for its actions, Respondent argues, is found in the interplay of CSATTA article 33, which provides that either party may reopen negotiations when a "change in economic or competitive circumstances

[11] See also *Maine Yankee Atomic Power Co.*, 258 NLRB 832 (1981), where the Board reversed an administrative law judge's *Collyer* deferral involving the unilateral creation of a new job outside the unit and the transfer of unit work to that new position on the basis that the issue of deferral to arbitration had been neither pleaded nor raised; the Board noted that the employer had not requested deferral of the basic issue. See also *Standard Oil Co. (Ohio)*, 254 NLRB 32 (1981), where the Board, Member Fanning dissenting, determined that an 8(a)(5) issue involving an employer's unilateral implementation of a voluntary program of physical examinations was appropriate for *Collyer* deferral.

[12] The contractual grievance procedures, providing for resolution of all controversies by Joint State and Joint Area Committees made up of equal numbers of delegates from labor and management, satisfy the Board's standards for deferral. See *United Parcel Service*, 232 NLRB 1114 (1977), and cases cited at fn. 4. See also *Campbell Sixty Six Express*, 202 NLRB 1126 (1972).

. . . has a significantly adverse effect on the financial structure of the tank truck industry" and article IV of Respondent's relief addendum, which provides that "any additional relief from the current Central States Area Tank Truck Agreement accepted by the Union membership will also affect this addendum." Respondent contends "that these articles obligate Local 618 to submit a wage relief proposal to its members for a vote prior to Respondent's obligation to pay such increases." Respondent relied on these contractual provisions and the fact that relief was being sought by the LRAA and had been granted to at least two of its competitors when it notified the Union that it was withholding the November 15 wage increase pending bargaining for additional relief.

I cannot conclude, as the General Counsel would have me do, that the contractual language presented is so clear and unambiguous that Respondent's interpretation must be rejected out of hand. In particular, the words "accepted by the Union membership" might be interpreted as Respondent urges, particularly when considered in conjunction with the language of Cavatoe's May 20 letter. That letter, purporting to clarify article IV, appears to lend credence to Respondent's interpretation when it states that any changes in the CSATTA "that can be effective or less than our settlement *must be presented to your employees and our members*, and voted on for approval." (Emphasis added.) One can argue that Cavatoe's letter can be construed as the Union's acknowledgment of its obligation to present Respondent's proposals for relief to its members for a vote. One can also argue that it merely prohibits Respondent from implementing changes unless and until approved by that membership. Which argument is the more persuasive is a fit question for an arbitral panel. Accordingly, I must conclude that Respondent's conduct raises a question of contract interpretation suitable for resolution by the parties' agreed-to method of dispute resolution.

However, the General Counsel further argues that Respondent's conduct, withholding a scheduled wage increase, i.e., its "failure to implement the wage provisions amounts to a repudiation of the contract and strikes at the very heart of the collective-bargaining relationship." From this, the General Counsel argues that it would be inappropriate to defer the dispute to the grievance-arbitration machinery, citing *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973). *Oak Cliff-Golman*, I believe, is distinguishable from the instant case. In *Oak Cliff-Golman*, the employer had unilaterally modified the contract, reducing wages and salaries, as an alternative to closing its business when faced with dire economic circumstances. At hearing, the employer asserted a defense based upon *Collyer*. The Board, in a panel consisting of Chairman Miller and Members Fanning and Jenkins, rejected the deferral defense. The latter two Board Members held that they would not defer under any circumstances because they did not subscribe to the policy enunciated in *Collyer*. Chairman Miller reasoned that deferral was inappropriate because there was "no claim, and indeed no room for any finding, that the contract's terms even arguably authorized the action taken by Respondent." Thus, he noted, the case did not turn on any underlying dispute over the meaning of a contract's terms.[13] The employer in *Oak Cliff-Golman* further contended that its action was at most a breach of contract which should be remedied "by other processes and ultimately by the courts." It was in response to this contention, not the *Collyer* defense, that the Board stated "that a clear repudiation of the contract wage provision is not just a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship." In such circumstances, the Board held, it was authorized and obligated "to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principal functions—the establishment and maintenance of a viable agreement on wages."

Even assuming that the language of *Oak Cliff-Golman*, quoted above, is applicable to questions of *Collyer* deferral, I cannot find, in the circumstances of this case, that Respondent's refusal to implement the scheduled wage increase amounts to a "death blow to the contract" or "a basic repudiation of the bargaining relationship." Here, Respondent continued to apply all other terms of the collective-bargaining agreement, notified the Union of its intended action, and sought bargaining with the Union. There is not the slightest indication that Respondent would not have complied with the results of any negotiations or a vote of the membership had one been conducted. Respondent, I must conclude, was not repudiating its contract; rather, it was complying with (or taking advantage of) what it believed were its rights to seek economic relief during the term of the agreement.[14]

Accordingly, I shall recommend that the 8(a)(5) portion of this consolidated complaint be dismissed with the Board retaining limited jurisdiction, as hereinafter described.

C. *Alleged Discrimination*

1. Factual discussion

Samuel A. Williams commenced his employment with Respondent in 1967. Throughout his tenure he was a transport truck driver and a member of the Union. For approximately 11 years prior to his discharge on December 9, 1981,[15] he was the Union's steward. As steward, Williams filed an average of two or three grievances per month. During 1979, he had also filed two unfair labor practice charges alleging that Respondent was discriminating against him because of his union or other protect-

[13] See *Roy Robinson Chevrolet*, supra at 830.

[14] The General Counsel notes in brief that Respondent made no proposal for relief until March 1982, by which time it was already 3 months delinquent in paying the scheduled wage increase. This is, I believe, irrelevant as Respondent was, at all times, relying on both the efforts of the LRAA to secure relief on an associationwide basis and on the relief subsequently granted to other employers in Respondent's geographical area. Moreover, I note that as the relief Respondent sought included rescission of the scheduled wage increase, payment of that wage increase when the contract called for it would have essentially negated the relief Respondent sought. Recovery of those moneys from the employees after payment would have been impractical, if not impossible.

[15] As above, all dates are 1981 unless otherwise specified.

ed concerted activities.[16] Williams received several reprimands between 1973 and 1975, but had a clean disciplinary record for approximately 5 years prior to May 1981.

On March 19, Williams (as an individual) filed an unfair labor practice charge, Case 14–CA–14829, alleging that Respondent, by refusing to pay a wage increase due on November 15, 1980, by threatening employees with the closure of its Fenton terminal, and by soliciting employees to operate as independent contractors, had discriminated against its employees, and had engaged in other conduct in an attempt to discourage membership in the Union.[17] Williams served this charge on Respondent, and it was seen by both Stanley and Lawrence Lewis, at the beginning of a March 19 meeting held for the purpose of negotiating Respondent's relief addendum. According to Williams' uncontradicted testimony, Stanley Lewis, on receiving a copy of the charge, asked Business Representative Cavatoe what it was all about. Cavatoe stated that Williams had merely exercised his right to file a charge with the NLRB. That meeting continued following Williams' service of the charge and broke up several hours later when Williams questioned the veracity of Stanley and Lawrence Lewis and accused the company of presenting forged documents to justify its economic position.[18]

On March 20, Williams returned to the Fenton terminal, clocking out at 4:13 p.m. He was told that Lawrence Lewis wanted to see him and was directed to wait. He waited approximately 15 to 20 minutes and was then brought in to Lawrence Lewis' office. There, according to Williams' testimony, Lewis referred back to a conversation held a week earlier, wherein a reference had been made to how much various people were worth at Commercial Cartage, picked up a copy of Williams' unfair labor practice charge, threw it across the desk and told Williams "this is the limit . . . you're done at Commercial Cartage . . . from now on you'd best watch yourself around here." Lewis' tone of voice, according to Williams, was not "quite normal"; Lewis was allegedly yelling "to a certain extent." Lewis unequivocally disputes and denies Williams' version of this conversation. He testified, in a version which I deemed to be the more accurate for the reasons set forth below, that he made no reference to the charge filed and served on March 19. He also denied yelling at Williams or throwing a copy of the charge across the desk. According to Lewis, his conversation referred not to that charge but rather to Williams' accusations of the previous evening concerning alleged forgeries of company documents and to his attacks on the character and veracity of Stanley and Lawrence Lewis. Lewis told Williams that such behavior was not appropriate and not conducive to substantive negotiations, that negotiations could not proceed without an atmosphere of trust and confidence, and that claims of forgery did not lend themselves to a successful conclusion of the negotiations.[19]

On May 23, Williams erred in the quantities of different grades of gasoline to be delivered to a customer. He reported his error to the dispatcher and another driver was dispatched to provide the customer with the correct quantity of product ordered for the holiday (Memorial Day) weekend. On May 28, Williams received a written reprimand, signed by Norsen. This was the first discipline given Williams since the alleged threat in March. He filed no grievance or unfair labor practice charge in regard to it, notwithstanding that he testified to considering this discipline the start of Lawrence Lewis' efforts to effectuate the alleged threat, because he admitted respon-

[16] Williams referred to these as "discrimination charges" and, it appears, drew a distinction between such charges and his subsequent charge, which he knew to be an "unfair labor practice charge." Contrary to Respondent's contention, I find no basis to discredit Williams arising from the fact that he denied filing "unfair labor practice charges" prior to March 1981. His error was one of terminology, not credibility.

[17] The record does not reflect the disposition of Case 14–CA–14829. I note that in the relief addendum ultimately agreed to, Respondent agreed to pay all back wages due from November 15, 1980.

[18] Lawrence Lewis' version of the course of this meeting was not disputed or contradicted by either Williams, who testified in the General Counsel's case in chief and on rebuttal, or by Cavatoe. I credit that version notwithstanding that a letter from Respondent's former attorney, setting forth Respondent's position on this case during the investigative stage, apparently misstated that the meeting had broken up in part because of the service of that charge. That statement, as well as a statement that Lawrence Lewis subsequently spoke to Williams because Williams' charge filing had put "a fly in the ointment," appear to be in error. Respondent terminated its relationship with the attorney who drafted that letter.

[19] Williams' credibility in regard to this conversation is weakened, rather than strengthened, by the attempt to support his version through the testimony of Clifford Pyatt. Pyatt, called as a corroborating witness by the General Counsel, testified that after he "came in from work about 5 in the afternoon," he walked back to Lewis' office to report a problem with his truck. There, at "around 5:00 or just a few minutes after," he allegedly heard Lewis state, in a voice both loud and mad, something to the effect that Williams was "through" or that Lewis would get Williams "one way or another." Pyatt subsequently testified that he had returned to the terminal at about 4:45 p.m. and had spent 10 or 15 minutes completing his paperwork before he went to Lewis' office. The clerical employees who worked outside Lewis' office, he testified, were gone for the day when he walked by their work stations, the conversation which he allegedly overheard must have occurred, he said, between about 5 and 5:03 p.m. and he left the building within about 3 minutes after allegedly hearing this threat. However, documentary evidence, including Pyatt's delivery tickets and his timecard, establish that it would have been virtually impossible for him to have been present when the conversation between Lewis and Williams occurred. Thus, while the testimony of Lewis credibly indicates that the conversation occurred shortly after 4:30, which testimony is essentially corroborated by Williams' timecard and the order of events which Williams described, Pyatt's delivery tickets establish that he was approximately 45 miles and 1 hour's driving time away from the terminal at 4:10 p.m. He did not clock out that evening until 5:28 p.m. Moreover, the secretarial area outside Lewis' office would not have been devoid of employees at the hour Pyatt allegedly walked through it because, according to Lewis' uncontradicted testimony, those clericals worked on flextime and some would have been there beyond the 5 o'clock hour. I note, too, that Williams testified that he believed he had walked past various secretaries on his way to Lewis' office. I additionally note that Williams' affidavit, given on March 27, makes no mention of Lewis yelling at him or raising his voice and describes their conversation as "short, sweet, and to the point." Moreover, Williams claimed that he learned that Pyatt had overheard this conversation within a week or 10 days after it allegedly occurred. Notwithstanding that he had filed a charge and given affidavits in support thereof, he claimed that he did not deem the existence of such corroborating evidence to be sufficiently important or relevant to warrant reporting it to the Board. Similarly, I note inconsistencies between Pyatt's testimony and his pretrial affidavit. Considering all of the foregoing, and my observations of the witnesses and their demeanor, I must conclude that Lawrence Lewis' denials of the conversation as attributed to him by Williams and Pyatt are more credible than the versions of that conversation presented by Williams and Pyatt.

sibility for the mistake charged against him.[20] Lawrence Lewis played no role in the events of May and Norsen denied that Williams' union or other protected activities motivated him in issuing this reprimand.

In August, Williams and a number of other employees signed a petition addressed to the Fenton police department wherein they complained that Respondent was unlawfully deducting money from their paychecks. When the police refused to act on the basis of a petition, Williams signed a formal complaint, charging larceny in excess of $150, making these same allegations on behalf of himself and his fellow employees. The police contacted Respondent and informed Norsen of the role that Williams had played in filing the complaint. On August 15, Norsen wrote Williams, charging that he had made unfounded accusations which were "an act of dishonesty" in violation of both that portion of the CSATTA which defined his authority as a job steward and the contract's discharge and suspension provisions. Williams was suspended and warned that if his complaint against Respondent was not resolved by August 21, he would be discharged. Other involved employees were warned that their support of the complaint could subject them to discharge; they were advised to notify Norsen, by August 19, of their intentions with respect to that complaint.

On August 20, Williams withdrew his complaint. On August 24, Norsen notified Williams, by letter, that his charges were "incorrect and, as such, an act of dishonesty" which could have resulted in discharge. However Respondent waived the discharge option and left his suspension, from August 16 through August 20, to serve as disciplinary time off. The letter stated that it was a "final warning that any further violations of the Contract or Company Rules will result in your discharge." The employees who had signed the petition but not the complaint were issued reprimands and warnings that further violations of the contract or rules would "result in severe disciplinary action up to and including discharge."

Williams filed a grievance concerning his suspension but no timely unfair labor practice charge. He also filed a grievance restating his allegations concerning Respondent's unauthorized deduction of time and money from his wages.

Norsen had come to Respondent and become its vice president of operations in late April. He was, according to testimony, a stickler for the enforcement of company rules. On May 15, he had issued a memorandum to the drivers directing them to complete driver operational reports "on all operational and sales incidents" including "spills or mixtures (cargo loss), personal injury," and "trip-related incidents." On May 20, he issued a memorandum informing the drivers of new forms for requesting paid or unpaid time off.

About September 10, Williams' grievance over his August suspension was discussed but not resolved at the first step of the grievance procedure. At that time, according to Williams, Cavatoe informed Norsen and Lawrence Lewis that the grievance would be added to the agenda for the next meeting of the Joint State committee, to be held on September 17. Williams testified that he told Lewis and Norsen that he would be in attendance to present his grievance. Norsen testified that verbal notice given at that time would have been satisfactory notwithstanding that written notice of time off for union business was required under article IV of the CSATTA. However, he denied hearing Williams say that he would be attending the next step of the grievance procedure.[21] It is conceivable that Williams made the statement, as he claimed, and that neither Norsen nor Lewis heard it. Whether they heard it or not, I find it difficult to believe that they would not have expected Williams to absent himself from work to attend a grievance meeting wherein his own grievance would be discussed and possibly resolved.

When Williams reported for work on September 16, he informed the dispatcher that he would be absent the following day. The dispatcher said he would write it on the dispatch sheet and Williams observed him making some notations thereon. Williams then took out his first load for the day and, while making that delivery, was sprayed with gasoline. According to Williams, no more than one-half gallon escaped from the hose and all of it fell on him, soaking his trousers. None of the spillage hit the ground. Williams reported the incident to the dispatcher, stating that he would complete the load, return the truck to the terminal, and go home to shower and change.

On Williams' return to the yard, he found two messages and forms in his mailbox. The first requested him to sign a leave-of-absence form for the following day. Williams refused; he wrote on the form, "This is not leave of absence—this is union business." The second requested that he fill out a driver operational report "for spill, cargo loss for coverage of possible complaint from term. or customer." Again, Williams refused, writing his own note which stated, "There was not spill only what went on me. One half to one gallon. Sam."

On September 22, Williams received his third reprimand since March 1981. That reprimand, a letter signed by Norsen, referred to his refusal to complete both forms and to his poor attendance for the week. It alluded to the cost of health and welfare benefits incurred by Respondent and stated:

> We cannot tolerate poor attendance or failure to fill out required requests for time off or explanation of why you cannot complete a days' work. We pay an enormous amount of fringe benefits on each employeee and must have complete attendance and job performance if we hope to remain in business.
>
> This letter is a warning that you must make arrangements in advance if you intend to be off work for any reason and that you will fill out required reports as requested or disciplinary action will follow.

[20] While Williams did not consider his mistake serious or costly, Norsen testified that the Company's efforts to rectify this mistake cost it 8 hours' holiday pay.

[21] Although Cavatoe testified on behalf of the General Counsel, he was not questioned and did not testify concerning Williams' alleged verbal notice. Lewis, however, corroborated Norsen's testimony.

Williams testified that company policy, as he understood it, did not require the completion of a spill report unless 5 or more gallons of gasoline were spilled. Pyatt, attempting to corroborate Williams, testified that no spill report was required unless 5 or more gallons were spilled. Spills of 3 to 5 gallons, he said, were merely noted on the delivery slip which was signed by the station managers or attendants. He, too, had had an incident where 1 or 2 gallons of gasoline spilled on his person, but that occurred approximately 2 years earlier. The only report Pyatt made of that incident, other than verbally informing the dispatcher, was to make a notation on the delivery ticket. Norsen testified that he made no exceptions in the requirement for completion of driver operational reports based on the size of a spill. He knew of no other incidents where a spill had occurred where a driver was requested to complete a report and did not do so. Respondent's exhibits, driver operational reports submitted both before and after Williams' September 22 reprimand, establish that drivers did submit reports of spills. The smallest spill reported, however, was 5 or 6 gallons.

Williams also testified that his attendance record was good and no evidence was offered to refute that testimony.

On September 22, Williams received a letter from Respondent which reviewed the claims of improper payment alleged in his grievance. In that letter, Norsen asserted that no instance of pay shortage could be found, that Williams' claim was unfounded, that the review which Respondent undertook had been time consuming and expensive, and that most of his problems were due to improper or incomplete logging of off-duty time and rest or lunch stops. That letter concluded with a reminder that pay requests must be completed in accordance with company policy and with a warning stating that "all lunch and rest stops must be logged accordingly. . . . Failure to properly complete your log or trip reports could subject you to disciplinary action." A copy of that letter was placed in his personnel file and that fact was noted in the letter.

Since at least some time prior to November 1979, Federal and state laws have required that vapor recovery systems be used when deliveries of gasoline are made to retail outlets. Such systems prevent the escape of gasoline fumes into the atmosphere. Respondent has endeavored to comply with these legal strictures. As early as November 30, 1979, Lawrence Lewis issued a memorandum to all of Respondent's drivers wherein he referred to deliveries being made without effecting the vapor recovery connections and stated, inter alia, "this disregard for the Federal and State laws, as well as Company policy must cease immediately. We intend to comply with the law as much as possible." Lewis also referred in the letter to the possibility of lost business resulting from driver failure to use vapor recovery. Williams described his understanding of Respondent's policy regarding the use of vapor recovery: Its use was required, he said, "at all times if and when possible." Other employees described it in even stronger terms. Thus, Howard Guerber testified that the policy was "to always use vapor recovery unless . . . it's impossible and then you call in." John Kronmueller testified that its use was mandatory and Clifford Pyatt similarly testified that impossibility was the only justification for failure to effect the vapor recovery hookup, that this was strict company policy, that violation of this policy would subject any employee to discharge and that Norsen was "a stickler for the rules." Each of the employees, however, testified that there were instances when vapor recovery hookup could not be made and that, in such circumstances, they were expected to call the dispatcher and secure authorization before making a delivery without using vapor recovery. Each also testified that at various sites where vapor recovery was impossible, they had ceased calling after repeatedly requesting and being granted such authorization.

Respondent also had a policy which required that drivers not leave the hoses unattended while gasoline is being delivered into the underground tanks. Gasoline, it was pointed out, is an extremely hazardous product, both toxic and highly explosive.

On the morning of December 9, Williams was dispatched on two loads, the second being to a Skelly station across from the airport where he had been making deliveries several times each month for a number of years. After completing his first delivery, he picked up the second load and drove to that station. According to his testimony, when a driver would pull into that station to make a delivery into the 10,000 gallon regular gasoline tank in the manner directed by the station manager, vapor recovery hookup was impossible because the rear wheels of the trailer would be immediately over the connection to the vapor recovery system. Williams testified that he had never used the vapor recovery system on that tank and had initially called the dispatcher on each occasion to inform him of that impossibility prior to making his delivery. After months of securing authorization to make the delivery without vapor recovery, Williams stopped calling. He had not been making such calls for the last 6 months.[22]

---

[22] Williams' testimony is corroborated by that of Kronmueller and both corroborated and contradicted, to some extent, by the testimony of Guerber and Pyatt. Thus, Guerber initially testified that the vapor recovery on that tank could be used when only one type of gasoline was being delivered. He said it could not be used on most occasions when two types of gasoline were being delivered because the driver could not get his truck and trailer into the station correctly, that cars would block the access. On cross-examination, Guerber admitted that it was possible to use the vapor recovery system on that tank but that its use required additional work including the moving of the truck. However, he further testified that the system on that tank had been changed since December 1981 and that prior to that date that tank did not have a working vapor recovery system. This latter testimony is not corroborated by any other witnesses, was not mentioned in an earlier affidavit given by Guerber, and is not credible. Pyatt testified that if a driver pulled into the airport Skelly station the way its management wanted him to, the trailer would be on top of the vapor recovery system, its wheels would prevent access to the connections, and, if there was enough room to reach them, the hoses were not long enough to make the connection. His testimony about the length of the hoses was credibly disputed by Respondent. He further testified, in what was clearly an exaggeration, that the plate over the connection was a half-inch thick sheet of steel 4 feet square which could not easily be lifted. All three drivers corroborated Williams' testimony that they had ceased calling the dispatcher for permission to make deliveries at that station without effecting vapor recovery some 6 months or so earlier.

According to Williams, he pulled into the station on December 9 in the way he normally did, and began unloading into the 10,000 gallon regular gasoline tank without attempting to hook up the vapor recovery system. At some point during his delivery, he allegedly shut off the flow of gasoline and went into the station to speak with a Skelly official about changing the type of hookup being used from a 2-point connection to a single-point system. That official, Charles Rand, agreed with Williams, according to Williams' testimony, and promised that he would speak to the Company's engineering department about changing the system. As Williams was then completing the delivery into this tank, Lawrence Lewis drove up, stepped out of his car with a camera,[23] and asked him why he was not using the vapor recovery. Williams explained the situation to Lewis, showed him why the vapor recovery system could not be used, and told him that he had pulled into the station in the manner requested by the customer. Lewis took some pictures, went inside the station, and spoke with Rand while Williams completed that delivery, moved the truck to the next set of tanks, hooked up the vapor recovery system, and completed his delivery. When Lewis came out of the station, he told Williams that Williams was being suspended and would be driven back to the terminal in Lewis' car. After a brief wait at the terminal, Williams was called into Norsen's office. Norsen asked him whether he had failed to use the vapor recovery system and whether he had left the trailer unattended while gasoline was being delivered. Williams explained the impossibility of using the vapor recovery system from the position the equipment was in and his reason for so positioning the truck.[24] He denied admitting that he had made a mistake warranting his discharge, as contended by Norsen and Lewis, discussed infra. Norsen told Williams that inasmuch as he "was on a final warning from the Fenton police incident . . . they had no alternative but to discharge" him.

As Lawrence Lewis described the incidents of December 9, he had been driving to a business appointment and passed the airport Skelly station. On doing so he noticed one of the Company's trucks with the product hose connected from the truck to the tank but no driver in attendance. From that vantage point he could not observe whether gasoline was actually being delivered. When he drove around the back of the station he saw gasoline fumes emanating from vents at the rear of the station which established that gasoline was being delivered and that the delivery was being made without vapor recovery. As he pulled around the front of the station he observed Williams coming out of the station, going to his truck. He watched Williams complete his delivery and move the hose to the next tank, again without making a vapor recovery hookup. Lewis then approached Williams and asked whether he was going to hook up the vapor recovery system. Williams protested that he could not reach it but, when Lewis asked him to try, was able to make the connection. Lewis asked Williams why the connection had not been used on the first tank and Williams told him that it was not possible, that he had discussed the problem with the customer's representative, had suggested that they utilize a different kind of hookup, and said the customer's representative had agreed with him.

After speaking with the customer's representative, Lewis called the terminal and told Norsen what he had observed. Norsen told him to suspend Williams and bring him back to the terminal. After watching Williams complete his delivery, and proving to Williams that the plate over the vapor recovery system could easily be removed, Lewis took some photographs and then drove Williams back to the terminal. At the terminal, according to both Norsen and Lewis, Williams was asked why he had not used the vapor recovery system. Williams, admitting that he had not used it and had made a mistake in not doing so, claimed that the position of the rear wheels on the trailer prevented access to the vapor recovery system. Norsen then asked why he had allowed product to be delivered without attending the hoses. To this, Williams responded that he could see the hoses from inside the station but admitted that he had made a mistake. Norsen then told Williams that Respondent could not condone his violations of company policy, that what he had done were dischargeable offenses and that he would be suspended pending probable discharge. Williams left the meeting saying something to the effect that Respondent would never get away with discharging him.

On December 9, Respondent, in a letter signed by Norsen, discharged Williams. That letter described the events of December 9 and charged him with both unloading without use of the vapor recovery system and leaving his unit while product was being discharged. It went on to state as follows:

> Your actions are in violation of the Uniform Rules and Regulations Governing Employees of Tank Truck Carriers Signatory to the Central States Area Tank Truck Agreement, Sections 3(g) "Flagrant disobeying of orders. First offense—reprimand," and 3(j) "Leaving equipment unattended when loading or unloading. First offense—reprimand." You were issued a final warning on August 24, 1981 that any further violations of the contract or Company Rules would result in your discharge.
>
> In view of the final warning and the nature of your conduct and attitude during what should have been a routine delivery, we feel we have no alternative except to discharge you for continued violations of the contract and Company rules.

Notwithstanding the language of the discharge letter, Norsen testified that Williams would have been discharged for his December 9 conduct whether or not he had received the August 24 final warning. The reference to that warning, according to Norsen, was only to satisfy the procedural requirements of the contractual grievance

[23] Credible testimony established that all company officials carry cameras for the purpose of photographing accidents, competitors who fail to make appropriate vapor recovery hookups, and other incidents.

[24] Williams acknowledged, under questioning by me, that it would have been possible to pull his truck in in a different way so as to effect vapor recovery but stated that to do so would have blocked a portion of the front of the station. It was this obstruction to which the customer objected.

procedure. The grievance committees request employers to furnish prior disciplinary records at the grievance proceedings, he said.

Williams filed a grievance over his discharge and that grievance was heard at several levels, culminating in a hearing before the Joint Area committee in Hollywood, Florida, on February 9, 1982. At that hearing, Stanley Lewis, speaking for Respondent, stated in the course of his summation that Williams had disagreed with him in regard to economic relief for the employer in the March negotiations and "that since that time period [Williams] had tried to become a knight in shining armor and take up all the troubles of the rest of the drivers."[25]

Several employees, including Kronmueller, provided affidavits to Williams for his use in regard to his grievance, which affidavits purported to show that the vapor recovery system could not be used at the airport Skelly station. Kronmueller's statement was brought out at the Two and Two (Joint State Committee) hearing and, on the following day, according to Kronmueller, Norsen approached him, looked at him with what Kronmueller described as "the evil eye" and told him "I'll get you for that." Norsen admitted knowledge of Kronmueller's affidavit in support of Williams, admitted making notations as to which employee had given such affidavits, and admitted speaking to Kronmueller about it. He claimed that he only told Kronmueller that Respondent was going to see to it that the people who had signed affidavits indicating that they could not make the vapor recovery hookup at the airport Skelly station were assigned to make deliveries to that station so that Respondent could establish that their statements were untrue.[26] On January 14, pursuant to Norsen's directions, Kronmueller was assigned to make a delivery to the airport Skelly station and to call Norsen as he was leaving for that site so that Norsen could meet him there. When Kronmueller called in, he asked Norsen why Norsen was coming out to the station. Norsen told him that it was to take his picture and prove that his affidavit supporting Williams was a lie. Norsen did meet Kronmueller at that station and took his picture using the vapor recovery system "in every way imaginable" including on the 10,000 gallon regular gasoline tank. Considering that Norsen did what, according to his testimony, he stated he would do when he spoke to Kronmueller, and also considering both their demeanors and inconsistencies between Kronmueller's testimony and his affidavit, I must credit the testimony of Norsen over that of John Kronmueller.

2. Analysis and conclusions

The General Counsel contends that Respondent bore animus against Williams because of the unfair labor practice charges he had filed in March 1981, and other union or protected activity he had engaged in, and "engaged in a systematic effort to build a case against Williams in order to eventually justify its intention to discharge him." Both the September 22 disciplinary warnings and the December 9 discharge are alleged as violative of Section 8(a)(1), (3), and (4) of the Act.[27] Each of the actions taken against Williams by Respondent, according to the General Counsel, was in fulfillment of the threat allegedly uttered by Lawrence Lewis on March 20. The discharge incident resulted, according to the General Counsel, from an elaborate multistage scheme whereby Williams would be dispatched to a station at which Respondent knew that the drivers "could not and did not" use the vapor recovery system, in such a way that Respondent would know when he was there, with Lewis positioned and camera equipped so as to catch him in the alleged transgression. Respondent denies that there was any scheme to discipline and ultimately discharge Williams and asserts that the conduct in which Williams engaged on December 9, in and of itself, warranted and brought about that discharge.

The alleged March 20 threat by Lewis to Williams is the linchpin in the General Counsel's theory, holding a wheel consisting of four disciplinary actions to an axle of unlawful motivation. The General Counsel's failure to establish the threat by a preponderance of credible evidence has withdrawn that linchpin. I cannot find, in its absence, that the discipline which followed Williams' filing of Case 14–CA–14829 on March 19 was part of any systematic effort to build a case against him or was otherwise motivated by animus toward Williams' charge-filing activity. Accordingly, I shall recommend that the General Counsel's complaint, insofar as it alleges a violation of Section 8(a)(4) of the Act, be dismissed.[28]

The failure of the General Counsel to credibly establish the March threat, or to convince me that its "systematic scheme" theory is valid, does not preclude a finding of merit as to some of the complaint's allegations. It is clear on the face of the August reprimand and suspension letters that Williams, by filing the complaint with the Fenton police, had engaged in an activity both concerted and protected.[29] Similarly, it is plain, from the

[25] Stanley Lewis acknowledged that, in response to an inquiry about the grievances filed by Williams, he had referred to Williams as considering himself "a knight in shining armor."

[26] The General Counsel offered this evidence solely to establish Respondent's animus toward employee exercise of protected rights; the intention to allege this as a separate violation of Sec. 8(a)(1) was expresly disclaimed.

[27] Inasmuch as the charge in Case 14–CA–15790 was not filed until March 9, 1982, Sec. 10(b) of the Act precludes any unfair labor practice finding in regard to the alleged March 20 threat, the May reprimand, or the August reprimand and suspension.

[28] With respect to the reprimand which Williams received in May, I can find no evidence which would warrant a conclusion that Williams was disciplined at that time in reprisal for his charge-filing activities, even assuming that Sec. 10(b) of the Act would permit such a conclusion. See *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960), and *Greenville Cotton Oil Co.*, 92 NLRB 1033 (1950), enfd. sub nom. *Grain Millers v. NLRB*, 197 F.2d 451 (5th Cir. 1952), discussed infra. Williams admitted making the mistake for which he was reprimanded and Respondent's action in reprimanding him may as rationally be explained by the presence of Norsen, a stickler for rigid adherence to company rules and newly arrived on the Commercial Cartage scene, as by any implication of animus. Moreover, it must be noted that Williams had filed previous charges without any hint of employer animus toward such activity and that Lawrence Lewis, the alleged perpetrator of the threat, was not involved in the May discipline. Rejection of the General Counsel's contentions that the May discipline was unlawfully motivated and evidenced animus further negates the General Counsel's contention of a long-range scheme to eliminate Williams from the scene.

[29] See *Ambulance Services of New Bedford*, 229 NLRB 106 (1977), enfd. 564 F.2d 88 (1st Cir. 1977). Therein, much like here, the employee con-

Continued

face of the disciplinary letters issued to Williams and his fellow employees, that Respondent strenuously objected to this exercise of their statutory rights. This animus, although displayed by Respondent in actions taken outside 10(b)'s limitation period, may be considered to explain and "shed light on the true character" of Respondent's actions within that statutory period which may constitute, in and of themselves, unfair labor practices. As the Supreme Court more fully stated in *Bryan*, supra, 362 U.S. at 416–417:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

The two disciplinary letters issued to Williams on September 22 fall within the ambit of the first situation described by the Court in *Bryan*. They may, and I find that in part they do, constitute unfair labor practices in and of themselves on which Respondent's pre-10(b) conduct sheds light, helping to establish Respondent's animus, an element necessary to a finding of violation. Such animus is similarly shown by the remarks of Stanley Lewis at Williams' February 1982 grievance hearing wherein Stanley Lewis, in seeking to persuade the grievance panel to sustain Williams' discharge, derogatorily referred to Williams as a "knight in shining armor" taking up the causes of other employees.[30]

More strongly evidencing the discriminatory nature of the reprimand issued to Williams for his refusal to complete a leave-of-absence request and the warning issued to him for alleged absenteeism and improper logging of off-duty time is the obvious pretextual nature of those reprimands. Neither the collective-bargaining agreement nor the rules as announced by Norsen required that a union officer take a leave of absence to attend to union business and Respondent knew or should have known that his September 17 absence was for official union business. Indeed, the simple fact is that Williams was reprimanded for taking time off, to attend to union business, itself a protected activity. Additionally, Respondent included totally unwarranted references to absenteeism in the warning.

Similarly, the second September 22 warning appears to have been motivated by animus directed toward Williams' filing of the grievance to which the September 22 letter purported to respond. That very response sought to discourage similar recourse to the grievance procedure by emphasizing Respondent's displeasure at having to investigate claims of improper wage payments and warned that further discipline might result if such grievances brought to light what Respondent deemed to be the grievant's errors rather than Respondent's.

Accordingly, I must conclude that by reprimanding Williams for his refusal to submit a leave-of-absence request for his union business related absence on September 17, and its threat of discipline for filing a grievance concerning his wage payments, Respondent has violated Section 8(a)(3) and (1) of the Act.[31]

Notwithstanding that I have found that Respondent bore animus toward those who would exercise their statutory rights, and particularly toward Williams, I am constrained by both the facts and the law from finding a violation in Williams' discharge. Williams was caught at the Skelly station in flagrante delicto, in violation of two well-established and significant rules. I cannot subscribe to the theory, propounded by the General Counsel, that this event was the result of an elaborate scheme wherein Respondent set up Williams for discharge, for the following reasons: (1) I have discredited the evidence of the threat which allegedly set the ground work for such a plot; (2) the evidence does not establish that Williams' as-

---

complained to the police that the employer was issuing checks which were not being honored and filed a criminal complaint against the signer of the checks, his employer's president. For that he was discharged. The Board found that the employee's conduct therein constituted protected concerted activity. The merits of Williams' complaint, moreover, are irrelevant to this conclusion so long as his complaint was not made in bad faith. *Wagner-Smith Co.*, 262 NLRB 130 (1982); *OMC Stern Drive*, 253 NLRB 486 fn. 2 (1980), enfd. 676 F.2d 698 (7th Cir. 1982); *John Sexton & Co.*, 217 NLRB 80 (1975). There is neither evidence nor implication of bad faith in this record.

[30] Stanley Lewis was certainly not, by these remarks, attempting to persuade the grievance panel of Williams' virtues. I note, further, that to a lesser extent even the credited versions of the March 20 conversation between Lawrence Lewis and Williams and the conversation between Norsen and Kronmueller concerning Kronmueller's affidavit in support of Williams tend to indicate Respondent's displeasure with employee exercise of protected rights.

[31] In reaching this conclusion I have rejected the General Counsel's contention that the September 22 reprimand, to the extent that it related to Williams' refusal to submit a driver operational report concerning the "spill" of gasoline, was also discriminatory. Respondent's policy, requiring the submission of such reports, contained no exceptions based on the amount of the spill and the evidence of any policy negating such a requirement for small spills was too vague, contradictory, or outdated to negate the plain language of the rule. Moreover, unlike the leave of absence and grievance response matters, Williams' refusal to submit a incident report did not involve any protected rights.

signment to two trips in succession was made so that Respondent would know when he would arrive at the airport Skelly station; (3) in view of the fact that the employees had not been calling in to report difficulties with the vapor recovery hookup at the airport Skelly station for 6 or more months, it cannot be established that Respondent would have had reason to believe that Williams would not utilize the vapor recovery system when making that assigned delivery; (4) similarly, in view of the importance Respondent attached to the use of vapor recovery systems, I cannot believe that it would knowingly have permitted the nonuse of vapor recovery for any significant length of time, as would necessarily be implied by the General Counsel's theory; (5) considering all of the evidence, including both the testimony of various witnesses and pictures introduced into evidence, I must conclude that Williams could have made the vapor recovery hookup on the 10,000 gallon regular gasoline tank, albeit with some extra effort, by stationing his truck somewhat differently, either a few feet back or ahead and by using extra hoses; and, (6) I further conclude that the evidence establishes Williams' failure to attend the vehicle while gasoline was being unloaded or, at the least, Respondent's reasonable belief that he had so failed. Williams had thus placed himself in breach of the established rules of conduct and exposed himself to justifiable discipline.

Respondent contends that Williams' December 9 conduct warranted and would have brought about his discharge even absent any prior warnings. This self-serving assertion is contradicted by the very language of the discharge letters. Therein, each of his actions on that day is described as a violation, for which reprimand is the appropriate first offense penalty. The letter goes on to refer to the final warning of August 24 and states that his discharge results from that final warning *and* from his conduct on December 9.

The letter, not Respondent's testimony, accurately describes the reason for discharge. The set of facts put forth in the letter, I believe, presents the second situation described by the Court in *Bryan*, infra, wherein the Court referred to "conduct occurring within the limitations, [which] can be charged to be an unfair labor practice only through reliance on an earlier [time-barred] unfair labor practice." To establish that Respondent's reliance on the August 24 final warning renders the discharge unlawful one would have to find that warning, itself, to have been unlawfully issued. This is precisely what Section 10(b), as analyzed by the Court in *Bryan*, prohibits. See also *Greenville Cotton Oil*, supra, cited with approval by the Court in *Bryan*. Therein, strikers who had been permanently replaced demanded reinstatement on the ground that the strike had been caused or prolonged by unfair labor practices committed by the employer prior to the hiring of the strike replacements. However, since the alleged unfair labor practices took place more than 6 months prior to the filing and the service of the charge, the Board held that Section 10(b) barred any reinstatement orders. See also *Davis Fire Brick Co.*, 131 NLRB 393 (1961). Williams' discharge was therefore premised on discipline validly assessed for breach of Respondent's rules and a final disciplinary warning, the validity of which is beyond attack. Under such circumstances, even evidence of Respondent's animus toward those who would engage in statutory protected activities is insufficient to sustain the General Counsel's ultimate burden of proving the discharges discriminatory. It cannot be said, on this record, that Respondent would not have discharged Williams on December 9 whether or not he had engaged in union or other protected concerted activities. See *Wright Line*, 251 NLRB 1083 (1980). See also *Klate Holt Co.*, 161 NLRB 1606 (1966), wherein the Board noted that the circumstance that the employer may have welcomed the justified opportunity to discharge an unwelcome activist does not make the discharge discriminatory and unlawful.

Accordingly, I shall recommend that the consolidated complaint, to the extent that it alleges that Williams was discharged in violation of Section 8(a)(3) and (1) of the Act, be dismissed.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. By reprimanding and threatening its employees with discipline for filing grievances or engaging in other union and protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices affected commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent has not engaged in any unfair labor practices other than those described above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Commercial Cartage Co., Fenton, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Reprimanding or otherwise threatening employees with discipline for filing grievances or engaging in other union and protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Remove the September 22 warning and reprimand from Samuel A. Williams personnel file.

---

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Post at its Fenton, Missouri facility copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the Board shall retain jurisdiction of this proceeding for the purpose of entertaining an appropriate and timely motion for further consideration of the dismissal of the 8(a)(5) allegations of the consolidated complaint upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, been either resolved by amiable settlement in the grievance procedure or submitted promptly to arbitration; or (b) the grievance or arbitration procedures have not been fair and regular or has reached a result which is repugnant to the Act.

IT IS ALSO FURTHER RECOMMENDED that the consolidated complaints be dismissed insofar as they allege violations of the Act not specifically found herein.

[33] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT reprimand or otherwise threaten with discipline any of our employees who file grievances or engage in other union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL remove the September 22 reprimand and warning issued to Samuel A. Williams from his personnel file.

COMMERCIAL CARTAGE COMPANY

International Association of Machinists and Aerospace Workers, AFL–CIO, and its Local Lodge 1224 of District Lodge 69 *and* Motor Trucks, Inc. Case 19–CB–4865

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On a charge filed by the Employer 28 July 1983 and amended 16 January 1984 the General Counsel of the National Labor Relations Board issued a complaint 2 September 1983 and an amended complaint 18 January 1984 against the Respondents. The complaint alleges that Respondent Local Lodge 1224 refused to accept five employees' resignations from membership in the Union, and filed intraunion charges, conducted disciplinary proceedings, and imposed court-collectible fines against the employees for conduct that occurred after they had submitted resignations, and that Respondent International Association maintained a provision in its constitution restricting the right to resign. The amended complaint alleges these actions violate Section 8(b)(1)(A) of the Act. The Respondents filed an answer denying that they committed any unfair labor practices.

On 30 January 1984 the parties jointly petitioned the Board to transfer the instant proceeding to the Board without benefit of a hearing before an administrative law judge. The parties agreed that the formal papers and the parties' stipulation of facts constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. On 23 July 1984 the Associate Executive Secretary, by direction of the Board, issued an Order approving the stipulation and transferring the proceeding to the Board. The General Counsel filed a brief. The Respondents did not file a brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the brief, and the entire record in this proceeding, and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a Washington corporation with its office and place of business in Everett, Washington, is engaged in the business of truck sales and repair. During the 12 months preceding issuance of the amended complaint, the Employer, in the course and conduct of its business operations, had gross sales of goods and services valued in excess of $500,000, sold or shipped goods or provided services from its facilities within the State of Washington valued in excess of $50,000 to customers outside the State of Washington or to customers within the State which were themselves engaged in interstate commerce by other than indirect means, and purchased or caused to be transferred and delivered to its facilities within the State goods and materials valued in excess of $50,000 directly from sources outside the State, or from suppliers within the State which in turn obtained such goods and materials directly from sources outside the State. The parties stipulated, and we find, that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties further stipulated, and we find, that the Respondents are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

About June 1983 Local Lodge 1224 brought internal union charges, conducted disciplinary proceedings, and assessed court-collectible fines against employees Lloyd Winther, Roy Dawnes, Melvin Larsen, Morinus Oosterwyk, and John Venderped for crossing the Local's authorized picket line to work at the Employer. The five employees had been members of the Union. They submitted their resignations from membership during Local Lodge 1224's economic strike against the Employer, but before crossing the picket line. The Respondents have refused to consider the resignations effective because of restrictions on the right to resign contained in the International Association's constitution. The relevant portion of the constitution reads as follows:

> Resignations shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout or within 14 days preceding the commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

[1] On 23 August 1984 the Respondents filed a motion to stay proceedings pending Supreme Court review of the validity of restrictions on resignation from union membership. We deny the motion.

B. *Contentions of the Parties*

The General Counsel contends that the Board's recent decisions in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), and *Engineers & Scientists Guild (Lockheed-California Co.)*, 268 NLRB 311 (1983), are controlling and the act of disciplining the five individuals and the maintenance of the constitutional provision set forth above constitute violations of Section 8(b)(1)(A) of the Act. The Respondents allege that the complaint fails to state a claim and deny that they have committed unfair labor practices or that an appropriate remedy should include expunging the constitutional provision.

C. *Discussion*

We agree with the General Counsel. A union may not lawfully restrict its members' right to resign. *Neufeld Porsche-Audi*, supra. Accordingly, we find that the constitutional provision set forth above is invalid and the five employees' resignations were effective when submitted. Therefore, Respondent Local Lodge 1224 violated Section 8(b)(1)(A) by refusing to accept the employees' resignations, and by filing intraunion charges, conducting disciplinary proceedings, and imposing court-collectible fines against the employees for returning to work after they had resigned their union memberships.

Furthermore, a union's maintenance in its constitution of an invalid provision restricting resignation tends to restrain and coerce employees from exercising their Section 7 rights. *Lockheed-California*, supra. Respondent International Association's maintenance of the constitutional provision set forth above therefore violated Section 8(b)(1)(A).

CONCLUSIONS OF LAW

1. By refusing to accept resignations from employees Lloyd Winther, Roy Dawnes, Melvin Larsen, Morinus Oosterwyk, and John Venderped, and by bringing internal union charges, conducting disciplinary proceedings, and imposing court-collectible fines about June 1983 against them for returning to work at Motor Trucks, Inc., during Respondent Local Lodge 1224 of District Lodge 69's strike after they had submitted resignations from membership in the Union, Respondent Local Lodge 1224 of District Lodge 69 violated Section 8(b)(1)(A) of the Act.

2. By maintaining in its constitution the restriction-on-resignation provision set forth above, Respondent International Association of Machinists and Aerospace Workers, AFL–CIO, violated Section 8(b)(1)(A) of the Act.

3. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents engaged in unfair labor practices in violation of Section 8(b)(1)(A) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. We shall order Respondent Local Lodge 1224 to refund to Winther, Dawnes, Larsen, Oosterwyk, and Venderped any moneys they may have paid as a result of the fines imposed against them, with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). In addition, we shall order the Respondents to expunge from their governing documents and constitution the restriction-on-resignation provision found invalid.[2]

ORDER

The National Labor Relations Board orders that

A. Respondent Local Lodge 1224 of District Lodge 69, Everett, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing employees who have resigned from, and are no longer members of, the Respondent in the exercise of the rights guaranteed them by Section 7 of the Act by refusing to accept their resignations, and by filing intraunion charges, conducting disciplinary proceedings, and imposing court-collectible fines against them because of their postresignation conduct in working at Motor Trucks, Inc. during the the strike that led to disciplinary action against Lloyd Winther, Roy Dawnes, Melvin Larsen, Morinus Oosterwyk, and John Venderped about June 1983.

(b) Maintaining in its governing documents the restriction-on-resignation provision in the constitution of Respondent International Association of Machinists and Aerospace Workers, AFL–CIO set forth below:

> Resignations shall not relieve a member of his obligation to refrain from accepting em-

[2] Though the complaint in this case does not allege, in haec verba, the "maintenance" of the provision by Respondent Local Lodge 1224 as being unlawful, the complaint does allege that Local Lodge 1224 unlawfully refused to consider the resignations valid because of the provision. Further, the absence of such a "maintenance" allegation has no bearing on the Board's discretion to fashion appropriate remedies for the violations found. *Neufeld Porsche-Audi*, supra. We will therefore order Respondent Local Lodge 1224 to cease and desist from maintaining the provision in its governing documents and to expunge the provision therefrom. Member Dennis would not order Respondent Local Lodge 1224 to take these two actions. See id. at fn. 22.

ployment at the establishment for the duration of the strike or lockout or within 14 days preceding the commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the fines levied about June 1983 against Lloyd Winther, Roy Dawnes, Melvin Larsen, Morinus Oosterwyk, and John Venderped because of their postresignation work for Motor Trucks, Inc., and refund to them any moneys they may have paid pursuant to those fines, with interest.

(b) Expunge from its records and files all references to fines, intraunion charges, or disciplinary proceedings against the above-named employees for conduct occurring after their resignations from the Union, and notify them in writing this has been done.

(c) Expunge from its governing documents the restriction-on-resignation provision in the constitution of Respondent International Association of Machinists and Aerospace Workers, AFL–CIO set forth above.

(d) Post in its business office and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix A."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Motor Trucks, Inc., if willing, at all places where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent International Association of Machinists and Aerospace Workers, AFL–CIO, Portland, Oregon, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in its constitution the restriction-on-resignation provision set forth above in paragraph A,1,(b) of this Order.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from its constitution the restriction-on-resignation provision set forth above.

(b) Post at its business office and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Motor Trucks, Inc., if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[4] See fn. 3, above.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce employees who have resigned from, and are no longer members of, Local Lodge 1224 in the exercise of the rights guaranteed them by Section 7 of the Act by refus-

ing to accept their resignations, and by filing intraunion charges, conducting disciplinary proceedings, and imposing court-collectible fines against them because of their postresignation conduct in working at Motor Trucks, Inc. during the strike that led to disciplinary action againt Lloyd Winther, Roy Dawnes, Melvin Larsen, Morinus Oosterwyk, and John Venderped about June 1983.

WE WILL NOT maintain in our governing documents the restriction-on-resignation provision in the constitution of the International Association of Machinists and Aerospace Workers, AFL–CIO set forth below:

> Resignations shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout or within 14 days preceding the commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the fines levied about June 1983 against Lloyd Winther, Roy Dawnes, Melvin Larsen, Morinus Oosterwyk, and John Venderped because of their postresignation work for Motor Trucks, Inc. and refund to them any moneys they may have paid pursuant to those fines, with interest.

WE WILL expunge from our records and files all references to fines, intraunion charges, or disciplinary proceedings against the above-named employees for conduct occurring after their resignations from the Union, and notify them in writing this has been done.

WE WILL expunge from our governing documents the restriction-on-resignation provision in the constitution of the International Association of Machinists and Aerospace Workers, AFL–CIO set forth above.

LOCAL UNION 1224 OF DISTRICT LODGE 69

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our constitution the restriction-on-resignation provision set forth below.

> Resignations shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout or within 14 days preceding the commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL expunge from our constitution the restriction-on-resignation provision set forth above.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL–CIO

D & M Sheet Metal, Inc. *and* Sheet Metal Workers International Association, Local Union #19, Petitioner. Case 4–RC–15562

14 December 1984

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held 6 April 1984 and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 4 for and 2 against the Petitioner, with 3 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Acting Regional Director's findings and recommendations,[1] and finds that a certification of representative should be issued.

The Acting Regional Director found, inter alia, that D & M is an employer within the construction industry and that April Rambo and Robert McGinn worked enough days during the 24 months preceding the election to satisfy the *Daniel Construction Co.*,[2] special criteria available for determining voter eligibility in the construction industry. However, he concluded they were not eligible to vote because they were engaged in full-time nonunit work on, and prior to, the eligibility date. *Eastern Rock Products*, 239 NLRB 892 (1978).

We agree with the Acting Regional Director's recommendation that the challenges to the ballots of Rambo and McGinn be sustained. The parties raised no issue concerning special eligibility criteria when they entered into the Stipulated Election Agreement which contains the standard eligibility formula. We find that the agreement is proper and should be given effect. Accordingly, we find it unnecessary to consider the *Daniel Construction* issues that the Acting Regional Director discusses.

[1] In the absence of exceptions, we adopt, pro forma, the Acting Regional Director's recommendation that the challenge to Thomas Hollenbach's ballot be sustained.

[2] 133 NLRB 264 (1961) (employees in unit who worked at least 30 days in 12-month period preceding election or who did some unit work in 12-month period preceding election and at least 45 days in 24 months immediately preceding eligibility date, eligible to vote).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Sheet Metal Workers International Association, Local Union #19 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All sheet metal workers employed by D & M Sheet Metal, Inc., at its Westlawn, Pennsylvania facility, excluding all office clerical employees, guards and supervisors as definded in the Act.

MEMBER ZIMMERMAN, concurring.

I agree with my colleagues that the Stipulated Election Agreement should be given effect. I further find that the *Daniel Construction* eligibility formula does not in any event apply in this case. That formula is not implicated in every election in the construction industry. See, e.g., *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978); *E. V. Williams Co.*, 175 NLRB 792 (1969). It was devised to address the unique sort of work assignments common in the construction industry. The Board found that because of the nature of the industry many employees experience intermittent employment for short periods and may be employed by several different employers during the course of a year. In consideration of those factors, the Board determined that employees who had been employed by an employer for at least 30 days in the year preceding the eligibility date for the election or had some employment with that employer in the year preceding the election and 45 days in the 2-year period preceding the eligibility date would have a continuing interest in their working conditions which would warrant their participation in the election. Here, as the Employer concedes, Rambo's and McGinn's work cannot be characterized as intermittent short term employment, nor do they work for several different employers in any given period of time. Instead, they hold permanent full-time jobs with another company. Although they sometimes work for this Employer, they do so only on the infrequent occasions when there is a lapse in their regular employment. As they hold regular full-time positions, they are not the kind of employees for which the special rule in *Daniel Construction* was developed.[1]

[1] *Eastern Rock Products* relied on by the Acting Regional Director is a limitation on the *Daniel Construction* rule; as *Daniel Construction* is not applicable in the instant case, likewise *Eastern Rock* does not apply.

Watt Electric Company and its alter ego, Watt Plumbing, Airconditioning & Electric, Inc. and John O. Watt *and* International Brotherhood of Electrical Workers, Local No. 584, AFL–CIO–CLC. Case 16–CA–11434

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 31 July 1984 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Watt Electric Company and its alter ego, Watt Plumbing, Airconditioning & Electric, Inc. and John O. Watt, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In the absence of exceptions Member Hunter adopts the judge's conclusion that the Union is the Sec. 9(a) collective-bargaining representative of the Respondent's employees.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. In this alter ego case I find that Respondent, establishing an alter ego in order to operate nonunion with the hope that it could then make a profit, violated Section 8(a)(5) of the Act by refusing to apply the union contract to its alter ego, and transgressed Section 8(a)(3) by constructively discharging its employees, members of the Union, when they quit rather than applying to work for the alter ego.

The case was tried before me in Tulsa, Oklahoma, on March 7–8 and April 16, 1984, pursuant to the January 27, 1984 complaint issued, and thereafter amended, by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed December 22, 1983, by International Brotherhood of Electrical Workers, Local No. 584, AFL–CIO–CLC (the Union, IBEW, or Local 584), against Watt Electric Company, Inc.[1]

In the complaint, as amended, the General Counsel alleges that the Respondent violated Section 8(a)(5) of the Act on August 23, 1983, when WPA repudiated its collective-bargaining contract with Local 584, unilaterally terminated its employees, and began operating nonunion under the name of Watt Electric Company (WECO). The General Counsel also alleges that Respondent violated Section 8(a)(3) of the Act on August 23 by terminating the employees of WPA because they were members of or represented by the IBEW.

By its answer Respondent admits receiving the charge but essentially denies all other allegations. At the hearing, Respondent amended its answer to admit commerce and certain other facts.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

WPA, until August 23, 1983, and WECO, on and after that date, have been engaged in the business of providing electrical contracting services in the building and construction industry. During calendar year 1983, Respondent performed such services valued in excess of $50,000 for other business enterprises, including Oklahoma Electric Supply Company (OES), located within the State of Oklahoma. During the past 12 months OES, an Oklahoma corporation with a place of business in Tulsa, Oklahoma, purchased and received goods and materials valued in excess of $50,000 at its Tulsa facility direct from points outside Oklahoma.

WPA and WECO are members of the Eastern Oklahoma Chapter, National Electrical Contractors Association, Incorporated (NECA). NECA is an organization of employers engaged in providing electrical contracting services. NECA exists for the purpose, inter alia, of representing certain employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. Various employer-members of NECA annually purchase goods and materials valued in excess of $50,000 directly from suppliers located outside Oklahoma.

I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are 1983 unless otherwise indicated. In this decision, Watt Plumbing, Airconditioning & Electric, Inc. is designated as WPA and John O. Watt as Watt. Because its articles of incorporation reflect the correct name to be "Watt Electric Company" (G.C. Exh. 11), I exclude the "Inc."

[2] Although Respondent asserted at the close of the hearing that it desired to file a brief, it failed to do so.

II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Local 584 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

John O. Watt has been president of WPA since 1979 (Tr. 1:37; 3:16).[3] Watt testified that the Company, although under a different name, was established in 1910 (Tr. 3:15). For approximately 50 years it enjoyed a bargaining relationship with the Union (Tr. 3:15). In 1979 Watt's father, Dale Watt, sold WPA to his sons. John Watt purchased 87 percent and his brother Jim purchased 13 percent (Tr. 1:64–65, 119).

On January 2, 1974, Watt's father, still active in the business then, signed a "Letter of Assent-A" with the Eastern Oklahoma Chapter of the National Contractors Association (NECA).[4] In signing the form (G.C. Exh. 2), WPA designated NECA as its collective-bargaining representative for all matters "contained in or pertaining to the current approved inside labor agreement" between NECA and Local 584. The authorization, by its express terms, shall remain in effect until terminated by the undersigned employer giving written notice to the Eastern Oklahoma Chapter, NECA, and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the aforementioned approved labor agreement." By its amended answer, Respondent admits that the Assent designation, described above, remained in effect until June 1983 as to WPA (Tr. 1:15).

The most recent collective-bargaining agreement (CBA) executed by NECA and Local 584 expressed an effective term of June 2, 1982, through May 31, 1984, continuing thereafter from year to year unless modified or terminated on written notice of 90 days prior to the anniversary date (G.C. Exh. 3). By letter dated June 9, 1983, Watt, on behalf of WPA, purported to cancel the Assent and to revoke the designation of NECA as WPA's bargaining representative (G.C. Exh. 7).[5] In a letter bearing the same date, Watt notified Local 584 of its desire to terminate the CBA set to expire May 31, 1984 (G.C. Exh. 6). Watt stated in the letter that WPA representatives would be available to meet with the Union to discuss a successor contract.

The General Counsel contends that Respondent's attempt to withdraw the bargaining authorization was untimely because Watt's letter failed to give the required 150 days' notice. The argument appears to be that Respondent desired the notice to be effective immediately (Br. at 26). Of course, it is clear that Watt's revocation letters, dated June 9, 1983, gave well over the required 150 days' notice prior to the contract's anniversary date. However, on June 29, 1983, NECA and Local 584 executed an amendment to the 1982–1984 CBA whereby the CBA was extended 1 year, to May 31, 1985. The extension was in exchange for the Union's deferring 75 cents of a $1-an-hour pay raise, scheduled for June 1, 1983, to June 1, 1984, with the remaining 25 cents of the scheduled dollar to be paid to the pension plan effective June 1, 1983. WPA took advantage of the deferred wage rate by continuing to pay the existing rate, plus the additional 25 cents for the pension fund, until WPA became dormant in August 1983. Watt testified that he considered WPA bound to the 1982–1984 CBA for its original term, but not to the 1-year extension, and that the reason WPA ceased making the fringe benefit payments after August 1983 is because after August 23, 1983, WPA no longer employed any bargaining unit employees (Tr. 1:182, 192–196, 212). I find that WPA's revocation notice was timely and effective. The notice exceeded the 150 days required.

As established by the amended pleadings, the bargaining unit is described as:

> All full-time and part-time journeymen electricians, apprentices, and helpers employed by Respondent, exclusive of office employees, guards, watchmen, and supervisors as defined in the Act.

WPA employed about four employees in the unit.[6]

B. *Alter Ego WECO Created to Evade Union Contract*

1. Facts

There is no dispute that by 1982 WPA was suffering from economic difficulty. Watt testified that WPA was losing jobs by being underbid by nonunion contractors during a time when the economy was generally poor (Tr. 1:231). The average nonunion pay rate, Watt testified, is about one-half that of union scale (Tr. 3:22, 48, 85). In January 1983 the Watt brothers, particularly John Watt, began a series of steps designed to help keep WPA afloat. Thus, in January, Watt eliminated his own salary (Tr. 1:68; 3:27). In April he mortgaged his home for $40,000, and Jim Watt did likewise for $10,000, and they put the funds into WPA (Tr. 1:70–71; 3:29, 91). Watt also sold an interest in an oil well, and in March he sold his automobile to provide his living expenses (1:71–72). WPA also auctioned some inventory for $40,000.[7] WPA

[3] Transcript references are by volume and page. The third day of this hearing followed a 6-week recess, and the reporting service prepared the volume of testimony for the third day as if it were a new hearing beginning with page one. To avoid confusion, I designate the transcript for the third day as volume 3, and I list the page numbers as they appear in that volume.

[4] The company name shown on the form is "Watt Electric Company." Watt explained that the company performed electrical work for 20 years, and that the clerks at NECA frequently used the name shown as the company's name as a shorthand rendition of the longer name (Tr. 1:214–216).

[5] Watt testified that WPA has not dropped its membership in NECA, and that WECO is a member of NECA although WECO has never assigned its bargaining rights to NECA (Tr. 3:92).

[6] Even if WPA initially entered into a prehire agreement with the Union under Sec. 8(f) of the Act, that agreement ripened into a Sec. 9 contract by virtue of the fact that WPA's employees constituted a permanent and stable work force with a majority, and perhaps all, being members of Local 584. In short, at all times material herein, Local 584 enjoyed majority status.

[7] Because the inventory sold at far below value, the sale hurt WPA's credit standing at the firm's bank, for the bank had listed the inventory at a much higher value (Tr. 3:31, 33).

also terminated an office employee who had worked for the firm 21 years (Tr. 1:137; 3:28).

Although Watt never told the Union how bad WPA's financial plight was, the NECA contractors did seek a number of contract changes in an attempt to remain competitive. The Union granted none of those requested, but did agree that a contractor could pay a reduced rate, 75 percent of scale, for certain small jobs. This concession was called the Jobs Target Program (G.C. Exh. 15).

Watt testified that, because the Jobs Target Program did not apply to much of his work, he went to each of his employees in July 1983 and asked if they would agree that WPA could apply the reduced scale to all jobs of WPA (Tr. 1:85, 92).[8] Each agreed. The Union did not learn of this conduct until late August (Tr. 2:374).[9]

Although the reduced rate helped, Watt testified, it was not enough (Tr. 1:93; 3:55). Earlier WPA's bank had given the Company an ultimatum—get profitable, or else! (Tr. 1:67, 160–161, 168) In August the Watt brothers decided they would have to take the ultimate step—begin operating a firm which had no union contract (Tr. 3:56). About August 1 the idea of incorporating another firm began to form (Tr. 1:40), and the decision made by the Watt brothers became firm on August 19 (Tr. 1:66, 217, 230). WECO was incorporated on August 22, the date the articles of incorporation were filed with the office of the Secretary of State of Oklahoma (1:41, 55; G.C. Exh. 11).

Watt testified that WECO was created in response to the bank's pressure to become profitable, and the only way left in which a profit could be made was by deactivating WPA and operating through a new company, WECO, which would not have to pay the high wages and benefits mandated by a union contract (Tr. 1:67, 161, 166).[10] This is reflected in a letter, dated January 9, 1984, from Respondent's counsel, Jeff Nix, to Board agent Leslie D. Imboden, responding to the Union's charge in this case. The first paragraph of the two-paragraph letter reads (G.C. Exh. 8):

> In response to the charges filed the Company replies as follows: Late in the summer of 1983 the employer ascertained that it could no longer operate paying union scale and further that the union would not consider a lesser rate, so the employer ceased doing business.

This is not a case involving a "double breasted" operation.[11] At the hearing Respondent's counsel described the situation as being one in which one company (WPA) simply "went broke," and, in an effort to salvage what was left, "They offered a reduced wage rate to employees who are performing essentially the same work [for WECO]." (Tr. 1:143)

Watt testified that he did not awake one morning hating the Union, and that if somehow he were given complete discretion regarding wages and benefits, he still would be operating under the CBA and WECO would not have been formed (Tr. 1:167–168).

The parties stipulated that Respondent converted WPA to a dormant status; that WPA exists merely to service its mortgage obligation; that the various business transfers, purchases, and lease payments between WPA and WECO have not been as an arm's-length transaction; and that WPA and WECO constitute a single integrated business enterprise, with the qualification that WPA exists only in its dormant condition (Tr. 1:149–151).

The parties further stipulated that at all times material, John O. Watt has controlled the operation and management of both WPA and WECO, and that the matters so controlled include labor relations (Tr. 1:60, 129).[12]

Watt testified that he was responsible for the hiring at both WPA and WECO, although Jim Watt, his brother, served as the only supervisor at WPA other than Watt (Tr. 1:132–133). Jim Watt is vice president of WPA and secretary-treasurer of WECO (Tr. 1:53, 55). The boards of directors of both corporations are composed principally of members of the Watt family (1:60). Watt testified that WECO assumed what business WPA had and has tried to expand on it (Tr. 3:64–65) while using the same job classifications for its electricians of journeyman and apprentice (Tr. 1:135). Following its August 23 deactivation, WPA has leased its office space, equipment, and land to WECO for $3600 per month from which WECO operates (1:141, 169). When WECO needs a supply item, it purchases it at market value from the inventory still owned by WPA (Tr. 3:89–90).

2. Analysis and conclusions

As noted by the Third Circuit in its lucid opinion in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, (1982), the Board reviews the following four factors in determining whether two nominally separate entities in reality constitute a single employer: (1) functional integration of operations; (2) centralized control of labor relations;[13] (3) common management; and (4) common ownership or financial control.[14] However, a finding of single-employer status does not necessarily establish that an employerwide unit is the appropriate bargaining unit. *South Prairie Construction Co. v. Operating Engineers*

[8] The complaint was amended at trial to allege such direct dealing as being violative of Sec. 8(a)(5) of the Act (Tr. 2:328, 379; G.C. Exh. 20).

[9] Watt bypassed the Union because he felt Local 584 would be negative (1:191, 225; 3:72). He never sought individual relief from the Union from the contractual wage scale and benefit contributions (Tr. 1:73–76). However, it should be noted that under art. II, sec. 2.4, of the 1982–1984 CBA, any better term granted to one contractor must be extended to all (G.C. Exh. 3).

[10] Watt testified that WECO has never recognized the Union or honored the 1982–1984 CBA (Tr. 1:174, 220).

[11] The Board has defined "double breasted" as being one "in which a contractor operates two companies, one unionized and the other nonunionized." *Walter N. Yoder & Sons*, 270 NLRB 652 fn. 2 (1984); Comment, *Double-Breasted Operations In the Construction Industry: A Search For Concrete Guidelines*, 6 U. Dayton L. Rev. 45 fn. 3 (1981).

[12] Dale Watt, the father of John O. Watt, has owned 100 percent of WECO's stock at all times (Tr. 1:66). John O. Watt is vice president of WECO and his wife, Malissa Watt, is president of WECO (Tr. 1:55). Notwithstanding Malissa Watt's position of president, Watt credibly testified, consistent with the stipulations, that his wife is not engaged in the operation of WECO (Tr. 1:121–122).

[13] Control of labor relations is deemed a critical factor. *Gerace Construction*, 193 NLRB 645 (1971); Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U.L. Rev. 624, 634, and fn. 68 (1979).

[14] With equal clarity, the Court distinguished the different concept of joint employer.

Local 627, 425 U.S. 800 (1976). This is so because the criteria for finding a single employer are not the same as those used in determining the scope of the unit. *Acoustics, Inc.*, 270 NLRB 1046 (1984). Thus, the collective-bargaining agreement (CBA) of one entity does not attach and bind the single employer simply because there is a single-employer finding. *NLRB v. DMR Corp.*, 699 F.2d 788 (5th Cir. 1983); *Samuel Kosoff & Sons, Inc.*, 269 NLRB 424 (1984); *Naccarato Construction Co.*, 233 NLRB 1394 fn. 2 (1977). On the other hand, where two firms do comprise a single employer employing employees in an employerwide unit found appropriate, the CBA of one will bind the single employer. *Walter N. Yoder & Sons*, 270 NLRB 652 fn. 2 (1984); *Ray C. Lapp Air Conditioning*, 270 NLRB 641 fn. 2 (1984); *DMR Corp.*, 258 NLRB 1063 (1981), remanded on other grounds 699 F.2d 788 (5th Cir. 1983).

In contrast to the single-employer situation, where two facially different firms are found to be alter egos of each other, the CBA of one automatically binds the other.[15] This result follows from the very definition of an alter ego. As a practical matter the second company, found to be the alter ego of the first, does not have a CBA of its own because typically the alter ego is established for the purpose of evading the original employer's responsibilities under its CBA. As we shall see, the purpose of the corporate transformation is a factor the Board considers.

In resolving questions of alter ego status the Board considers a number of factors, no one of which is controlling, with several being similar to those reviewed when determining single employer status. The Board recently listed these factors as including:[16] (1) common management and ownership; (2) common business purpose, nature of operations, and supervision; (3) common premises and equipment; (4) common customers, i.e., whether the employers constitute the same business in the same market; (5) the nature and extent of the negotiations and formalities surrounding the transaction; and (6) whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.

Because I find WECO to be the alter ego of WPA, it is not necessary that I resolve the single-employer or appropriate unit questions.

Turning now to a review of the evidence regarding the alter ego factors, I note that consideration of the first factor calls for an affirmative finding. Admittedly, there was common management. Even though Watt's father is the sole shareholder of WECO, there is substantially identical ownership of WPA and WECO because the Board, at least in these circumstances, treats ownership by family members as personal ownership.[17]

In fact, most of the factors are covered by the parties' stipulation that following WECO's creation it had substantially identical management, ownership, business purpose, operation, supervision, equipment, and customers that WPA had before August 23, 1983 (Tr. 1:147). As discussed earlier, the parties also stipulated that Watt controls the labor relations policies of WECO as he also did at WPA before it became dormant on August 23 (1:60–61).

The fact that WECO operates from the same premises occupied by WPA has been noted. Moreover, the parties stipulated that the $3600 monthly lease payment made by WECO to WPA is not based on fair market value considerations but only on WECO's remaining mortgage obligations, that the arrangement is not an arm's-length transaction, and that the two firms are a single integrated business enterprise, with the qualification that WPA is dormant and exists only to service its mortgage obligations (Tr. 1:149–151).

Finally, and as previously discussed, Watt was quite candid at the hearing in testifying that the principal motivation, indeed, the only reason, in creating WECO was for the purpose of establishing a profitable company based on operating at wage and benefit[18] rates substantially less than those mandated by WPA's CBA. Watt testified that WPA was deactivated because it could not make the desired profit under a union contract (Tr. 1:164, 165). WECO was created to avoid WPA's financial obligations under the 1982–1984 CBA.[19]

Although Watt did not, I find, harbor any personal dislike, animus, or hate for the Union, the absence of such a motivation is not determinative. What does resolve the issue is the undisputed fact that the Watt family created WECO in an attempt to evade the CBA WPA was obligated to honor with Local 584.

Certain testimony by Gerald H. Edwards, Local 584's business manager, is illuminating here. Edwards credibly testified that on August 23, 1983, Watt informed Edwards that WPA was closing and WECO would open nonunion. Edwards inquired how Watt expected to benefit from this when his brother had been unsuccessful in an earlier attempt to operate a nonunion shop. Watt replied that when Jim Watt had tried to operate nonunion earlier, it was under the name "Diversified Electric," a name not known in the electrical business in Tulsa. By utilizing the name of Watt Electric Company, Watt explained to Edwards, Watt felt WECO could survive and make a profit (Tr. 2:343–344). In his subsequent testimony, Watt did not address the subject of "Diversified Electric" or the remarks (aside from the nonunion part) attributed to him by Edwards. I credit Edwards who testified with a persuasive demeanor.

A majority of the court in *Denzil S. Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983), held that an alter ego conclusion cannot be made unless it is supported by a finding that the employer "obtained, or reasonably expected"

[15] *Walter N. Yoder & Sons*, supra; *E.G. Sprinkler Corp.*, 268 NLRB 1241 fn. 1, 1244 (1984); *J. M. Tanaka Construction*, 249 NLRB 238, 241 (1980), enfd. 675 F.2d 1029, (9th Cir. 1982).

[16] *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). See also *Advance Electric*, 268 NLRB 1001 (1984).

[17] *E.G. Sprinkler Corp.*, 268 NLRB 1241 (1984); *Advance Electric*, supra; *J. M. Tanaka Construction*, 249 NLRB 238, 241 fn. 29 (1980), enfd. 675 F.2d 1029 (9th Cir. 1982).

[18] Watt testified that WECO does not provide any fringe benefits such as insurance (Tr. 3:94).

[19] Certain work rules, deemed restrictive, pertaining to such matters as the journeyman-apprentice ratio also figured in Respondent's motivation (Tr. 1:115–116; 3:93–94).

an economic benefit as a result of the transfer of its operations to the alleged alter ego. As with the Shoots family in *Advance Electric*, 268 NLRB 1001 (1984), and the Cordes family in *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), here the Watt family anticipated the "reasonably expected" economic benefit that the alter ego (WECO) could be operated at a profit (because of no CBA) instead of the loss being sustained by WPA which was bound to a CBA.

Even with the added factor of a reasonably expected economic benefit, it is clear, and I find, that from its inception WECO has been the alter ego of WPA.[20]

Accordingly, I find that Respondent, by allowing WECO to fail to honor the 1982–1984 CBA with Local 584, has violated Section 8(a)(5) of the Act. *Samuel Kosoff & Sons*, 269 NLRB 424 (1984); *Advance Electric*, supra.

WPA's Employees Constructively Discharged

There is a sharp dispute over what Watt told Gerald H. Edwards, Local 584's business manager, either the early morning or early afternoon of August 23, 1983,[21] and the unit employees later that afternoon. The crux of the dispute is whether Watt, on informing them he was closing WPA on August 23 and would begin operating the next day as a different firm, also asserted that the new company would be nonunion. Watt contends that he said nothing about nonunion, whereas Edwards and four employee witnesses testified that he did. I credit Edwards and the employees, who testified persuasively, and I find that on August 23, Watt did tell them WECO would open as a nonunion shop. The employees, faced with the choice of having to forgo the benefits of their union contract, all declined Watt's offer that they could apply for work at WECO.

To the extent that it matters, I credit Watt's testimony that he did not awake one morning hating the Union (Tr. 1:167). I also credit his testimony that he had no objection to the men retaining their union membership while working for WECO. Admitting that he did not tell the men this latter fact, Watt asserts that he did not do so because they did not ask (Tr. 1:186). Such admission lessens the weight to be given his further testimony that he would welcome the men to WECO's payroll (Tr. 1:83). It is clear that, although Watt would like to have had the experience and reliability of these electricians at WECO, he made little affirmative effort to encourage them to apply. Whether Watt followed his course of lukewarm effort because of the men's negative reaction at working for a nonunion firm, or because Watt perhaps felt that there was no way he could convince union electricians to work for a nonunion shop, is not entirely clear.[22] Resolution of the question is not really important, for the determination of whether a constructive discharge occurred does not depend on a finding that Watt acted from union animus and discriminatory intent.

A constructive discharge is shown simply by the fact that Watt presented the electricians with a Hobson's choice: work for WECO without benefit of a union contract, or work elsewhere. By presenting its employees that choice on August 23, 1983, Respondent violated Section 8(a)(3) of the Act. *Advance Electric*, supra; *Remodeling By Oltmanns*, 263 NLRB 1152, 1162 (1982).

CONCLUSIONS OF LAW

1. Respondents WPA and WECO are employers within the meaning of Section 2(2), (6), and (7) of the Act.

2. WECO is the alter ego of WPA.

3. IBEW Local 584 is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time journeymen electricians, apprentices, and helpers employed by Watt Plumbing, Airconditioning & Electric, Inc., and by its alter ego Watt Electric Company, excluding office employees, guards, watchmen, and supervisors as defined in the Act.

5. At all times material herein, IBEW Local 584 has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

6. WPA effectively revoked the "Letter of Assent-A" on June 9, 1983, and therefore did not become bound to the 1-year extension of the expiration date provided for in the June 29, 1983 amendment to the 1982–1984 collective-bargaining agreement.

7. By negotiating a reduction in the pay scale at midterm directly with its unit employees in July 1983, WPA violated Section 8(a)(5) and (1) of the Act.

8. By failing and refusing to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit, by failing to honor the 1982–1984 CBA with respect to such employees and by failing to apply to such employees the terms and conditions of the 1982–1984 CBA, Respondent has violated Section 8(a)(5) and (1) of the Act.

9. By constructively discharging Donald J. Andrews, Robert L. Silver, Johnny F. Taylor, and Jerry W. Wallace on August 23, 1983, by conditioning their employment on working for WECO without the benefit of the 1982–1984 CBA applicable between WPA and the Union, and below the wage rates and benefits called for in the CBA, Respondent has violated Section 8(a)(3) and (1) of the Act.

10. These are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[20] The pleadings designate WPA as the alter ego of WECO. The difference is immaterial, for the alter and the ego are one and the same under the law.

[21] The hour is disputed, but I need not resolve the conflict.

[22] One of the electricians, Jerry W. Wallace, returned about January 1984 and discussed with Jim Watt the possibility of being hired by WECO (Tr. 1:187, 247; 2:259). Nothing developed from this interview and, although the cause is not fully explained in the record, it appears to be unrelated to Wallace's known union membership.

THE REMEDY

Having found that Respondent has violated Section 8(a)(3) and (5) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel makes no contention that John O. Watt is named in his capacity as an individual. It therefore appears that Watt is named only as an owner, representative, or officer of WPA and WECO. Accordingly, no monetary liability shall attach to Watt in his individual capacity. See generally *Contris Packing Co.*, 268 NLRB 113 (1983).

In making the discriminatees whole in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), Respondent shall pay interest on any backpay which is determined in the compliance stage to be due.[23] Interest shall be calculated in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Respondent shall expunge any reference to the constructive discharges from the personnel records of the discriminatees. *Sterling Sugars*, 261 NLRB 472 (1982).

As earlier discussed, the 1982–1984 CBA expired as to Respondent on May 31, 1984, and the 1-year extension of the CBA does not bind Respondent. However, Respondent cannot eat the cake without paying the baker. This means that Respondent, having revoked NECA's right to bargain on Respondent's behalf, could not avail itself of the deferred wage rate called for by the June 29, 1983 amendment negotiated by NECA, while at the same time decline to honor the 1-year extension. Respondent must therefore make contributions and backpay at the scale set forth in the 1982–1984 CBA without regard to the deferred rate negotiated by NECA in the June 1983 amendment.

Respondent was experiencing serious financial difficulty. In Watt's words, the (nonunion) competition was "fierce" and "cutthroat." (Tr. 3:18.) The course of action Respondent chose in creating WECO, however, was worse than futile. Respondent now not only must make whole the constructively discharged employees and reimburse them and the contractual benefit funds, but it also must make whole all those employees hired by WECO between August 23, 1983, and May 31, 1984, pursuant to the terms and pay scale set forth in the 1982–1984 CBA.[24] And it does not end there. Although the 1982–1984 CBA expired May 31, 1984 as to Respondent, it is well settled that terms and conditions of employment cannot be unilaterally changed following the expiration of a CBA, *Stone Boat Yard*, 264 NLRB 981 (1983), enfd. 715 F.2d 441 (9th Cir. 1983), although the rule does not hold for continuation of any dues-checkoff provision,[25] or for arbitration of a grievance arising after expiration of the CBA which is not over an obligation arguably created by the CBA.[26] Thus, Respondent's backpay liability continues until Respondent complies with the order set forth below.

On these findings of fact and conclusions of law and the on entire record, I issue the following recommended[27]

ORDER

The Respondent, Watt Electric Company, and its alter ego, Watt Plumbing, Airconditioning & Electric, Inc. and John O. Watt, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union, IBEW Local 584, as the exclusive representative of its employees in the appropriate unit with respect to wages, hours, working conditions, or other terms and conditions of employment of the employees.

(b) Bypassing IBEW Local 584 and dealing directly with its employees on wages, hours of work, or other conditions of employment.

(c) Discouraging membership in the Union, or any other labor organization, by constructively discharging its employees through the imposition of illegal conditions of employment, or by otherwise discriminating against any of its employees in regard to hire, tenure of employment, or other terms and conditions of their employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Donald J. Andrews, Robert L. Silver, Johnny F. Taylor, and Jerry W. Wallace immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired on or after August 24, 1983, to fill any of said positions, and make such employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Comply retroactively with the terms and conditions of the 1982–1984 CBA, without regard to the modifications prescribed in the June 29, 1983 amendment, as those original terms would have applied through May 31, 1984, by making whole the Union for any and all

[23] Backpay shall be due not only for any loss of earnings resulting from their constructive discharge on August 23, 1983, but also resulting from the reduced wages Respondent unlawfully paid them from July to August 23, 1983. As to the latter, backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970).

[24] The names of the affected employees and all amounts due are matters to be determined at the compliance stage.

[25] *Hassett Maintenance Corp.*, 260 NLRB 1211 (1982).

[26] *Digmor Equipment & Engineering Co.*, 261 NLRB 1175 (1982).

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

benefit funds and other payments due and owing pursuant to the 1982–1984 CBA.[28]

(d) Make whole all unit employees for any losses they may have suffered by reason of Respondent's failure to honor the 1982–1984 CBA beginning in July 1983 and extending through May 31, 1984.[29]

(e) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment:

> All full-time and part-time journeymen electricians, apprentices, and helpers employed by Watt Plumbing, Airconditioning & Electric, Inc., and by its alter ego Watt Electric Company, excluding office employees, guards, watchmen, and supervisors as defined in the Act.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Tulsa, Oklahoma facility copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 16, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[28] The Board leaves to the compliance stage the full implementation of this provision. *E.G. Sprinkler Corp.*, 268 NLRB 1241 (1984); *Advance Electric*, supra.

[29] In addition to any backpay Respondent must pay the employees with interest, as noted in the remedy section of this decision. Respondent must reimburse its employees for any expenses ensuing from its unlawful failure to make the required payments referred to in paragraph 2(c) as set forth in *Kraft Plumbing*, 252 NLRB 891 fn. 2 (1980).

[30] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local No. 584 as the exclusive representative of our employees in the following appropriate unit:

> All full-time and part-time journeymen electricians, apprentices, and helpers employed by Watt Plumbing, Airconditioning & Electric, Inc., and by its alter ego Watt Electric Company, excluding office employees, guards, watchmen, and supervisors as defined in the Act.

WE WILL NOT refuse to honor and abide by the terms and conditions of any collective-bargaining agreement (CBA) which we may have now or in the future with IBEW Local 584, or with any other labor organization.

WE WILL NOT constructively discharge you by forcing you to quit rather than to work without the wage scale, benefits, and conditions of any CBA which we have with IBEW Local 584, or any other labor organization, and without representation by such labor organization where we have a legal obligation to recognize such union and honor the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you with respect to your rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL NOT bypass IBEW Local 584, or any labor organization which is your exclusive representative, and negotiate directly with you concerning wages, hours, or terms and conditions of employment.

WE WILL, on request, recognize and bargain with IBEW Local 584 as the exclusive representative of all the employees in the appropriate unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment.

WE WILL make whole all employees employed in the unit at any time between July 1, 1983, and May 31, 1984, by transmitting, with interest, the contributions owed to various funds provided for in the 1982–1984 CBA; by reimbursing, with interest, such unit employees for any expenses they may have incurred by our failure to make the required contributions; and by paying to all employees employed at any time in the unit between July 1, 1983, and May 31, 1984, the difference, with interest, in wages actually paid and the wage scale specified in the 1982–1984 CBA.

WE WILL offer Donald J. Andrews, Robert L. Silver, Johnny F. Taylor, and Jerry W. Wallace immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privi-

leges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest and WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WATT ELECTRIC COMPANY AND ITS ALTER EGO, WATT PLUMBING, AIRCONDITIONING & ELECTRIC, INC. AND JOHN O. WATT

Southwestern Bell Telephone Company *and* Communications Workers of America, AFL–CIO, Local 6310. Case 14–CA–16558

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 September 1983 Administrative Law Judge Thomas D. Johnston issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), by denying employee Daniel Reed's requests for union representation at an investigatory interview Reed reasonably believed might result in disciplinary action against him. As a remedy for the violation, the judge, applying *Kraft Foods*, 251 NLRB 598 (1980), recommended that the Respondent be required to make whole employee Reed for any loss of pay resulting from the Respondent's suspension of him for alleged misuse of company property. However, in our recent decision in *Taracorp Industries*, 273 NLRB 354 (1984), we overruled *Kraft Foods* and held that Section 10(c) of the Act precludes a make-whole remedy for *Weingarten* violations where the discipline of an employee is for cause.[3] Accordingly, consistent with *Taracorp*, we shall modify the judge's recommended Order to delete the make-whole and expunction remedies and shall order the Respondent to cease and desist from depriving any employee of his right to union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action. We shall further order the Respondent to post an appropriate notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Southwestern Bell Telephone Company, Union, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 2(a), (b), and (c) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT require our employees to participate in employer interviews or meetings where they have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action and where we have refused to permit them to be represented at such interviews or meetings by their labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SOUTHWESTERN BELL TELEPHONE COMPANY

DECISION

STATEMENT OF THE CASE

THOMAS D. JOHNSTON, Administrative Law Judge. This case was heard at St. Louis, Missouri, on July 19, 1983,[1] pursuant to an amended charge filed on April 15[2]

[1] All dates referred to are in 1983 unless otherwise stated.

[2] The original charge was filed on March 15.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge concluded that the Board will not defer a case to arbitration which involves a violation of Sec. 8(a)(1). At the time of his decision, *United Technologies Corp.*, 268 NLRB 557 (1984), which holds otherwise, had not yet issued. However, no exceptions were filed to this conclusion. In addition, no exceptions were filed to the judge's conclusion that the Regional Director did not abuse his discretion by refusing to approve a settlement agreement entered into by the parties.

[3] As further explained in *Taracorp*, discipline is "for cause" within the meaning of Sec. 10(c) if it is imposed for some reason other than an employee's protected concerted activities. Since it is clear in the present case that employee Reed was not disciplined for asserting his right to union representation in the investigatory interview, but for alleged misuse of company property, his discipline was "for cause" within the meaning of Sec. 10(c) and a make-whole remedy is therefore precluded.

by the Communications Workers of America, AFL–CIO, Local 6310 (the Union), and a complaint issued on April 19.

The complaint alleges that Southwestern Bell Telephone Company (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying employee Daniel Reed's request to be represented by the Union during an interview which Reed had reasonable cause to believe might result in disciplinary action, and suspended Reed as a result of information received from him during the interview and after his request for representation had been made, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The Respondent in its answer, which was amended at the hearing, denies having violated the Act as alleged. While it admits it suspended Daniel Reed about January 18, it denies it suspended him as a result of information obtained from him during the interview or that Reed had requested representation or that such request had been denied.

The issues involved are whether the Respondent violated Section 8(a)(1) of the Act by discriminatorily denying Reed's request for union representation during an interview which he had reasonable cause to believe might result in disciplinary action and suspended him as a result of information received from him during the interview after he had requested such representation.

On the entire record in this case and from my observations of the witnesses and after due consideration of the briefs filed by the General Counsel and the Respondent,[3] I hereby make the following[4]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Missouri corporation with an office and place of business located at St. Louis, Missouri, and with other places of business located in the State of Missouri, including a facility located at Union, Missouri, which is the only facility involved in this proceeding, is engaged in the telephone communications industry. During the calendar year 1982, a representative period, the Respondent in the course of its operations received revenues in excess of $100,000, of which revenues in excess of $100,000 were received for providing interstate telephonic communications to its customers.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Communications Workers of America, AFL–CIO, Local 6310 is a labor organization within the meaning of Section 2(5) of the Act.

[3] The Charging Party did not submit a brief.

[4] Unless otherwise indicated the findings are based on the pleadings, admissions, stipulations, and undisputed evidence contained in the record, which I credit.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Respondent is engaged in the telephone communications industry and has a facility located at Union, Missouri. Included among its supervisory personnel are District Manager of Outside Plant Construction Eugene Enright, Assistant Staff Manager of Security Francis Clark, and Network Service Supervisor Lawrence Prichard.[5]

The employees of the Respondent employed at that facility are represented by the Union.

Daniel Reed, the discriminatee, who has been employed by the Respondent for approximately 14-1/2 years, works as a lineman at the Union, Missouri construction facility. From 1976 to February 1983 he worked under the direct supervision of Supervisor Prichard. His duties include placing and removing pole lines and cable drops and his work involves the use of a company bucket truck which he uses daily. Reed is also a member of the union and has served as a union steward at the Union, Missouri facility for about 5 years representing the linemen and splicers.

B. *Denial of Reed's Request for Union Representation and His Suspension*

An anonymous unsigned letter purportedly from a telephone customer, dated July 9 and addressed to District Manager Enright, was sent to the Respondent accusing Reed, who it suggested be investigated, of ripping off the Company for years. It mentioned seeing him on numerous occasions using a company truck drilling post holes for his fencing, using the bucket truck for trimming trees, and unloading and stacking telephone poles he would bring in and later sell. The letter further stated Reed had a company ladder leaning against a tree, a new pole with an CB antenna attached, and mentioned that someone else believed Reed's electric fence posts were also company equipment. The letter further related the customer's telephone bills had kept increasing and the Company had said it needed more money for increased costs and suggested if the labor force was better controlled costs should and could decrease and indicated the letter might help.

District Manager Enright, who is a third-line supervisor and supervises approximately 223 employees including 36 first- and second-level managers, testified that on January 17 on receiving and reading this anonymous letter, which was postmarked January 13 but had been misdirected, he felt the allegations, if true (that Reed used Company trucks to dig post holes and to trim trees, and had obtained used poles to sell and had a company ladder and a new telephone pole for a CB antenna), would violate company rules.

Under the Respondent's policies, as expressed in its booklet entitled "A Code of Business Conduct," and the section pertaining to "Company Property," which had been in effect for at least 4 years, company property is not to be used for personal benefit, or any other improper purpose and, except with proper authorization, it

[5] These three individuals are supervisors under the Act.

should not be sold, loaned, given away, or otherwise disposed of regardless of condition or value. The booklet also indicates violations of such company policies can lead to disciplinary action, dismissal, and prosecution. The contents of this booklet are reviewed annually with the Respondent's employees and Reed, who admitted having read it, acknowledged in writing as required by Company policies that such review was last held with him on May 20, 1982.

That same day Enright contacted Assistant Staff Manager of Security Clark and informed him about the letter and the following day, January 18, they together drove out to Reed's farm and made a visual inspection from the road. According to both Enright and Clark they observed various items of company property or what appeared to be former company property on the farm which were items Reed would have had occasion to work with as a lineman. These included two sheave blocks; a stack of 25 to 40 poles varying in length from 25 to 40 feet; a lubricating or vehicle ramp constructed out of telephone poles; what appeared to be a new telephone pole by the house with a CB antenna attached; rope similar to that used by the Respondent hanging from a tree limb; a stack of poles 8 to 10 feet in length; an electric fence for cattle constructed out of 40 or 50 ground rods;[6] a fence and a fenced in area constructed of about 80 to 100 old used telephone poles; a loading dock constructed out of fairly good size class stubs from poles; a yellow fiberglass ladder with a stenciled-on crew number leaning against the house; and three dead-end arms[7] which appeared to be new.

Enright testified following their visit to Reed's farm he contacted Reed's immediate supervisor, Supervisor Prichard, read him the anonymous letter, and questioned him about its contents. After Prichard denied any knowledge of the allegations contained in the letter, Prichard stated that Enright instructed him to have Reed report to the central office at Union, Missouri, which he did.

That same day, January 18, District Manager Enright, Assistant Staff Manager Clark, Supervisor Prichard, and Reed met in the basement meeting room at the central office, which Reed described as a room which was used for grievance and disciplinary meetings where he had previously represented other employees as their union steward.

Reed testified Enright began the meeting by asking him if he had ever used company trucks to trim his trees at his house. According to Reed, having been asked this question, he thought he was in trouble because when he looked at Prichard, who he contends had given him permission to use the company truck to trim trees,[8] Prichard gave him a shrug like he did not know anything about it and he knew he was on his own, whereupon he then said he needed union representation. Enright responded by telling Reed that he was the union steward and that should be good enough. Enright then continued to question him about whether he had trimmed trees on his property with the company vehicle whereupon he admitted he had used the bucket truck once to trim the trees on his lunch hour 2-1/2 years ago, but he said he had permission to do so. Enright, after questioning Reed's assertion about doing the work on his lunch hour, explained he had a letter and what it accused Reed of doing and said he and Clark had gone out to Reed's home that morning where they saw a large pile of used poles and crossarms, a lot of discarded company equipment, and an old company ladder leaning against the house. Reed explained that equipment had all been given to him or he had taken it with permission and it was not stealing like Enright was trying to insinuate. On Enright's mentioning the ladder was worth over $150 and that constituted a felony, Reed explained he took it out of the junk pile at least 5 years ago and that the crew number stenciled on the ladder would verify how old it was.[9] After discussing the ladder, Reed stated he told them he thought they were headhunting and said he needed union representation. Enright responded by asking Read was he not the union representative for Union, Missouri. When Reed replied he was, Enright continued questioning him by asking him who authorized him to take the hugh pile of old poles which were stacked beside the road. His response was every first line foreman he had worked for let the linemen, telephone people, or the general public take poles out of the pole yard[10] when they were brought in and he explained he probably had first crack at them because he pulled them and knew when they came in and that he had permission and could still get foremen to testify to that. During the meeting Reed also admitted about 8 to 10 years ago he used a company post hole digging truck to place two poles in a vehicle ramp he built on his property.[11]

Enright then asked Reed for permission to seach his property and said since he had admitted taking the ladder, which constituted a felony, if Reed would not give him permission he would go to the county judge and get a search warrant and search his property. Although Reed first refused permission after Enright told him if he did not he would have to press criminal charges against him to get the search warrant because that was the only way he could get it and Reed would be up for a felony. Reed stated he decided that his best defense was to let Enright come down and see what was there because he did not have anything to hide.

Before signing a statement given to him to sign authorizing Clark and Prichard to search his property and vehicles,[12] Reed stated he again asked for union representa-

[6] Enright acknowledged the Respondent did not recover ground rods used in construction but instead drove them underground.

[7] This is the arm that dead ends the wire on the telephone pole.

[8] Prichard denied at the hearing that he ever gave Reed permission to use company property or equipment for his personal benefit.

[9] According to Reed, Clark later obtained the correct crew number on the ladder which verified it belonged to a man who had been gone for 5 years.

[10] Bill Konecnik, another employee, testified the past practice was that used telephone poles were up for grabs by anyone who wanted them and they would notify their supervisor, or the linemen would just take them home.

[11] According to Reed, his foreman at the time, John Palisch, who did not testify, had given him permission to use the truck on that occasion.

[12] The statement dated January 18, which was signed by Reed and witnessed by Enright, contained in pertinent part the following sentence: "No threats or promises have been made to force me to submit to this search for property of Southwestern Bell Telephone Company." Reed

Continued

tion. When Enright replied that he would give him a minute to get his union representative there, Reed stated he went ahead and signed to let them search because there was no telephone in the room and he did not see any way he could get a representative there that fast.

Reed, during the hearing, denied, except for the two occasions he admitted during the interview, using the company trucks for his personal use and specifically denied using the company truck to set his antenna pole. Reed testified the approximately 100 ground rods used in constructing his electric fence had been obtained from dismantling jobs. These rods had been junked by the Respondent and he had asked all of his foremen whether it was all right to take them. His foremen had also given him permission to take the old telephone poles which he had also obtained in the process of wrecking out pole lines. Reed denied the antenna pole or any other poles or crossarms on his property were new and stated that the ladder was manufactured by the Louisiana Ladder Company about 1973 and he had obtained it about 1977. Reed explained that as he wrecked cables or transferred poles he took the used bolts that held the cables on the telephone poles home or put them in the trash at the Company from which they were then dumped and covered over with dirt by a trash hauler.

District Manager Enright gave a different version of this meeting. According to him he began the meeting by telling Reed what he had to cover with him was difficult because he had difficulty in understanding anybody who would write a letter and not sign his or her name. However, there were some allegations in the letter which bordered on company assets being so to speak manipulated and made inferences about Reed's conduct off the job and accused him of using company vehicles and having company property. He then, after also mentioning he had been out to Reed's farm that day, said he would like to cover some of the pertinent questions and would like to have Reed answer them. After looking at both Clark and Prichard, Reed commented it looked to him like he was in a little trouble whereupon he told Reed he did not regard it as trouble but said he needed answers to some questions. When Reed inferred that he would like to have some help he asked Reed was he not the union steward. On Reed replying he was the union steward but for construction he informed Reed that it was a construction matter that he would like to discuss with him. After Reed pondered awhile and shrugged his shoulders, he again asked Reed if he would answer the questions and Reed nodded affirmatively. Following this he mentioned there was some serious allegations in the letter that Reed had used certain materials and vehicles to perform work on his farm and he mentioned the letter had said on numerous occasions he was observed using a company truck to dig holes and to set poles and asked Reed if he had done that. Reed replied he had but said it was on his lunch hour. After questioning Reed about doing it on his lunch hour, he told Reed it did not make any difference whether it was on his lunch hour or not because it was unauthorized use of company property to perform work for his personal gain. However, on asking Reed whether he had permission Reed replied he had and looked at Prichard and said they knew about it. Prichard then denied he gave Reed or other employees permission to use company equipment.

Enright then mentioned the letter inferred Reed had used the bucket trucks to trim trees and asked Reed whether he had done that, whereupon Reed again admitted he had but said it was on his lunch hour. He again told Reed that he needed permission to do that and it was misuse of company property to perform work for his own benefit.

According to Enright, he did not think they ever identified when Reed said he used these vehicles.

Reed was then questioned about the ladder which he said was a discarded ladder he had obtained from the junk bin. He informed Reed that it was his recollection that fiberglass ladders had only been approved by the Company for 8 to 10 years and asked Reed whether they were allowed to take ladders and tools from the junk bin home which Reed said they were. Reed also, pursuant to Enright's inquiry, said the ground rods and crossarms were also obtained from the junk pile.

Enright stated he then asked Reed whether there was anything else on the farm they ought to know about. When Reed replied there might be some other articles out there, but nothing of any consequence, he asked Reed whether he minded if they went out and checked his farm to see whether there was anything else there that belonged to the Company. Reed, after hesitating and appearing reluctant, finally nodded affirmatively after Enright suggested that Clark and Prichard could accompany Reed and he would not accompany them. While Clark was preparing a statement for Reed to sign, Enright stated Clark was sitting there shaking his head and mentioning that only a few days ago he was accused of poorly representing two other employees[13] and now here he was in trouble. According to Enright, when this occurred, he told Reed if he felt he needed some additional help, now would be the time to get it. However, Reed's response was they had gone that far and for them to proceed. Reed then read the search form and signed it. Enright denied threatening to have Reed arrested if he did not sign the search form.

Enright denied recalling Reed saying he wanted union representation and stated he only made one request for help.

Assistant Staff Manager Clark substantially corroborated Enright's version of the meeting and denied that Enright threatened to press criminal charges against Reed to obtain a search warrant. While he also denied Reed asked for union representation, he stated that after Enright informed Reed there were allegations made against him in the letter which he wanted to discuss with him, Reed remarked it seemed like a pretty serious matter to him and maybe he needed some representation, where-

explained at the hearing he had no recourse but to sign the statement even though it said no threats had been made to force him to sign because they had threatened to have him arrested for a felony or to be taken before the judge.

[13] Reed had earlier represented two employees who were dismissed for misconduct.

upon Enright then asked Reed was he not the union steward there. Under cross-examination Clark further stated that later in the meeting Reed again said he might need some representation, whereupon Enright told him he thought that had been settled and Reed was the union steward there, to which Reed agreed and consented to go on.

According to Clark, Reed also informed them in the meeting he had gotten the used telephone poles from the used pole pile and denied the CB antenna pole was a new pole.

Supervisor Prichard corroborated the testimony of both Enright and Clark in part. However, contrary to their testimony he testified that at the beginning of the meeting, after Enright had informed Reed that allegations had been made against him in an anonymous letter and what the letter said and asked him if any of it was true, Reed responded that it appeared to him that some serious allegations had been made and he might be in some trouble and stated he thought maybe he ought to have union representation in the meeting with him. He then stated Enright asked Reed if he was not the steward for the union complex and when Reed replied he was for the construction work crew, Enright mentioned it was a construction matter and he would like for him to respond to some questions he had pertaining to the letter. According to Prichard, when Enright then asked Reed if he would respond to those questions, Reed said he would. Prichard further stated when Enright sought Reed's permission to search his property Enright told Reed if he felt he needed union representation then would be the time to obtain it but Reed remarked he had gone that far and would not need union representation.

I credit the testimony of Reed concerning what transpired at this meeting rather than that of District Manager Enright, Assistant Staff Manager Clark, and Supervisor Prichard. Apart from my observations of the witnesses, not only did Prichard contradict the testimony of both Enright and Clark about whether Reed specifically requested union representation, but his testimony in this respect supports Reed's version that he did so.[14] Moreover, even the versions of both Enright and Clark that Reed had informed them he wanted some help or needed some representation, to which Enright responded by questioning Reed about his being the union steward, shows they would have been aware that he was seeking union representation.

Following this meeting Assistant Staff Manager Clark and Supervisor Prichard, accompanied by Reed, left the office and first searched Reed's company truck where, according to Clark, they found three screwdrivers marked company property. Reed described them as being old, rusty, and bent.

After searching Reed's company truck they went to the farm where they searched Reed's farm including his home, outbuildings, and his personal vehicles.

Clark described their search of the farm revealed the following: A voltage tester that Reed claimed was obsolete and had been discarded in the trash which Prichard confirmed; a set of hooks used by linemen to climb poles with the leather deteriorated which Reed said had been discarded and Prichard verified; 20 to 30 U-guards with the company emblem which Reed said had been salvaged and used by him to brace fence posts which Clark later observed; a pile of bolts which Clark commented appeared to be good bolts but which Reed said he had gotten from jobs which Prichard confirmed were not used anymore; a vehicle ramp constructed of used telephones which Reed said he had used the truck to drill the holes for; a pile of long telephone poles about 10 feet high which Reed, pursuant to Clark's inquiry, said he had transported there with his boat trailer; and a pole with the antenna which Reed said was used and Prichard inspected and indicated it looked like the identifying remarks had been removed.

According to Reed, he explained to them before searching the farm that he had a lot of company-discarded material there which he had been carrying home for 14 years. He described the bolts and crossarms as being ones which had been used and discarded. Reed stated that, on searching his personal truck, they also found an outdated first aid kit Prichard had given him a long time ago.

Following the search of Reed's property, Clark reported to Enright that same day what they had found. Enright testified Clark showed him the three company screwdrivers which appeared to be good to him and the first aid kit and reported the piles of bolts and U-guards and the discarded voltage tester. Although Reed stated Clark explained to Enright that it was nothing but a bunch of junk, Clark denied having made such statement. Enright testified that after receiving the report, he reiterated that under company policy the use of equipment for one's own personal use was not allowed and questioned Reed about how he had hauled the larger uncut poles and whether he had used the company truck which Reed denied, stating he hauled them on a boat trailer.

Enright, who alone made the decision, testified he then suspended Reed and informed him the reason was the unauthorized use of company vehicles to perform work on his farm, the digging of holes, the setting of poles, and the trimming of trees. Reed acknowledged that, following Clark's report, Enright, who also remarked that the three screwdrivers which had since gone bad but were good when Reed stole them, suspended him indefinitely.

Enright, under cross-examination, testified he suspended Reed for the unauthorized use of company vehicles and the evidence he had at the time consisted of Reed's admissions during the interview about using the trucks and the anonymous letter. However, he also acknowledged he would not have suspended Reed solely on the basis of allegations contained in the anonymous letter. On redirect-examination Enright, on being asked what he

[14] The Respondent's counsel in a letter to a Board agent dated March 31, in which it provided a response to the charge in this case, described this interview and stated in pertinent part as follows:

> After the meeting had been in progress for some time, Mr. Reed made a comment to the effect that the matter sounded pretty serious and that maybe he needed some union representation.

The letter further reflects that, after additional questions and answers, Reed also stated, "Maybe I better get some union representation."

considered in suspending Reed, stated it was Reed's admissions to using a post hole digging truck one time and also his belief that the truck had been used on numerous times which was based on what was in existence on Reed's farm, including the fencing he had observed that would have been laborious work to hand dig, and the statements contained in the letter about numerous occasions a truck was used.

Reed's suspension on January 18 was without pay and lasted 2 weeks. According to Enright he had initially decided to suspend Reed for a week; however, after being informed about January 19 or 20 by Donald Cook, who is now the manager of outside construction in Sikeston, Missouri, that Cook had previously suspended Reed for using a company vehicle on company time to go to his farm, he decided on a 2-week suspension period.

Cook, who previously held the position of supervisor of construction and cable splicing and who supervised Reed, testified that in early 1975 he had disciplined Reed and docked his pay for 2-1/2 hours because he and employee Tim Plank had used a company truck and trailer to haul some poles To Reed's house during working hours. He also denied ever giving Reed permission to use company equipment and property to perform work on his farm. Reed, however, denied such an incident occurred involving him and Plank.

After the 2 weeks' suspension was up, Reed returned to work. His return to work was also conditioned on his returning all of the paraphernalia he had carted off which he did return including bolts, poles not in the ground, ground rods, U-guards, crossarms, and the ladder. According to Enright, the ladder was then destroyed in accordance with established company practice.

Reed filed a grievance over his suspension, which was later withdrawn. Warren Stecker, who is the union president, and Bill Konecnik, who is the union chief steward, both testified during the grievance meetings held on Reed's suspension, which were held after he returned to work. Respondent's representatives, Division Manager Dave Nylan and Ken Mayer, informed them Reed was suspended for misuse or unauthorized use of company vehicles which were the two incidents Reed had admitted and they denied that Reed's possession of other company property was part of the suspension. Reed also testified during the first grievance meeting Nylan stated he had been suspended for unauthorized use of company vehicles which involved the two incidents of using company trucks to dig holes and trim trees which he had previously admitted.[15]

C. *Analysis and Conclusions*

The General Counsel asserts the Respondent violated Section 8(a)(1) of the Act by discriminatorily denying Reed's request for union representation during an interview in which he had reasonable cause to believe might result in disciplinary action, and by suspending him as a result of information received from him during the interview after he had requested union representation. Contrary to these assertions, the Respondent denies having violated the Act as alleged or that Reed requested or was denied union representation or was suspended as a result of information obtained from him during the interview.

The Respondent further argues in its brief that the Board should defer to the parties' grievance and arbitration procedures regarding Reed's suspension[16] and also that the Regional Director abused his discretion by refusing to approve a settlement agreement entered into by the Respondent and the Union. Both positions lack merit and are hereby rejected. With respect to the deferral argument, the Board's *Collyer*[17] doctrine is not applicable in cases involving violations of Section 8(a)(1) of the Act. *Loomis Courier Service*, 235 NLRB 534, 536 (1978), enf. denied on other grounds 595 F.2d 491 (9th Cir. 1979); and *General American Transportation Corp.*, 228 NLRB 808 (1977). Insofar as the settlement agreement is concerned the rights guaranteed under the Act are in the public interest rather than private rights and the Regional Director's refusal to approve a private settlement agreement by two of the parties would not constitute an abuse of his discretion. *Schuylkill Metals Corp.*, 218 NLRB 317, fn. 1 (1975).

Under Section 7 of the Act[18] an employee has the right to have union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The protection accorded employees covers both "investigatory" and "disciplinary" interviews except for those interviews, not applicable here, conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action. *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). The test for determining whether an employee reasonably believes the interview might result in disciplinary action is measured by objective standards under all the circumstances of the case rather than an employee's subjective motivations. *NLRB v. J. Weingarten*, cited supra at 257 fn 5. Further, to invoke this protection, the employee must request union representation.

The disciplining of employees as a result of interviews where they are unlawfully prevented from securing the assistance of their union representative is also unlawful. See *AnchorTank, Inc.*, 239 NLRB 430, 431 (1978), enfd. in part and denied in part, 618 F.2d 1153 (5th Cir. 1980). Where an employer conducts an investigatory interview in violation of an employee's *Weingarten* rights and that employee is disciplined for conduct which was the subject of the unlawful interview, the appropriate remedy is a make-whole remedy unless the employer can demonstrate that its decision to discipline that employee was

[15] Neither Nylan nor Mayer testified and I credit the undisputed testimony of Stecker, Konecnik, and Reed concerning the reasons given to them for Reed's suspension which were also consistent with the reasons as testified to by Enright.

[16] Reed's grievance regarding his suspension had previously been withdrawn.

[17] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[18] Sec. 7 of the Act guarantees to employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

not based on information obtained at the unlawful interview. *Kraft Foods Inc.*, 251 NLRB 598 (1980).

The findings supra establish that on January 18 Reed was notified to attend a meeting held at the Respondent's office by Respondent supervisory personnel District Manager Enright, Assistant Staff Manager of Security Clark, and his immediate supervisor, Supervisor Prichard. Enright began this meeting by questioning Reed whether he had ever used the company trucks to trim his trees at his house. When Reed responded by saying he thought he was in trouble and he needed union representation, Enright ignored his request by informing Reed that Reed was the union steward and that should be good enough and then continued to question Reed about whether he had trimmed his trees with company trucks, and used company trucks to dig holes on his property and other matters which Reed had been accused of doing in an anonymous letter regarding the misuse of company property and equipment by Reed. Later during the interview, when Reed repeated that he needed union representation, Enright again ignored his request by indicating Reed was the union steward and continued with his questioning of Reed. After having questioned Reed about his use of company equipment and property during which Reed, after his initial request for union representation had been denied, admitted having used a company basket truck on one occasion 2-1/2 years ago to trim trees on his property and using the company post hole digging truck on another occasion 8 to 10 years ago to place two posts in a vehicle ramp he built on his property, Enright attempted to have Reed sign a consent form to permit them to search Reed's vehicles and property. Although at that point, when Reed again renewed his request for union representation, Enright said he would give him a minute to get his union representative there, Reed went ahead and signed the form because there was no telephone in the room and he did not see how he could get a representative there that fast.

That same day, following a search of Reed's vehicles and property, he was suspended without pay and his suspension lasted 2 weeks. This suspension, according to Enright's own testimony, as well as statements made by the Respondent's representatives to Reed and the Union's representatives during grievance meetings concerning Reed's suspension was based on Reed's admissions during the January 18 interview that he had used the company's trucks on the two occasions related by him to perform work on his property. These admissions occurred during the interview after he had first requested and been denied union representation.

The evidence further shows that Reed, at the time he requested union representation at the January 18 interview, he had more than reasonable cause to believe the interview might result in disciplinary action being taken against him. This was because under company policy, of which Reed had knowledge, the use of company property for personal benefit or improper purposes could lead to disciplinary action, dismissal, or prosecution. When Enright began the conversation by questioning him at the office, where disciplinary meetings had been held, in the presence of two supervisors about whether he had ever used company trucks to trim his trees at his house, his supervisor, Prichard, who he said had given him permission, gave him a shrug like he did not know anything about it, which led Reed to believe he was in trouble and he so expressed himself during the interview at the time he made the request.

Based on this evidence, and for those reasons discussed and applying the applicable law, I am persuaded and find that the Respondent violated Section 8(a)(1) of the Act by denying Reed's request for union representation at an investigatory interview he reasonably believed might result in disciplinary action against him and by suspending Reed for 2 weeks without pay which resulted from this unlawful interview.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Southwestern Bell Telephone Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communications Workers of America, AFL–CIO, Local 6310 is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring that Daniel Reed participate in employer investigatory interviews without union representation, which had been requested by Reed and had been refused by the Respondent, when Reed had reasonable grounds to believe that the matters to be discussed might result in their being the subject of disciplinary action and actually imposing such disciplinary action on Reed by suspending him on January 18, 1983, for 2 weeks, without pay, Respondent has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Accordingly, having found that the Respondent after denying Reed his *Weingarten* rights, suspended him for 2 weeks, without pay, based on information obtained from him at the unlawful interview itself, I shall order that the unlawful suspension be rescinded and all references to the suspension be expunged from his records and that he be so notified and that he be made whole for any loss of pay he suffered as a result of this unlawful suspension, with payment of interest [illegible]

in the manner prescribed by *Florida Steel Corp.*, 231 NLRB 651 (1977).[19]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Southwestern Bell Telephone Company, Union, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring its employees to participate in employer interviews or meetings without union representation where such representation has been requested and refused by the Respondent, when the employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action and actually suspend or impose such disciplinary action on its employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the January 18, 1983 2-week suspension, without pay, of Daniel Reed and make him whole for any loss of earnings he may have suffered as a result of the suspension with the payment of interest in the manner set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its files all references to the suspension of Daniel Reed on January 18, 1983, and notify him in writing that this has been done and that evidence of this unlawful suspension will not be used as the basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Union, Missouri facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges unfair labor practices not specifically found herein.

[19] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Queen Anne Record Sales, Inc. d/b/a Tower Books *and* Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO. Cases 19–CA–15570 and 19–CA–15724

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 4 November 1983 Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the administrative law judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

We agree with the judge's findings regarding the Respondent's failure to provide relevant material to the Union and its refusal to meet to negotiate a collective-bargaining agreement. With regard to the Respondent's failure to supply relevant information, we note the following. On 3 March 1983 the union president wrote to the Respondent's counsel Robert Scolnik requesting, inter alia, wage and hour data for the 12 bargaining unit employees employed by the Respondent at its Seattle, Washington store. The information was requested by the Union under its newly acquired obligation to negotiate a bargaining agreement for these employees. In his first letter of response, Scolnik indicated he had referred the request to company headquarters. In his second letter he made no reference to the information request. In his third letter, mailed a month after the initial request for information, Scolnik offered to make the information available for inspection and copying at its payroll headquarters in Sacramento, California. Alternatively he suggested that the Respondent would compile the information and make copies of documents "at the Union's expense for clerical and administrative time and copying time expenses." This offer by the Respondent to make copies was conditioned on the Union paying copying and administrative expenses in advance, yet the cost of these expenses was not disclosed. The Union was therefore expected to commit itself in advance to paying an undisclosed amount for copying and administrative fees. If the Respondent were serious about sending the information, at the very least it would have said what the charges would be per page for copying and what the administrative fees would be based on an hourly rate so that the Union would have some objective basis on which to render a decision.

Our dissenting colleague cites *United Aircraft Corp.*[2] for the proposition that the union is obligated to pay for the expenses related to compiling the request information. The law is not so clearcut as the dissent would make it. Although in the cited case the union was obligated to pay, the information request there was extensive and the expenses amounted to over $50,000. Here, the Union requested information such as the names, addresses, and job classifications of only 12 employees, and their wages, hours, and other terms and conditions of employment. The information sought was basic and encompassed matters which employers are required to provide to enable unions to bargain intelligently and to fulfill their obligations as the selected representative of the employer's employees.[3] The cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data.[4] "If there are substantial costs involved in compiling the information in the precise form at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs . . . ."[5] The Respondent expressed no willingness to bargain about costs. Additionally, the onus is on the Respondent to show that production of the data would be unduly burdensome. There is nothing in the record to substantiate such a claim. On the contrary, it can be inferred from the Respondent's failure to produce evidence of substantial cost in response to the Union's claim that the cost would be "de minimis," that the costs for compiling basic information on only 12 employees was indeed negligible. Mindful that each case

[1] Although we agree with the judge's finding that the Respondent attempted to construct artificial barriers around the bargaining process, in reaching our conclusion we disavow reliance on his determination that the Respondent conditioned bargaining on satisfaction of a lawsuit.

[2] 192 NLRB 382 (1971), enfd. in relevant part 534 F.2d 422 (2d Cir. 1975). In *American Telephone & Telegraph Co.*, 250 NLRB 47 (1980), enfd. sub nom. *Communications Workers Local 1051 v. NLRB*, 644 F.2d 923 (1st Cir. 1981), another case cited by the dissent for the proposition that photocopying costs are to be borne by the union, it is significant to note that the union itself requested to pay the photocopying costs, which it had calculated would cost 10 cents a page. Rather than sanction an arbitrary figure, the Board ordered that the parties bargain over the reasonable cost.

[3] See, e.g., *Union Carbide Corp.*, 197 NLRB 717 (1972).

[4] See *Electrical Workers IUE v. NLRB*, 648 F.2d 18 at 26 (D.C. Cir. 1980).

[5] *Food Employers Council*, 197 NLRB 651 (1972). Contrary to the assertion of our dissenting colleague, this case indicates that there is indeed a sound basis in the law for the Union's request that the Respondent demonstrate a burdensome financial impact before the Union would discuss costs.

of what constitutes good-faith bargaining must turn on its particular facts, it is clear that the Respondent's refusal to supply the information—while neither justifying its request for costs nor offering to bargain over the matter—was unreasonable. A lack of good faith can be inferred therefrom.

The Respondent's underlying motive was to forestall sending the requested information and thereby forestall actual negotiation until it knew what the bargaining chips were going to be. A recurring theme throughout the Respondent's correspondence was its request that the Union submit its initial contract proposals in advance. In his fourth letter to the Union, the Respondent's counsel declared,

> If . . . the Union is really desirous of bargaining, then I suggest you put the cards face up on the table and send me your written contract proposals so that the Company can see what is really involved here—in terms of the real substance—and see what the prospects are. If we are in the same ballpark, some telephone conversations, some exchanges of contract language, some correspondence, etc. will most likely be sufficient to wrap it up. Why play games? Why not get down to the guts of the matter? . . . . But why not get it out into the open? Put the real substantive issues on the table, instead of horsing around. If we can make a "deal" (in the honorable sense of the word, of course), we can do it by phone in short order, provided that we get started.

This letter speaks for itself as to the Respondent's recalcitrant reluctance to send the requested information. Thus, the judge was warranted in finding that the Respondent's insistence on advance payment for the requested information was a "phony issue."

The second issue is whether the Respondent unlawfully refused to meet with the Union to negotiate a collective-bargaining agreement. The judge's rationale for discounting the Respondent's good faith is supported by the record. Since the affected employees and Union were located in Seattle, Washington, the Respondent's headquarters office and wage data were located in Sacramento, California, and the Respondent's attorney was located in San Francisco, California, it is clear that some travel might be involved in order to negotiate effectively a collective-bargaining agreement. By the mere fact that the Respondent suggested meeting halfway between Seattle and Sacramento (or San Francisco) at some undesignated location entirely unrelated to any of the parties it has in essence conceded that negotiations could in fact take place away from headquarters or the Respondent's counsel office. As noted by the dissent, "the record contains no evidence as to the extent to which Respondent's headquarters otherwise controls or deals with business matters arising within its Seattle store." If there were any overriding reason compelling negotiations to take place in Sacramento, the Respondent surely would have come forward with such a justification in its correspondence. Its failure to do so calls into question its intransigent insistence in refusing to consider negotiations in Seattle. Under these circumstances, the Respondent refused to make a reasonable and sincere effort to meet and confer with the certified representative of its employees. Applicable here is the court's observation in *NLRB v. P. Lorillard Co*:[6]

> The collective bargaining features of the statute cannot be made effective unless employer and employees cooperate in the give and take of personal conferences . . . the employer must make his representatives available for conferences *at the plant where the controversy is in progress*, and at reasonable times and places, so that personnel negotiations are practicable. [Emphasis added.]

The Board also has found that employers have violated Section 8(a)(1) and (5) when an employer has refused to meet near the locale of the represented employees.[7] The conditioning of the commencement of contract discussions on the Union's willingness to meet at a place over 700 miles from the store and employees involved does not meet the statutory test of good-faith bargaining.[8]

Finally, we disagree with the judge's finding that the Respondent violated the Act by making pay adjustments in May 1983 without negotiating with the Union. The Respondent had a prior practice of granting regular periodic automatic and merit increases. In November 1982, the Union sent the Respondent a letter specifically requesting that it continue its past practice of wage increases and Christmas bonuses, and promising not to file unfair labor practice charges.

---

[6] 117 F.2d 921, 924 (6th Cir. 1941). In the *Lorillard* case, the Respondent insisted on bargaining in New York although the plant involved was located in Middletown, Ohio.

[7] See, e.g., *Semperit Pacific*, 237 NLRB 478 (1978); *N. C. Coastal Motor Lines*, 219 NLRB 1009, 1013 (1975).

[8] *Westinghouse Pacific Coast Brake Co.*, 89 NLRB 145 (1950); *Mid-America Transportation Co.*, 141 NLRB 326 (1963).

Contrary to the assertion made by the dissent, we do not, by any means, advocate a per se approach to deciding where bargaining should take place. Nor does *Semperit Pacific*, supra, stand for such a proposition. We have considered all the relevant circumstances bearing on the issue in this case and have concluded that all the factors, taken as a whole, lead to the conclusion that the Respondent was not bargaining in good faith, but was merely using this issue as a stratagem to delay or avoid bargaining.

In good-faith reliance on this request and representation, the Respondent granted May wage increases. Although the certification was issued in February 1983 thereby activating, under normal circumstances, the obligation to bargain about wage adjustments, the Union here specifically requested that the Respondent continue its past wage practices. This request was open ended, with no time limits specified, implying that the Respondent would be free to make these adjustments until a collective-bargaining agreement was reached. Under these circumstances we find that the Respondent's unilateral action, taken in reliance on the Union's representation, was lawful and not violative of Section 8(a)(5) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Queen Anne Record Sales, Inc. d/b/a Tower Books, Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragaph 1(c) and reletter the remaining paragraph.

2. Substitute the attached notice for that of the administrative law judge.[9]

MEMBER HUNTER, dissenting.

I agree with my colleagues' conclusion that the Respondent did not violate Section 8(a)(5) and (1) of the Act by making pay adjustments in May 1983 without negotiating with the Union. However, I cannot agree to adopt the judge's conclusion that the Respondent violated the Act by failing to provide information to the Union and refusing to meet to negotiate a collective-bargaining agreement. In my judgment, the evidence favors a conclusion that the Respondent did not act unlawfully in its dealings with the Union.

The Respondent operates approximately 50 stores in various States and has its headquarters in Sacramento, California. On 7 February 1983[1] the Union was certified by the Board as the exclusive representative of the employees located at the Respondent's Mercer Street, Seattle, Washington store. On 3 March the Union, also located in Seattle, wrote to the Respondent's counsel in San Francisco, California, requesting certain information as to unit employees. This information included employees' names, job classifications, dates of hire, rates of pay, dates and amounts of lost wage increases, average number of hours worked during the previous 3-month period, and health insurance and retirement benefits. On 9 March the Respondent's counsel informed the Union that its request was being transmitted to the Respondent's headquarters where both the Respondent's labor relations offices and the requested information were located. On 15 March the Union acknowledged this response and requested that the data be provided no later than 24 March.

On 21 March the Respondent's counsel informed the Union that the Respondent considered the Board's certification to be invalid and that the Respondent was considering whether to "appeal" the certification by refusing to bargain. Noting that its negotiators were located in Sacramento, the Respondent's counsel referred to the expenses involved in either challenging the Board's certification through the Federal courts or bargaining in Seattle, Washington. He informed the Union that, as a matter of good-faith compromise, the Respondent would forgo a legal battle over the certification if a mutually satisfactory agreement could be worked out as to the time, place, and extent of negotiations. Toward that end, the Respondent's counsel proposed that negotiations be held either in Sacramento or San Francisco. He further noted since a great deal of the negotiating could be accomplished by the exchange of written proposals, revisions, and drafts, and in view of the geographical separation of the principals, face-to-face meetings on a monthly basis seemed appropriate and reasonable. The Respondent's counsel stated that he would give full consideration to any counterproposals the Union would offer and suggested that the Union might propose alternating negotiations between Seattle and Sacramento (or San Francisco), or conducting negotiations at a convenient place halfway between these cities. The letter invited the Union to contact the Respondent if it were interested in working out a mutually agreeable system of conducting negotiations in lieu of further litigation.

On 8 April the Union replied to the Respondent's letter, saying that the Union did not have the resources to meet with the Respondent in California and that the Respondent's proposal appeared to be an effort to frustrate bargaining. The Union proposed that the parties meeting "marathon" negotiations and offered to pick up the Respondent's negotiators at the Seattle airport. The Union also renewed its request for information.

On the same date the Union prepared the foregoing response, the Respondent's counsel wrote to

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 1983 except as indicated.

the Union offering to provide the information requested in the Union's 3 March letter by making it available for inspection and copying at its payroll and labor relations office in Sacramento. He added that, as a gesture of good faith and, if the Union wished, the Respondent would compile the information and make copies of relevant documents and records but that the Union would be required to pay for the copying and administrative expenses in advance. The Respondent also noted that it had not yet received a response from the Union as to its 21 March letter and that the Respondent was anxious to move ahead on its decision regarding negotiations and needed the Union's position in a timely fashion.

On 15 April the Union replied to the Respondent's 8 April letter. The Union contended that as the monetary impact of providing the information was "de minimis," the administrative costs should be borne by the Respondent. The Union further contended that it had a fundamental right to the information regardless of cost, but that if the Respondent would provide "clear and convincing evidence" that the request would impose substantial financial impact, the Union would consider sharing the expenses.

On 23 April the Respondent wrote the Union rejecting its 8 April counterproposal as to the meeting place for negotiations and the concept of "marathon" negotiations. The Respondent proposed monthly meetings starting at 9:30 a.m., with a 2-hour caucus for lunch and review of documents, and concluding at 5 p.m. The Respondent offered to consider further proposals from the Union on these matters and suggested that the Union submit a contract proposal by mail which the parties could negotiate telephonically or by mail.

On 12 May the Union wrote to the Respondent expressing astonishment that the Respondent would not come to Seattle to negotiate. The Respondent replied on 17 May reaffirming its previous positions and emphasizing once more that it was not insisting on any particular proposal and had tried to remain as flexible as possible in its approach to negotiations. On 20 May the Union replied indicating that the Respondent's positions as to providing information and meeting in California were totally inappropriate. The Union said that negotiations by telephone were "terribly inconvenient" and that the Respondent should meet in Seattle as a show of good faith.

On these facts the judge concluded that the Respondent acted in bad faith in failing to provide information to the Union and in refusing to agree to negotiate in Seattle, Washington. In so doing, the judge concluded that the information requested by the Union and not provided by the Respondent was relevant and necessary to the Union's role as bargaining agent. The judge concluded that the Respondent's insistence on advance payment before supplying the information was a "phony issue," saying "whether or not the Union is obligated to pay for such information, Respondent never advised the Union how much the billing would be, despite a suggestion from a Union official that it would consider paying for the information if [Respondent's attorney] would do so." In addition, the judge concluded that the Respondent had unlawfully conditioned bargaining by agreeing to forgo a test of the Board's certification of the Union if the Union would meet in California, and had approached bargaining in bad faith by arbitrarily refusing to meet in Seattle. In the latter regard, the judge noted that the Respondent's suggestion that the parties meet at a location between Sacramento and Seattle was "preposterous," and revealed its lack of sincerity, as did the Respondent's suggestion that the Union provide it with an initial written contract proposal while at the same time refusing to supply information needed for bargaining. Because I believe that the judge misapplied both the facts and the governing law in reaching his conclusions, I would reverse the judge and dismiss the complaint in its entirety.

At the outset, I would note that the record here contains no evidence or suggestion that the Respondent delegated bargaining authority or misrepresented the location of its labor relations functions or information in an effort to impede bargaining. Thus, we are faced with a situation where preexisting circumstances have created a geographical separation between the principals involved in collective bargaining and the information relevant to the bargaining process. Moreover, the record contains no evidence as to the extent to which the Respondent's headquarters otherwise controls or deals with business matters arising within its Seattle store, or the nature of communications between the two.

While the judge found it unnecessary to decide whether the Union was obligated to pay for the information requested by it, the law is clear that the Union was so obligated. In *United Aircraft Corp.*, 192 NLRB 382 (1971), enfd. in relevant part 534 F.2d 422 (2d Cir. 1975), the Board examined a contention that the employer, who was willing to allow the union access to its records, nonetheless violated Section 8(a)(5) of the Act by refusing to prepare at its own cost certain reports and information requested by the union. In rejecting the contention the Board said:

> An employer, if it is to fulfill its bargaining obligation under Section 8(a)(5), is required to furnish relevant information requested by the employee representative. But it does not follow that the union is entitled to such information in the exact form or on the exact terms requested. "It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining." "Good-faith bargaining requires only that such information be made available at a reasonable time and in a reasonable place and with an opportunity for the Union to make a copy of such information if it so desires." These are the terms upon which Respondent generally offered to make available the information requested by the Unions. Respondent was not required to duplicate or conform its records, at its own cost, for the convenience of the Unions. [192 NLRB at 389, footnotes and citations omitted.]

In addition, in *American Telephone & Telegraph Co.*, 250 NLRB 47 (1980), enfd. sub nom. *Communications Workers Local 1051 v. NLRB*, 644 F.2d 923 (1st Cir. 1981), the Board was faced with the issue of whether the employer was required to furnish photocopies of documents requested by the union. While agreeing with the judge that absent unusual circumstances the employer was so required, the Board stated (250 NLRB at 47 fn. 2):

> We further note that the Administrative Law Judge ordered that Respondent furnish the photocopies to the Union "at a rate of no more than 10 cents a photocopy page." We shall modify this portion of the recommended Order to order Respondent to provide, or allow the Union to make, the photocopies, and to bargain over the reasonable additional costs to the Employer for furnishing the requested information. *The reasonable additional costs shall be assumed by the Union.* [Emphasis added.]

The foregoing cases make clear that an employer is not required to absorb the expenses of compiling and photocopying information and will not be found to violate Section 8(a)(5) so long as it acts reasonably in attempting to make relevant information available to the Union. In the instant case the judge concluded that the Respondent acted in bad faith because it failed to advise the Union how much the billing would be, despite the Union's suggestion that it would consider paying for the information if the Respondent did so. The judge's conclusion misstates the facts. The record reveals that the Respondent offered to make its records available to the Union in Sacramento, or to compile and forward the information if the Union would agree to pay the costs. The Union did not indicate a willingness to consider the Respondent's offer, but replied instead that it had a fundamental right to the information and that the Respondent should bear the costs of compiling the information unless it could demonstrate by "clear and convincing evidence" that the compilation process involved "substantial and/or burdensome financial impact," whereupon the Union would *consider sharing* the expenses. Under no construction of these facts can the Union be said to have indicated a willingness to consider paying the costs if informed of such by the Respondent. Moreover, there is no basis in the law for the Union to require that the Respondent demonstrate burdensome financial impact by clear and convincing evidence before the Union would discuss costs.[2] Accordingly, I would find that it was the Union's intransigence and not a lack of good faith which caused the Respondent to refuse to supply the information to the Union and I would therefore dismiss this allegation of the complaint.

Similarly, the judge relied on an erroneous construction of the facts to conclude that the Respondent refused to meet and negotiate with the Union. The complaint in the instant case alleged that the Respondent violated Section 8(a)(5) and (1) of the Act and that since 9 March 1963 it has refused to meet and bargain with the Union near the locale of

[2] *Food Employers Council*, 197 NLRB 651 (1972), does not support the majority's contrary conclusion. In that case, the employer flatly refused to provide information requested by the union. The Board found a violation but noted that the employer had at an earlier time furnished some of the requested information to the union, albeit in a form other than desired by the union. The Board further noted the unsupported assertion of each party that an onerous burden would be placed on it should the Board require production of the requested information in a form desired by the adverse party. Unable to make a judgment on this issue, the Board ordered the parties to bargain "if there are substantial costs involved in compiling the information in the precise form and at the intervals requested by the Union." The Board added, however, "if no agreement can be reached, the Union is entitled in any event to access to records from which it can reasonably compile the information" (citations omitted). Id. at 651. Thus, even in the remedial posture of the case, the Board declined to require that the employer bear the costs of producing information, including that categorically denied the union. The existing law clearly permits an employer to unilaterally shift to the union the financial burden of compiling and reproducing information by allowing access to records from which the requested information may be gathered. *Cincinnati Steel Castings Co.*, 86 NLRB 592, 593 (1949). Where circumstances are such that access to an employer's records will not reasonably satisfy the union's needs, an employer may be required to compile or photocopy information, but the union must bear the reasonable costs involved. *American Telephone & Telegraph Co.*, supra; *United Aircraft Corp.*, supra. In the instant case, the Respondent offered the Union access to its records, located in Sacramento, and offered to compile and forward information to the Union, if it preferred, on payment of costs. There is no indication that the Respondent's offer contemplated other than reasonable costs in this regard. Assuming that the Union's needs could not reasonably be met by access to records, located in Sacramento, it was obliged to bear the reasonable costs of the Respondent in compiling the information and forwarding it to Seattle.

the unit. In adopting the judge's conclusion, my colleagues expressly disavow reliance on his determination that "Respondent conditioned bargaining on satisfaction of a lawsuit." Presumably, this is a reference to the judge's conclusion that the Respondent conditioned a waiver of its right to contest the Board's certification of the Union, on the Union's agreement to meet in California. I agree with my colleagues that the Respondent did not condition bargaining on such a waiver, but I disagree that the evidence otherwise supports the finding of a violation.

In its communications to the Union, the Respondent made it clear that it was concerned with the high costs associated with conducting extensive face-to-face negotiations in Seattle, when the Respondent's negotiators were located in Sacramento. It proposed that all negotiation meetings be conducted in Sacramento and added:

> The Company will appreciate your response in the same (good faith) spirit and will give full and serious consideration to any and all counterproposals you wish to make. For example, you may feel that the location of negotiation meetings should be alternated, one time in Sacramento (or San Francisco), and the next time in Seattle. Or, you may feel that a better solution would be to meet at some convenient place halfway in between Seattle and Sacramento (or San Francisco). Or you may have some other proposal or proposals.

In addition, the Respondent informed the Union of its belief that the parties could reasonably conduct negotiations through a combination of written exchanges and face-to-face sessions:

> [T]he Company would like to know what proposals you wish to make concerning the frequency of meetings and the time periods for each meeting. Since a great deal can be accomplished by the submission of written contract proposals, counterproposals, revisions, drafts, etc., and in view of the distances involved, meetings once a month seem appropriate and reasonable as a general plan, subject to change by mutual agreement depending on the particular circumstances.
>
> Likewise, in view of the distances, scheduling each meeting for 9 a.m. to 5 p.m. (with an adequate lunch period for conferring, preparation, etc.) seems appropriate and reasonable, subject, again, to change by mutual agreement depending on particular circumstances.

At a later point, the Respondent urged the Union to begin the negotiation process by submitting a contract proposal by mail, which could have been further discussed by the parties telephonically, or by mail. At the same time, the Respondent indicated a willingness to consider any other proposals the Union would advance. For its part, the Union adhered to its position that the Respondent should agree to negotiate in Seattle, and that its refusal to supply the information requested by the Union made submission of bargaining proposals impossible.

The judge found that the Respondent's only contention in regard to the site for negotiations was that it would be "inconvenient" to negotiate in Seattle because the Company's records were in Sacramento. In addition, the judge found that the Respondent's suggested counterproposal of negotiating in a location between Seattle and Sacramento was "preposterous," and that the Respondent disingenuously contended that the Union's failure to provide an initial proposal prevented negotiations from beginning inasmuch as the Respondent refused to provide the Union with information necessary to construction of such proposal.

Without regard to whether the Union's refusal to submit an initial contract proposal is of significance in this case, for the reasons indicated above, I would not find that the Respondent unlawfully refused to provide information to the Union and do not believe the judge could rely on this allegation in support of his conclusion here. Further, the judge's rationale for otherwise discounting the Respondent's good faith is not supported by the record. As the facts above reveal, the Respondent immediately and clearly expressed its concerns over the financial impact of extended negotiations in Seattle and indicated its belief that great progress could be made through a procedure combining mail and face-to-face negotiations. In addition, there is absolutely no evidence on the record to support the judge's conclusion that the Respondent's suggestion of possible negotiations at a location between Seattle and Sacramento was not a viable alternative in terms of convenience or cost. Rather, it appears a literal attempt to meet the Union halfway. Finally, there is no evidence that the Respondent failed or refused to promptly and directly address itself to the Union's communications, or engaged in any other conduct which would support a finding that the Respondent refused to bargain in good faith. In these circumstances, I find that the Respondent could lawfully refuse to agree to the Union's proposal, as Section 8(d) of the Act does not require that it concede its

position in negotiations.[3] As the Respondent was at all times willing to negotiate with the Union, I would dismiss this allegation of the complaint as well.

[3] I agree that an employer may violate Sec. 8(a)(5) and (1) of the Act by refusing to bargain near the locale of the represented employees. However, unlike my colleagues, I am not willing to adopt the per se approach found in *Semperit Pacific*, 237 NLRB 478 (1978). Whether an employer's conduct constitutes a refusal to bargain in good faith is a matter which requires consideration of all relevant circumstances bearing on the issue. *Rhodes-Holland Chevrolet Co.*, 146 NLRB 1304 (1964). In addition, Sec. 8(d) of the Act allows the parties discretion to seek the most advantageous bargain while also prohibiting the Board from requiring concessions in negotiations. Thus, the parties should be given considerable leeway in reasonably pursuing bargaining arrangements favorable to their respective interests. In the instant case, the Respondent had a reasonable basis for pursuing negotiations in locations other than Seattle. Over a relatively brief period, the Respondent sought the Union's agreement to negotiate in Sacramento, or to alternate negotiations between Sacramento and Seattle. The Respondent also expressed its willingness to consider other arrangements proposed by the Union and offered alternatives for the Union's consideration. While the Union rejected the Respondent's proposals, it was not prepared to begin negotiations until the Respondent provided information requested by the Union, and I have found above that the Respondent did not violate the Act by refusing to provide the information. Under the circumstances, I do not find that the Respondent unlawfully refused to bargain near the locale of the represented employees.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union certified as the exclusive representative of employees at our store located on Mercer Street in Seattle, Washington.

WE WILL NOT refuse to bargain with that Union, Retail Store Employees Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO by refusing to supply it with wage and personnel data relevant to collective bargaining.

WE WILL NOT refuse to meet with the Union in or near Seattle to engage in good-faith collective bargaining in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately supply to the Union the wage and personnel data sought by it on 3 March 1983.

WE WILL, on request, bargain with the Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed at the Respondent's facility located at 20 Mercer Street, Seattle, Washington, excluding all office clerical employees, deposit clerks, professional employees, guards, and supervisors as defined in the Act.

QUEEN ANNE RECORD SALES, INC.
D/B/A TOWER BOOKS

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. On June 6, 1983, the Acting Regional Director for the National Labor Relations Board for Region 19 issued a consolidated complaint accusing Queene Anne Record Sales, Inc. d/b/a Tower Books (Respondent) of having violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). It is based on charges filed on April 4 and May 19, 1983, by Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO (the Union). Although an answer was filed to the consolidated complaint, the parties on August 17–19 executed a stipulation of facts in lieu of hearing in which they agreed that there are no disputed issues of fact, waived a hearing, and further stipulated that the case be decided on the stipulations of fact as supplemented by the formal papers. Thereafter the General Counsel and Respondent filed briefs which have been carefully considered.

Issues

Whether Respondent violated Section 8(a)(5) and (1) of the Act by: (1) failing to provide the Union with material relevant to collective bargaining; (2) refusing to meet with union representatives for the purpose of negotiating a collective-bargaining contract; and (3) unilaterally, and without notice to the Union, making certain pay rate changes or whether the Union waived its right to complain of such changes.

Pursuant to the stipulation I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Respondent is a wholly-owned subsidiary of MTS, Incorporated, a California corporation headquartered in Sacramento, California, and from which it operates approximately 50 stores in California, Washington, Oregon, Nevada, Arizona, Hawaii, and New York. During the past 12 months, a representative period, Respondent's gross sales of goods and services exceeded $500,000 and during the same period it purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 from sources outside the State. The parties agree, therefore, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulate, and I find, that the Union is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The store in question is located on Mercer Street in Seattle, Washington. On January 15, 1982, the Board conducted a representation election among the employees at that store. Due to challenged ballots the results of the election were indeterminative. Thereafter Respondent filed objections to the Union's conduct affecting the outcome of the election. Later a hearing was held on February 11, 1982, to resolve challenged ballots and objections. The hearing officer issued a report on March 5 and on July 16 the Board directed the opening of one of the ballots. Respondent filed a motion for reconsideration which was denied on September 9. The challenged ballot was opened on September 20 and a revised tally issued that day showing that five employees had voted for union representation with four against. Respondent then filed an additional objection to the conduct of the election with respect to the marking of the opened ballot. The Regional Director issued a report recommending that the objection be overruled; Respondent again excepted. Finally, on February 7, 1983, the Board issued its decision and certification of representative in the agreed-upon unit.[1]

B. *The Refusal to Supply Information*

On March 3, 1983, approximately 3 weeks after the certification of representative was issued, the Union's president, Steve Gouras, wrote Respondent's counsel, Robert J. Scolnik, advising him of the Union's desire to negotiate a labor agreement. He asked for the following information so that he could prepare for negotiations: The name of each bargaining unit employee, his or her job classification, hire date, rate of pay, date, and amounts of last wage increase, average number of hours worked in the last 3 months and copies of "health insurance or retirement benefits available to your bargaining unit employees."

On March 9, Respondent's counsel stated that all of the information which the Union sought was located in Respondent's Sacramento headquarters and that he was transmitting the request to the appropriate officials there. On March 15, another union official, Grievance Director Fred Rosenberry, wrote Scolnik acknowledging the response and asking that the material be provided no later than March 24.

By letter of March 21, Scolnik advised the Union of his client's position. Although he raised a number of matters which will be discussed in the section of this decision dealing with the refusal to meet, section III, C, infra, he did not transmit any of the information which the Union sought. By letter dated April 8 Rosenberry again sought the material. Also by letter dated April 8 Scolnik wrote the Union offering to provide the information to the Union by making it available for inspection and copying at its payroll and labor relations office in Sacramento. He said as a "gesture of good faith" the Company, if the Union wished, would compile the information and make copies of the documents and records but that the Union must pay for the copying and administrative expenses in advance. He did not suggest what the cost would be.

By letter dated April 15, another union official, Louis T. Spignesi, asserted to Scolnik that the monetary impact of providing the information was "de minimis" at best and that the administrative costs should be borne by the Employer. Although he contended the Union had a "fundamental right" to the information regardless of cost, he said Respondent would provide "clear and convincing evidence" that the request would impose "substantial and/or burdensome financial impact," the Union would consider sharing the expenses.

By letter dated April 20, Scolnik asserted the Union was refusing to come to Sacramento and refusing to bear the cost for assembling and sending the information. He said assuming he was correct, the parties were "at an impasse concerning these procedural issues," i.e., both the information request and other matters. He suggested the reason implied in the Union's April 8 and 15 letters for refusing to accept or consider the Company's "proposal" was "the Union's claimed inability to pay." He then demanded a large amount of financial data from the Union. However, he did not transmit any of the material sought. By letter dated May 12, Rosenberry advised Scolnik the Union still needed the information listed in Gouras' March 3 letter. In his reply of May 17, Scolnik said Respondent "specifically reaffirms its position with respect to the information you have requested." He referred to his April 8 and 20 letters. He said, "We seem to be in an impasse on that subject as well."

One of the themes which is found throughout Scolnik's letters is that before agreeing to meet with the union officials, the Union should provide him with its initial contract proposals. The Union's standard reply in

[1] Although Respondent argues to me that it was an error for the Board to have issued the certification, I am bound by the Board's action and do not consider any attack on it.

each case was that to formulate an initial proposal it needed the information sought in its March 3 letter. At no time did Respondent ever provide the information; neither did it tell the Union the nature of the work needed to assemble it or its cost.

The Supreme Court has consistently held that Section 8(d) of the Act imposes an affirmative duty on an employer to supply the union with information relevant to collective bargaining. A breach of that duty is a violation of Section 8(a)(5). See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Furthermore, it has long been held that wage data is presumptively relevant to collective bargaining. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965). Indeed, the underlying Board decision in *Curtiss-Wright*, 145 NLRB 152, 157 (1963), clearly holds that there is a presumption of relevance when the sought-for data covers employees in the bargaining unit, as it does here. Thus the Union seeks the names of unit employees, their job classifications, dates of their hire (i.e., seniority, their pay rates, the amount of their last pay increase, the average number of hours worked in the most recent 3-month period and copies of the health and pension plans available to them. Respondent has made no effort to rebut the presumption of relevance.

Moreover, the case law is contrary to Respondent here. The Board decision in *Curtiss-Wright*, supra, specifically dealt with a similar refusal to turn over job classification data and wage information. Indeed wage histories were early required to be divulged. *Aluminum Ore Co. v. NLRB*, 131 F.2d 485, 487 (7th Cir. 1942). Both the request for the last pay increase and the average number of hours worked fall into that category. Moreover, health and retirement plan information have also been deemed relevant whether as wages or as a term and condition of employment. *NLRB v. Feed & Supply Center*, 294 F.2d 650 (9th Cir. 1961). Finally, although mentioned first by the union, the names of the unit employees must be disclosed to permit the union to perform its statutory duty of representation. *Magma Copper Co.*, 208 NLRB 329 (1974). See also *Harvey's Wagon Wheel*, 236 NLRB 1670 (1978).

The simple fact is Respondent never supplied any of the information. Its only advance reason for refusing to do so was that it wished reimbursement, in advance, for the cost of providing it. Whether or not the Union is obligated to pay for such information, Respondent never advised the Union how much the billing would be, despite a suggestion from a union official that it would consider paying for the information if Scolnik would do so. Scolnik never did.

I hold that Section 8(d) of the Act obligated Respondent to provide the information sought in the March 3 letter and that by failing to do so it violated Section 8(a)(5) and (1) of the Act. I also find Scolnik's insistence on advance payment without advice regarding the actual cost to be, simply put, a phony issue. If it had been a legitimate issue he would have, at the very least, given the Union some sort of means of estimating the cost. Moreover, it seems likely that all the information would have been at the fingertips of either the personnel or payroll offices and easy to marshal.

C. *The Refusal to Meet*

In his letter of March 15, Union Grievance Director Rosenberry had asked that the wage data be provided by March 24. Scolnik in his reply of March 21 responded that the Board certification was "invalid." He pointed out that Respondent was considering appealing the certification by refusing to bargain, the standard manner by which Board certifications are challenged. He then compared the expense of litigating that question with the expense of negotiating a contract in Seattle observing that the appropriate company officials were located in Sacramento. He asserted:

> The company is willing, as a matter of good faith compromise of a dispute concerning the validity of the NLRB's decision and certification, to waive its rights to challenge that decision and certification and to go through the various legal steps and procedures leading to judicial review in the United States Court of Appeals, if a mutually satisfactory arrangement can be worked out with your union concerning the time and place of negotiation meetings and frequency and extent of such meetings.

Supposedly attempting to work out such an arrangement, Scolnik proposed "all" negotiations be conducted either in Sacramento or San Francisco. He said he would "give full and serious consideration to any and all counter-proposals [the Union wished] to make." He suggested the Union might wish to propose alternating the California cities with Seattle or some "convenient place half-way between Seattle and Sacramento (or San Francisco)." (Parenthesis in original.) He also wanted to know what the Union proposed with respect to the frequency of the meetings and the time period for each meeting. He said, "Since a great deal can be accomplished by the submission of written contract proposals, counter-proposals, revisions, drafts, etc., in view of the distances involved, *meetings once a month seem appropriate and reasonable as a general plan . . . .*" (Emphasis supplied.) He also suggested meetings take place from 9 a.m. to 5 p.m. with an adequate lunch period for conferring, preparation, etc.

He concluded saying, "If you are interested in working out a mutually agreeable system of conducting bargaining negotiations, *in lieu of further litigation*, please let me know." (Emphasis added.) Rosenberry replied by letter of April 8, saying the Union did not have the resources to meet with Respondent in California. He also said Scolnik's proposal appeared to be an effort to frustrate the bargaining process. Even so, Rosenberry offered to pick up the Employer's representatives at the Seattle airport. With respect to the frequency of meetings, Rosenberry suggested "marathon negotiations" and observed that bargaining should be a relatively easy process since the store was less than a mile from the Union's office.

Scolnik's April 8 letter stated his client was "anxious to make a decision concerning collective bargaining negotiations." He said that no decision had been made or

could be made until the Union's position had been ascertained. Thus, he said, he was repeating his offer to negotiate rather than litigate if the expenses of negotiating were less than litigating.

The Union's April 15 letter did not refer to the question of where to meet or the frequency of meetings. But Scolnik's April 20 letter rejected the Union's "counterproposal" which the Union wished to make. He also rejected the concept of "marathon negotiations." Instead, he proposed "monthly meetings starting at 9:30 a.m., with a 2-hour caucus for lunch and assessment of positions, review of documents and materials presented during the meeting, and recessing at 5 p.m. until the next meeting." He said he would consider further counterproposals. Also in this letter he asserted that the parties were at an impasse regarding these "procedural issues" but said he was not declaring an impasse.

In his May 12 letter Rosenberry expressed astonishment that Respondent would not come to Seattle to deal with the representative of its Seattle employees.

Scolnik in his May 17 letter "renew[ed his client's] position" as stated in his previous letters and "specifically reaffirm[ed] them" saying that it was "prepared to waive its right to contest the Board's certification if bargaining negotiations can be conducted in any mutually agreeable, reasonable times and places." He claimed Respondent was not insisting on any particular proposal. He later said Respondent had "tried to be as flexible as possible. In my [Scolnik's] opinion, but for the Union's adamant insistence on its position we could have and would have made substantial progress by now." No further correspondence occurred.

Section 8(d) of the Act obligates the parties "to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." The question therefore is whether or not Respondent's conduct here was in good faith or whether it was an outright refusal to meet.

In this case I find myself most unimpressed with the conditions imposed on bargaining by Mr. Scolnik. He has conditioned collective bargaining by offering not to litigate the certification question if the Union would agree to meet in California. Assuming that negotiating the procedures for collective bargaining is a mandatory subject of bargaining, it is quite clear that conditioning bargaining on satisfaction of a lawsuit is unlawful for that is a nonmandatory topic. *Peerless Food Products*, 231 NLRB 530 (1977); *Kit Mfg. Co.*, 142 NLRB 957, 971 (1963), enfd. 335 F.2d 166 (9th Cir. 1964). Thus, Respondent has approached bargaining here by constructing an artificial barrier around the bargaining process. Moreover, while imposing the barrier, Scolnik asserts that Respondent is ready, willing, and able to bargain with the Union, but only if the Union agrees to the procedures he has proposed, his disclaimers notwithstanding. Finally, his only explanation for refusing initially to meet with the Union in Seattle is that it was "inconvenient." There is no real explanation of why it is inconvenient other than the fact that the company headquarters and records are in Sacramento. That hardly seems to be an insurmountable problem considering the fact that Respondent no doubt routinely deals with the Seattle store on other business matters. Indeed, his suggested union counterproposal to meet halfway (somewhere in Oregon?) is a preposterous one. Why would any negotiator wish to meet at a place where neither party could consult with its principals? Finally, I note that Respondent claims one of the reasons it should not travel to Seattle is the Union's failure to provide it with an initial proposal. Considering the fact that Respondent has unlawfully refused to provide the information the Union sought, such a contention is purely disingenuous. Accordingly, I find Respondent has approached bargaining in a bad-faith manner and that its refusal to negotiate in Seattle is a breach of the obligation set forth in Section 8(d). *Samperit Pacific*, 237 NLRB 478 (1978), and the cases cited at 488. Compare *Case, Inc.*, 237 NLRB 798 (1978), wherein an administrative law judge found that an offer to negotiate by conference call or by mail was an impediment to good-faith bargaining. I also note that Respondent's proposal with respect to the manner of bargaining here is designed to frustrate the process. Its proposal to meet 1 day a month with 2-hour lunch periods cannot be construed as reasonable. See *General Motors Acceptance Corp.*, 196 NLRB 137, 138 (1972), where the employer allowed only 10 half days for bargaining during a 6-month period.

D. *The Unilateral Wage Change*

It will be recalled that the election was held on January 15, 1982. On November 18, some 11 months after the election, the union official responsible for the organization drive, Mike Orth, wrote a letter to William Fratzke, Respondent's store manager. The letter reads as follows:

> It has been brought to my attention that you intend to freeze or withhold all wage increases for your employees, including the past practice of providing Christmas bonuses for fear of charges being filed by this local union.
>
> The National Labor Relations Board prohibits the employer from:
>
> > "Promising or granting promotions, pay raises, or other benefits, to influence an EMPLOYEE'S VOTE, by a party capable of carrying out such promise."
>
> As you are aware, the N.L.R.B. secret ballot election has already been concluded and for that reason I request that you continue your practice of providing periodic wage increases as well as maintaining your Christmas bonuses for all of your employees.
>
> You have the word of this local union that we will not file charges against Queen Anne Record Sales, Inc., d/b/a Tower Books for providing wage increases and other benefits that will provide a better way of life for your VALUED employees.

As previously found the Board's certification of representative was issued on February 7, 1983. The parties stipulated that on or about May 1, 1983, Respondent adjusted the wages of unit employees and did so without

previous notice to the Union or affording the Union an opportunity to negotiate and bargain as the employees' exclusive representative. The salary adjustments included three automatic step increases and six discretionary merit increases. According to the stipulation, Respondent's policy and practice with respect to automatic step increases was "25 cents per hour after 5, 8, and 12 months." After the final automatic step increase, performance reviews are made semiannually, generally January and July. Increases based on merit are generally effected in February and August of each year. The stipulation also states the delay until May 1983 was the result of an accidental misfiling of Orth's letter. A divisional manager of Respondent, Heidi Keller, did advise the Union, by letter dated May 6, 1983, that Respondent had "adjusted some of the salaries" of the Seattle employees "to be in keeping with the wage policies in our other stores." She did not give any other details.

The parties further stipulated that Respondent in good faith believed Orth's letter was intended to apply to any wage increases but that the Union intended it to apply only to automatic step increases, not merit increases.

Clearly the tenor of the letter was to ask Respondent not to freeze or withhold routine wage increases or Christmas bonuses out of fear that the Union filed charges over them. The organizer, in the apparent belief that the Act only prohibited an employer from attempting to influence the election via wage increases, said that since the election was over, the Company could continue its practice of providing "periodic wage increases as well as maintaining . . . Christmas bonuses for all of your employees." He said if that was done the Union would not file unfair labor practice charges.

Whatever legal questions might be raised with respect to wage increases, whether discretionary or nondiscretionary, given after the November 18 letter, the significant fact is the certification of representative was issued on February 7, 1982. The wage increases which are the subject of complaint were granted in May, 3 months later. While the letter may well have insulated Respondent from any unfair labor practice charges with respect to nondiscretionary increases prior to the certification and arguably may have insulated it from those dealing with nondiscretionary increases, the efficacy of the letter expired with issuance of the certification, for it ended the election process. Once the certification was issued Respondent no longer had the exclusive authority to make wage changes. It was obligated to first deal with the Union on all questions of wages. It did not do so. Thus, the fact that it in good faith relied on the letter (even though it had misplaced it) to grant the increases is no defense. The Board's certification is the controlling document. *Allstate Insurance Co.*, 236 NLRB 193 (1978).[2] The unilateral wage increases are clearly barred by the Act in that circumstance. *Katz v. NLRB*, 369 U.S. 736 (1962); *Sav-On Drugs*, 261 NLRB 1168 (1982), enfd. 716 F.2d 574 (9th Cir. 1983); *Master Slack Corp.*, 230 NLRB 1054 (1977), enfd. 618 F.2d 6 (6th Cir. 1980) (unilateral change issue not pressed on appeal).

Accordingly, I find that the May 1983 wage increases, both discretionary and nondiscretionary, were given without notice to the Union and without giving the Union the opportunity to bargain over them. In that circumstance Respondent is guilty of making unilateral wage changes in breach of the good-faith bargaining obligation of Section 8(a)(5) and (1).

IV. THE REMEDY

Having found that Respondent has engaged in various acts and conduct in violation of Section 8(a)(5) and (1), I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include an order requiring Respondent to provide, at its expense, the information the Union sought in its letter of March 3, 1983, and that it be ordered to bargain in good faith with the Union, at the Union's request, at a reasonable location near the Seattle store. The cease-and-desist order shall be construed so as not to deprive any employee from any wage or salary increase he or she may have received by Respondent's unlawful unilateral increases.[3] In addition, I shall recommend that the Certification of Representative be extended until such time as Respondent begins to bargain with the Union in good faith. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S 817.

On the foregoing findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent Queen Anne Record Sales, Inc. d/b/a Tower Books is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed at Respondent's facility located at 20 Mercer Street, Seattle, Washington; excluding all office clerical employees, deposit clerks, professional employees, guards and supervisors as defined in the Act.

4. Since February 7, 1983, the Union has been the exclusive collective-bargaining representative of all the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

5. On the dates shown in the foregoing decision Respondent has failed to bargain in good faith with the Union and has therefore violated Section 8(a)(5) and (1) of the Act by:

[2] *Allstate* also governs whether or not Respondent may refuse to bargain pending a challenge to the Certification of Representative. Clearly it may not.

[3] *Keystone Steel & Wire*, 248 NLRB 283 (1980).

(a) Refusing to honor the Union's request to provide information relevant to the performance of its duty as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit.

(b) Refusing to meet with the Union for the purpose of engaging in good-faith collective bargaining.

(c) Making unilateral wage increases to the employees in the bargaining unit without first bargaining with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Queen Anne Record Sales, Inc. d/b/a Tower Books, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Retail Store Employees Union Local 1001, chartered by United Food and Commercial Workers International Union, AFL–CIO by refusing to supply it with wage and personnel data relevant to collective bargaining in the appropriate unit.

(b) Refusing to meet with the Union in or near Seattle Washington to engage in good-faith collective bargaining with respect to the wages, hours, and terms and conditions of the employees in the appropriate unit.

(c) Unilaterally and without notice to the Union changing the wages of the employees in the bargaining unit.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[5]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately supply the Union with the material it sought in its letter of March 3, 1983; the expense of providing such information to be borne by Respondent.

(b) On request, bargain in good faith with the Union at a reasonable location near its Seattle, Washington store with respect to a collective-bargaining agreement covering employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Mercer Street location in Seattle, Washington, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the Board should order the Certification of Representative extended as discussed above in the Remedy portion of this decision.

---

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] In view of the fact that Respondent's conduct here constitutes a rejection of the principle of collective bargaining, a broad order is appropriate. *Hickmott Foods*, 242 NLRB 1357 (1979).

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Preterm, Inc. *and* District 1199, Mass. National Union of Hospital and Health Care Employees, a division of RWDSU/AFL–CIO. Cases 1–CA–12325 and 1–CA–12326

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 23 July 1982 Administrative Law Judge Jerry B. Stone issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party also filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

The Respondent has excepted to the judge's conclusion that the Union's expressly unconditional offer to return to work on behalf of the unfair labor practice strikers was not in fact conditioned nor was it qualified by the Union's later statements. The Respondent argues that by making the offer on behalf of "each and every" striking employee in response to the Respondent's position in settlement negotiations that it would not reinstate 10 strikers because of their strike misconduct, and by later statements, the Union "insisted as part of its offer" that the Respondent take back every striking employee.

We have found that 6 of the 10 contested strikers did forfeit their entitlement to reinstatement and backpay under the Act by their misconduct during the strike. Had the Union made an offer on 2 March 1977 providing that the strikers would return to work only if all strikers were reinstated, none of the strikers would be entitled to backpay from that date because the offer would have been conditioned, in part, on the reinstatement of those strikers we have found the Respondent was not legally obligated to reinstate and the Respondent therefore would have been privileged to reject it. See *Sawyer Stores*, 190 NLRB 651 (1971); *American Beauty Baking Co.*, 171 NLRB 700 (1968). The judge found, however, no evidence that the Union either implicitly or explicitly made such an "all or none" offer. On careful review, we find the judge's conclusion to be supported by the record and therefore adopt it.

An offer to return to work on behalf of "each and every" employee, standing alone, does not raise the inference that no striker will return unless all are reinstated. See *Homes Insulation Service*, 255 NLRB 311, 312 fn. 8 (1981). The Respondent urges that the Union's offer on behalf of each and every striker does have such import here because it was made in "response" to the Respondent's position in settlement discussions that it would not reinstate 10 of the strikers. The Union's witnesses testified that the Union did not learn of the Respondent's position concerning the 10 strikers until after the offer was made. Even assuming, however, that the Respondent's version of the sequence of events is correct, the record shows that the Union's offer both

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Hunter would not adopt the judge's finding that employee Harriet Ruffen was working a 40-hour week at the time of the Union's 19 October 1976 strike and was not reinstated to an equivalent position in June 1977. Ruffen was given a performance evaluation on 25 May 1976 which carried a notation from her supervisor that Ruffen would work a 40-hour week until 2 October 1976. Ruffen testified that she was told that she could work full time until the Respondent no longer needed her services because of the Respondent's practice of hiring Northwestern University students to work as nurses aides. It is undisputed that about 2 weeks before the 19 October 1976 strike a Northwestern University student was hired to do the same work Ruffen was doing. In addition, Ruffen testified that her regular work schedule called for 7–8 hour days on Saturday and Tuesday through Friday of each workweek. On such a schedule, Ruffen would have worked between 42 and 48 hours over the portion of the pay period occurring before the 19 October 1976 strike. Instead, Ruffen's payroll record reveals that she worked only 32 hours during this period, a number consistent with the Respondent's contention that Ruffen was placed on a 3-day/24-hour workweek before the strike began. While Ruffen testified that her schedule was not changed before the strike, the judge did not specifically credit this testimony and elsewhere discredited Ruffen. Under the circumstances, Member Hunter finds that Ruffen was working a 3-day/24-hour workweek before the strike and that the Respondent therefore reinstated Ruffen to an equivalent position in June 1977.

[2] We adopt as consistent with our holding in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), the judge's conclusions that striking employees Erde, Pinero, Reeves, Walker, and Matson forfeited their entitlement to reinstatement and backpay under the Act by their strike misconduct. In addition, we find merit in the Respondent's exception to the judge's conclusion that striking employee Rena Baskin did not likewise disqualify herself from reinstatement. Strike misconduct warrants denial of reinstatement and backpay if, under the existing circumstances, it reasonably tends to coerce or intimidate. *Clear Pine Mouldings*, supra. We find that by grabbing a nonstriking employee walking along the sidewalk on her way to work by the elbows and shaking her and by taking an incoming patient by the arm and steering her away from the Respondent's clinic, Baskin clearly engaged in intimidating and coercive conduct. We therefore conclude, contrary to the judge, that Baskin is not entitled to backpay and have modified the recommended Order accordingly.

In adopting the judge's conclusion that the Respondent failed to carry its burden of demonstrating that employee Harmon did not engage in misconduct warranting a denial of reinstatement, Member Hunter relies solely on the judge's finding under *Blue Flash Express*, 109 NLRB 591 (1954), that the Respondent did not produce persuasive evidence that Harmon had engaged in the misconduct alleged.

by its terms and the form and circumstances of its delivery is separable from the exchange of positions comprising the contemporaneous settlement discussions. The Respondent's witnesses testified that the settlement negotiations were conducted by the presiding judge at the unfair labor practice hearing, who relayed each party's position or response to the other while the parties were sequestered in separate rooms. On the other hand, it is uncontested that the Union's offer was in the form of a signed and dated document expressly stating that it was an unconditional offer to return to work which was delivered directly to the Respondent by the Union in the hallway outside the hearing room during a scheduled break in the negotiations. The evidence proffered by the Respondent establishes at most that the Union was aware of the Respondent's position on the 10 strikers before making its offer. That the Union nevertheless made the offer on behalf of each and every striker does not compel the inference that the offer was conditioned on the return of all.

Also, we are not persuaded that the Union's statements following the offer to return to work, cited by the Respondent, conditioned the offer on the reinstatement of every striker. The record indicates that the Union's statement to the presiding judge at the hearing and to counsel for the General Counsel that the Respondent should drop the strike misconduct allegations and that all strikers had to be reinstated pertained to the Respondent's proposal in settlement discussions that the parties engage in some form of expedited litigation or arbitration to determine whether the listed strikers were entitled to reinstatement. The Respondent chiefly relies on union attorney Domesick's testimony that, in response to the statement by the Respondent's attorney Leon Kowal that the list of 10 strikers represented those employees whom the Respondent would not take back under any circumstances but that the Respondent was prepared to discuss the return of the others, Domesick told Kowal that "we were not going to engage in discussions which were premised on our agreement that these ten under no circumstances would be returned." It cannot be conclusively determined from the record whether this exchange concerned the future course of settlement discussions or the fulfillment of the Respondent's legal obligation to reinstate the strikers triggered by the offer to return to work. Even assuming that Domesick's remarks concerned reinstatement of the strikers pursuant to the Union's offer, his expression of the Union's disagreement with the Respondent's position on the 10 strikers does not amount to a statement that, unless these strikers were reinstated, no employee would return to work.

The Respondent also contends in its exceptions that on 2 March 1977 it made a valid unconditional offer of reinstatement to the striking employees both by its expressed willingness in settlement discussions to take back all the listed strikers without condition and by Leon Kowal's above-mentioned statements to attorney Domesick that the Respondent was prepared to discuss the return of the other strikers or as to them did not have the same objection as it did to the strikers on the list. We find no merit in this contention. To toll the backpay period, an employer's offer of reinstatement must be unequivocal, unconditional, and sufficiently specific to apprise employees that they are being offered their former jobs, or if these jobs no longer exist, equivalent positions. *L. A. Water Treatment*, 263 NLRB 244 (1982); *Standard Aggregate Corp.*, 213 NLRB 154 (1974). The Respondent's statements that it would "take back" certain of the strikers or was "prepared to discuss" their return lack the required specificity to constitute a valid offer of reinstatement and toll the backpay period. Cf. *Moro Motors*, 216 NLRB 192 (1975) (employer's statement to employee that he would like to have employee back not valid offer of reinstatement). For the foregoing reasons, we agree with the judge's conclusion that the Union made a valid offer to return to work on 2 March 1977 and that the backpay period runs from that date.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Preterm, Inc., Brookline, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Strike the name Rena Baskin from the list of backpay recipients.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge. This proceeding to determine backpay, if any, due certain unfair labor practice strikers, pursuant to the remedial order issued by the Board on February 9, 1979 (reported at 240 NLRB 654), and by stipulation conceded to be in all respects a valid and proper order, was held on November 16–20, 1981, and January 25–28, and February 1–2 and 8–10, 1982, at Boston, Massachusetts.

The issues essentially concern (1) whether the Union made an unconditional offer on March 2, 1977, for the striking employees to return to work, (2) whether certain employees engaged in serious strike misconduct remov-

ing them from the remedial protection of the Act, (3) whether certain employees engaged in due and diligent search for employment, (4) whether certain interim earnings are correct as alleged, and (5) whether there has been inexcusable delay on the part of the General Counsel from September 13, 1979, until April 2, 1981, in issuance of the backpay specifications so as to prohibit interest as part of the backpay for such period of time. By and large, the formula and computations are not in dispute.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by all parties and have been considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

A. *The Issue of Inexcusable Delay*

The facts reveal that the Board's remedial order in the underlying unfair labor practice proceeding issued on February 9, 1979, and that the Respondent entered into a stipulation conceding that said remedial order was a valid and proper order about September 13, 1979.

The Respondent contends that there was an inexcusable delay on the part of Region 1 of the NLRB in taking from September 13, 1979, until April 2, 1981, to issue the backpay specifications, and that therefore "interest" is not properly owed by the Respondent for such period of time.

The remedial order in the underlying proceeding is directed to the Respondent. No evidence was presented to reveal that the Respondent, on its own, could not have made all the computations and determinations necessary for compliance with such order. Accordingly, the lack of evidence to establish that the Regional Office withheld facts from the Respondent or made it difficult for the Respondent to see witnesses or records relating to interim earnings, search for employment, or expenses would require a rejection of the Respondent's contentions without further consideration of the Region's compliance efforts.

However, such evidence as was presented concerning the Region's compliance efforts[1] also fails to establish any basis for the relief requested by the Respondent. Thus, the facts clearly reveal that the Region, prior to the underlying decisional order, had commenced efforts in 1977 to obtain information necessary for the determination of backpay. It is clear therefore that as of September 13, 1979, the Region had some of the information relating to the backpay claims. The precise type of information to determine what employees would have earned had they worked for the Respondent during the backpay period normally has to be determined from the Respondent's records. The facts clearly reveal that shortly after September 13, 1979, efforts were commenced by the Region to obtain such records from the Respondent and that such records were only received as of July 3, 1980.

Although the Region clearly had some information from employees relating to backpay questions as of September 13, 1979, such information as was specifically discussed or presented into the record had been obtained in 1977. It is obvious that information relating to a backpay period commencing in 1977 and continuing as of September 1979 would require further completion or updating of information within the knowledge of the Respondent and/or backpay claimants. No evidence was presented to reveal in detail steps taken by the Region or problems presented. Nor was evidence presented to reveal in detail the communications between the Region and the Respondent from July 1980, to April 1981. The proceeding revealed much dispute as to backpay issues up and to the trial in this proceeding. Many issues were narrowed, but many issues remained unsolved. In sum, the facts fail to establish that there was unreasonable or inexcusable delay, for which the Region should be deemed responsible, with respect to the issuance on April 2, 1981, of the backpay specifications in this case. Accordingly, the Respondent's contention that interest should not be computed on the backpay for such period of time until April 2, 1981, is rejected.

B. *The Unconditional Offer to Return to Work*

On March 2, 1977, the Union executed a document purporting to be an unconditional offer to return to work by striking employees. Such document was worded as follows:

> District 1199 Mass. National Union of Hospital and Health Care Employees, a division of RWDSU/-AFL–CIO, on behalf of each and every employee employed by Preterm, Inc. as of October 18, 1976, whose work ceased thereafter as a consequence of a labor dispute with Preterm, Inc., unconditionally offers to return to work at Preterm, Inc.
>
> Dated: March 2, 1977
>
> /s/ Elliot Small
> Elliot Small, President

On March 2, 1977, representatives of the Union met certain representatives of the Respondent and handed the above-referred-to document to the Respondent's attorney Kowal.

The Respondent objected to the receipt of such document in evidence on the alleged basis that the document or offer to return to work by strikers was a part of settlement negotiations. The document clearly purported to be an unconditional offer to return to work by the striking employees and for such reason was received into the evidence.

The Respondent was allowed to litigate the question of whether in fact such offer was an unconditional offer to return to work by the striking employees.[2]

[1] Although compliance with an order is the responsibility of the Respondent, the Board tenders its aid in effectuating compliance, and determines whether compliance is proper and, if disputed, has procedures to resolve such dispute.

[2] The evidence presented with respect to the negotiations for settlement has value limited to the specific issue of whether or not the March 2, 1977, offer was an unconditional offer to return to work by the strikers.

Nothing in the evidence presented reveals that the Union withdrew such offer, or made any statements qualifying such offer. Nor does the evidence presented reveal that such offer was a mere position or was qualified in any way.

The facts relating to the "negotiations" for settlement reveal that the administrative law judge for the underlying unfair labor practice proceeding attempted to aid the parties in the settlement of the unfair labor practice proceeding and that an aspect of such settlement involved a strike settlement and a question of the returning to work of striking employees. There had been settlement efforts by the parties and the administrative law judge prior to March 2, 1977, the date of the referred-to offer to return to work.[3] There were settlement efforts after the referred-to offer. Excluding the events wherein the March 2, 1977 offer to return to work was made, settlement efforts involved each party having discussions of its own, having discussions with the administrative law judge, making statements to the administrative law judge for transmission to the other party, and receiving statements from the administrative law judge purportedly transmitted from the other party.

In effect prior to the March 2, 1977 unconditional offer to return to work by the strikers, there had been some indication that the parties should build step by step to a settlement and that a solution as to the end of the strike and return to work of striking employees was needed before settlement could ensue.

An unconditional offer to return to work by strikers is more than a position, it is an actual act. Positions, as viewed with respect to evidentiary questions of settlement negotiations, may be said to be tantamount to conditional offers.

The evidence relating to settlement efforts does not reveal that the Union ever abandoned its act of an unconditional offer made on March 2, 1977. The evidence, however, reveals that prior to such offer and afterward, the Respondent took the position that certain of the strikers were not to be returned to work because of misconduct during the strike. The Union's position in settlement discussions consistently was to the effect that any settlement would have to be on the basis that all striking employees be returned to work.

There is a distinction between the Union's act, the March 2, 1977 unconditional offer for striking employees to return to work, and its position. As to the Union's act, absent a settlement, the Respondent was obliged to take the striking employees, excepting those disqualified by misconduct from statutory protection, back immediately if such enployees were unfair labor practice strikers, and immediately if not replaced or whenever a position became available, if such employees were economic strikers. The Union's position that all strikers had to be reemployed had only a bearing as a part of negotiations for settlement.

The evidence presented as to negotiations for settlement merely reveals that the Respondent participated in settlement negotiations and considered settlement with the return of strikers other than ones considered to have engaged in misconduct, despite the fact that many, if not all, strikers had been replaced. The evidence reveals that the Respondent's position at the unfair labor practice trial was that the strike was an economic strike and not an unfair labor practice strike.

At some point in the negotiating discussions with the administrative law judge, apparently toward the end of such attempts to settle, one of the Respondent's attorneys indicated to the administrative law judge that the Respondent would "accept" back the strikers other than certain strikers who had allegedly engaged in misconduct. There is no evidence to reveal that such remarks were transmitted to the Union. Nor is there any reason to infer that an administrative law judge would communicate such remarks or that the parties should believe that he would. The administrative law judge's interest is in aiding the parties to develop a proper settlement and, if not, to conduct a proper trial. Remarks, not related to "negotiations" of this nature, are of the type that the parties themselves should communicate to other parties. Moreover, evidence of later communications reveals that the effect of such remarks involved an understanding that the Respondent was treating such striking employees as "economic" strikers who would be accepted back when a vacancy occurred.

The sum of the evidence, relating to the unconditional offer of March 2, 1977, and to "negotiations" for settlement, persuades and I conclude and find that the Union's offer of March 2, 1977, constituted an unconditional offer to return to work by all striking employees.[4]

Since the facts reveal that the Union's offer of March 2, 1977, constituted an unconditional offer to return to work by all striking employees, the evidence relating to settlement negotiations must be considered rejected for all other purposes.

C. *The Backpay Determination*

1. Employees as to whom the only issue involved the "unconditional offer" question

As to the below-referred-to employees, the only issue as to backpay or entitlement concerned the validity of the March 2, 1977 unconditional offer to return to work. As indicated beforehand, the March 2, 1977 unconditional offer to return to work by the strikers constituted a valid unconditional offer.

Based on the findings and conclusions relating to the March 2, 1977 unconditional offer by the Union for the strikers to return to work and the pleadings and admissions therein, it is concluded and found that the net backpay due the individuals set forth below is as follows:[5]

CALENDAR QTRS.	*NET BACKPAY*
Kathryn Alexas Abrams	
1977–I	$ 625.93

[3] The offer was made in the hall or outside the room wherein the unfair labor practice trial was scheduled to be resumed.

[4] See *Colonial Haven Nursing Home*, 218 NLRB 1007 (1975).

[5] With minor corrections concerning inadvertent erroneous computations or other errors and with interest as indicated later.

1977–II	1967.19
1977–III	1564.80
Sandra Brody	
1977–I	214.33
1977–II	576.59
1977–III	696.54
1977–IV	246.47
Betsy Budd	
1977–I	772.84
1977–II	1310.42
1977–III	787.12
Ann Chronis	
1977–I	90.00
1977–II	240.60
1977–III	221.34
Susan Cohn	
1977–I	708.08
1977–II	638.19
1977–III	160.35
Elizabeth Cone	
1977–III	11.46
Alice Fine	
1977–I	108.64
1977–II	369.28
1977–III	450.62
Cynthia Jones	
1977–I	145.53
1977–II	126.29
1977–III	151.32
1977–IV	6.98
Kathleen Kelley	
1977–I	515.60
1977–II	1602.29
1977–III	1378.78
1977–IV	63.64
Vivian Kemp	
1977–I	252.25
1977–II	724.08
1977–III	785.73
1977–IV	675.34
Joan Levine	
1977–I	383.71
1977–II	1205.96
1977–III	222.94
1977–IV	30.71
Paula Murray	
1977–I	630.12
1977–II	1383.79
1977–III	77.72
1977–IV	109.20
Frances Newcombe	
1977–I	300.09
1977–II	574.87
1977–III	33.22
Anne O'Leary	
1977–I	5.45
1977–II	5.70
Elizabeth Phillips	
1977–II	522.93
Chlorae Prince	
1977–I	145.53
1977–II	152.46
Judith Rice	
1977–I	727.65
1977–II	2305.09
1977–III	2483.13
1977–IV	2303.13
1978–I	191.01
Gail Shulman	
1977–I	526.68
1977–II	1680.36
1977–III	1637.81
1977–IV	52.63
Paula Spires	
1977–I	551.25
1977–II	166.09
1977–IV	12.88
Phyllis Sweet	
1977–I	611.18
1977–II	1920.84
1977–III	1973.95
Ann Wax	
1977–I	312.35
1977–II	624.70

2. Employees for whom no backpay is alleged to be due Fradkin and Simmons

The General Counsel's backpay allegations included allegations relating to backpay computations for employees for whom there was in effect no ultimate loss in backpay under the formula. Further, as to some individuals, the formula sets forth amounts of backpay due for some quarters and not for other quarters during the backpay period. There would appear to have been no dispute between the General Counsel and the Respond-

ent on such point. No issues thereto have been raised by the pleadings. And no issues have been raised by the parties or potential intervenors in interest during the public proceedings held to determine the backpay issues. Thus, I note that the issues litigated in this proceeding are the issues raised by the pleadings. Accordingly, I conclude and find that the facts relating to the backpay computations for Sharon Fradkin and Betty Simmons are those alleged in the specifications and admitted in the pleadings, and that no backpay is due either Fradkin or Simmons.

3. Backpay claimants—unavailable as witnesses—Claudia Bostick and Azariah Phipps

There are two alleged backpay claimants, Claudia Bostick and Azariah Phipps, who were unavailable as witnesses at the backpay trial. As to these claimants, the resolution of the "unconditional offer" issue leaves only potential issues as relate to search for employment, interim earnings and expenses. There is no dispute as to the backpay period or as to gross earnings to be utilized in the computations of backpay for each alleged claimant. Thus, it is clear that the General Counsel has met his initial burden of establishing backpay due to such backpay claimants.

It is the Respondent's burden to establish offsets to the gross backpay due claimants. Thus, the Respondent has the burden of establishing that the claimants had interim earnings not utilized in the backpay computations and to establish willful loss of earnings as by failure to seek employment. The Respondent's answer avers that it is without knowledge of whether there were no "interim earnings" or whether the backpay claimants sought interim employment. It is not necessary to determine the adequacy of such pleadings in this case. The parties expressed agreement at trial for a determination of backpay due with provisions for payment into escrow funds of the amounts determined and for provision for future litigation, if necessary, as to the "interim earnings" and "search for employment" issues.

On consideration of the determination that the Union made a valid and unconditional offer on March 2, 1977, for the striking employees to return to work, the facts relating to gross backpay as established by the pleadings, the lack of evidence relating to "interim earnings" or willful loss of earnings, and the agreement by the parties as to further procedures to be used pending location of the backpay claimants, I conclude and find that the backpay due, with interest, to the below listed backpay claimants is as set forth, but with certain rights accorded to the parties for further litigation, if necessary, concerning backpay determinations.[6]

CALENDAR QTRS.	*NET BACKPAY*
Claudia Bostick	
1977-I	$ 450.24
1977-II	1415.04
1977-III	1536.47
1977-IV	283.66
Azariah Phipps	
1977-I	462.00
1977-II	1452.00
1977-III	1518.81
1977-IV	751.87

4. Certain miscellaneous issues excepting as relate to misconduct—Dawe, Jones, Present, Poole, and Ruffen

a. *Janice Dawe*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Excepting for the question of determination of average weekly earnings as a basis for computing gross earnings, there are no other issues concerning backpay due Dawe.

The General Counsel's formula averred and the General Counsel contends that Dawe's gross earnings should be based on a projection of average earnings for an 18-1/2-hour week. The Respondent contends that Dawe's gross earnings should be based on a projection of average weekly earnings of $49.26 as determined from Dawe's earnings of the second and third quarters of 1976.

The General Counsel presented testimonial evidence by Regional Compliance Officer Beal to the effect that the backpay computations for Dawe were based on a consideration of an affidavit by Dawe and the Respondent's payroll records. Beal testified that normally he had utilized the earnings for employees for the second and third quarters of 1976 in determining average earnings for computing gross earnings;[7] that, however, Dawe's affidavit indicated that she had worked approximately 12-1/2 hours a week until the end of September or beginning of October 1976, that a change in employment occurred around such time and that Dawe commenced working 5 hours on Saturday in addition to a schedule of 4-1/2 hours on Monday, Wednesday, and Friday of each week. Beal testified that he spoke with Dawe and ascertained that the change and added hours resulted from an

[6] In accordance with the procedures set forth in *Mastro Plastics Corp.*, 136 NLRB 1342, 1348 (1962), the Respondent shall place a sum of moneys, equal to the backpay determined due said backpay claimants, in escrow accounts. Further, on location of one or both of the backpay claimants, existence of an estate or heirs if a backpay claimant is deceased at such time, or establishment of state of jurisdiction of one or more of the backpay claimants, if deceased, if the Respondent has evidence to present relating to issues concerning "interim earnings" or willful loss of earnings, the Respondent shall be entitled to a reconsideration of the order relating to backpay to such claimant and to litigation of the issue of "interim earnings" and "willful loss of earnings." If there exists no evidence relating to such issue, the escrow funds shall be paid to such claimant, estate or heirs of such claimant, or the person otherwise entitled to such assets, as the case may be. In the event of additional evidence relating to the issues referred to, disposition of the backpay awards shall be in accordance with the procedures in the *Mastro Plastics* case. Further, the Regional Director shall report the status of these backpay claims to the Board when these matters are resolved and in no event later than 1 year from the date of the Supplemental Decision and Order for such further orders as may be necessary.

[7] It is noted that the unfair labor practice strike commenced on October 19, 1976.

employee named Alice Fine (Springer) dropping Saturday work. Beal testified that an examination of Fine's affidavit corroborated Dawe's affidavit in such respect. The testimony of Beal was objected to as regards proof of facts other than the method or asserted basis of computation. Neither Dawe nor Fine was presented as a witness. Payroll records for Dawe and Fine were presented into the record.

Beal testified to the effect that an examination of Dawe's payroll record and her affidavit, including reference therein to a vacation during the last week of September, indicated an 18-1/2-hour workweek.

In and of themselves, the payroll records relating to Dawe and Fine are not sufficient to establish an 18-1/2-hour workweek for Dawe during the period of time just preceding the strike. Beal's testimony of a hearsay nature, objected to, and received on a limited basis, does not supply the necessary evidence to establish that Dawe's workweek immediately prior to the strike was that of an 18-1/2-hour workweek.

This being so, the preponderance of the evidence only warrants a finding, as alleged by the Respondent, that Dawe's average earnings should be based on the work history for the second and third quarters of 1976, and that the average weekly earnings, properly to be used for computation of gross earnings, should be $49.26 per week as of the commencement of the backpay period on March 3, 1977.

Accordingly, the computations for Dawe's backpay should be as follows:

Calendar Quarters	*Weeks*	*Gross Backpay*	*Net Interim Earnings*	*Net Backpay*[8]
1977-I	4.2@ $49.26	$206.89	0	$206.89
1977-II	9@ $49.26	443.34	0	650.22
	4@ [9]$51.72	206.88		
1977-III	12@ $51.72	620.64	0	674.95
	1@ [10]$54.31	54.31		
1977-IV	4.6@ $54.31	249.83	0	249.83

b. *Carolyn Jones (LaFleur)*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. There remains issues as to whether (1) Jones resigned on October 21, 1976, and (2) the Respondent made a proper offer of reinstatement on June 8, 1978. Further, the Respondent's pleadings set forth a denial that Jones had "no interim earnings" because the Respondent was without knowledge as to whether Jones had sought interim "Saturday" employment.

(1) The resignation issue

The evidence relating to the "resignation" issue consists of the following letter.

3 Adams Street
Charlestown, Mass. 02129
October 21, 1976

Preterm Massachusetts
1842 Beacon Street
Brookline, Mass. 02146

To Deborah Feinbloom:

It is my understanding that my picketting [sic] on October 19, 1976 from 6:30 am to 9:00 am aligns me with the strikers at Preterm. As a result of this fact and of my decision not to cross the picket line to work my usual part time Saturday schedule as of October 23, I also understand that I have been permanently replaced at Preterm.

I have remained in this area in hopes that I could have added some constructive element to a very worthy cause. It is very obvious to me that such constructive efforts are of little benefit when both sides are willing to take extreme measures to win. I acknowledge with frustration and sadness that more respect was not shown for some very dynamic women and that no one at Preterm was able to respond at the onset with the kind of leadership that maintains good communication and prevents polarization.

For both personal and professional reasons it is time for me to seek full time employment in another region. Enclosed are my usual forms which I will need by Tuesday, October 26.

Sincerely,
/s/ Carolyn Jones
Carolyn Jones

An unfair labor practice striker has a statutory right to reinstatement on an unconditional offer to return to work. Board law consistently has held that the waiver or relinquishment of a statutory right must be clear and unequivocal. Considering the above letter under such standards, it is clear that Jones did not give up her statutory right as an unfair labor practice striker that she be reinstated upon an unconditional offer to return to work.

I do not find in such letter any statement of resignation of employment. Rather, such letter asserts that Jones continues to support the strike by a determination not to cross the picket line. The letter reveals that, although Jones continues to support the strike, Jones intends to seek full-time employment. It is noted that such actions, however, are postulated on the understanding that Jones had been replaced. Absent evidence that the Respondent, around such time, advised Jones that she had not been replaced, the evidence warrants a finding that the Respondent had "replaced" Jones. As a matter of law, however, the Respondent could not replace an unfair labor practice striker. Thus, it is further clear that Jones' letter could not constitute a clear and unequivocal waiver of Jones' rights as an unfair labor practice striker.

[8] With interest as set forth later.

[9] Dawe would have received a 5-percent wage increase on June 6, 1977.

[10] Dawe would have received a 5-percent anniversary wage increase on September 26, 1977.

In sum, I conclude and find that Jones' letter of October 21, 1976, does not constitute a letter of resignation of employment.

(2) The June 8, 1978 reinstatement offer

On June 8, 1978, the Respondent transmitted the following letter to Carolyn Jones.

June 8, 1978

Ms. Carolyn Jones
331 Shawmut Avenue
Boston, MA 02118

Dear Carolyn,

I understand from the NLRB that your letter of October 21, 1976, to Deborah Feinbloom (wherein you said "For both personal and professional reasons it is time for me to seek full-time employment in another region.") was not a letter of resignation.

I am writing to say that your former position of Saturday Counselor is available if you wish to unconditionally return to your former job.

Please advise me whether you can return to work the week of June 26, 1978. I must know by June 14, 1978, in order to make the necessary arrangements.

Sincerely

/s/ Diane Richards

Diane Richards
Director

DR/sa

The above letter does not reveal itself to be a clear "unconditional" offer to reinstate Jones to her former position. Rather, the letter indicates that the job is available. In any event, the Respondent's decision to offer Jones her old job position was in fact conditioned on Jones' receiving a certain amount of retraining. Following the June 8, 1978 letter, referred to above, the Respondent's agents had communication with Jones concerning such retraining during weekdays (not on Saturday). Later, on June 30, 1978, the Respondent transmitted the following letter to Jones:

June 30, 1978

Ms. Carolyn Jones
331 Shawmut Avenue
Boston, MA 02118

Dear Carolyn,

This is to confirm our telephone conversation of Friday, June 30, 1978.

I understand that at present you have a commitment during the week which makes it impossible for you to come into the clinic on week days to re-orient. As I mentioned to you, it is not feasible for you to come back without going through an orientation period. I further understand that the first week you would be available to come back to work is at the end of August. As we discussed, unless you can make a commitment for "on call" in the fall, it may not make sense to re-orient at the end of August. I further understand from you that you want to have a chance to think about this issue.

Please advise me whether you will be returning to Preterm by July 7, 1978. If we do not hear from you by July 7, 1978, we will assume you will not be returning to work.

If you have any questions, please do not hesitate to call me.

Sincerely,

Deborah H. Feinbloom, Ph.D.
Coordinator of Abortion Counseling &
Gynecology Clinic

DHF/sa

Contentions and Conclusions

The General Counsel contends that the Respondent, by its letter of June 8, 1978, did not make a proper offer of reinstatement to her old job to Jones. In such regard the General Counsel argues that the "offer" was conditioned on Jones' receiving retraining. The Respondent appears to argue that there was a need for "retraining" because of the passage of time and that, in such context, such offer was proper. I find merit in the General Counsel's contentions. Thus, on or about March 3, 1977, the Respondent had an obligation to reinstate Jones to her old position. Although as of June 1978, there might be some merit to a contention that some retraining might be necessary, such would not necessarily be true as of March 3, 1977. The need for any retraining as of June 8, 1978, has either been caused by the Respondent's failure to reinstate Jones in March 1977, or at least greatly aggravated by such failure. Further, the 1976 strike was caused and prolonged by the Respondent's unfair labor practices. Under such circumstances, it is the wrongdoer's responsibility to take such acts as are necessary to enable it to carry out its remedial responsibilities. Thus, the Respondent has the burden of making accommodations to enable it to ensure necessary training of employees connected with the reinstatement of employees. In the instant case, if necessary, the Respondent had the obligation to arrange for "retraining" on Saturday. Accordingly, I conclude and find that the Respondent's June 8, 1978 offer of reemployment to Jones included a restrictive condition resulting in such offer being an invalid offer.[11]

(3) Interim earnings

The Respondent's answer asserted, "Respondent is without knowledge whether Carolyn Jones ever sought interim 'Saturday' employment during her alleged backpay period and therefore denies that there are no interim earnings."

It is the Respondent's burden of proof to establish "interim earnings" or willful loss of earnings. No evidence

[11] I do not find it necessary to pass on whether a need actually existed for retraining for Jones. I note, however, it would appear that if such need existed, the same would have been specifically adverted to in the June 8, 1978 letter. Further, the June 30, 1978 letter almost suggests an insincerity in the Respondent's actions.

has been presented as to "interim earnings" or willful loss of earnings other than certain admissions of interim earnings set forth in the backpay computations.

(4) The backpay due Jones

In accordance with the backpay specifications and pleadings, the disposition of the issues as previously set forth, it is clear that the backpay due Carolyn Jones for a backpay period (3/3/77-9/1/79) is as follows:

CALENDAR QTRS.	*NET BACKPAY*[12]
1977-I	$138.60
1977-II	435.60
1977-III	459.10
1977-IV	472.94
1978-I	472.94
1978-II	472.94
1978-III	434.34
1978-IV	454.20
1979-I	496.60
1979-II	524.08
1979-III	366.43

c. *Amy Present*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of strikers to return to work constituted a valid unconditional offer. It is clear that Present's backpay period ran from March 3 to May 3, 1977, that Present's average weekly earnings for the purpose of computing backpay was 33.44 per week, that Present had no interim earnings during the backpay period, that gross backpay (subject to the question of whether backpay should be disallowed because Present did not seek employment during the backpay period) was $140.44 for the first quarter of 1977, and $147.13 for the second quarter of 1977.

The critical issue is whether Present should be disallowed backpay because of her failure to search for work.

There was a paucity of evidence presented with respect to the issue as to Present's failure to seek work. Thus, the evidence consists of (1) a questionnaire and statement (attachment to a letter), utilized by Compliance Officer Beal with respect to his determination of "backpay" due Present, and (2) testimony by Beal as to conversations with Present.

Beal's testimony was to the effect that the questionnaire and statement were prepared by him, sent to Present, and received back in completed form. Considering a presumption of regularity, one must conclude, absent contrary evidence, that the signature on such documents purporting to be that of Present, was in fact the signature of Present, the backpay claimant.

The questionnaire completed by Present and executed on June 30, 1980, contained the following questions and answers excerpts.

[12] With minor corrections concerning inadvertent erroneous computations and with interest as indicated later.

III. After March 2, 1977, when Preterm failed to reinstate strikers upon the Union's request, how long did you continue to picket?

Not sure exactly.

When did you begin to search for another job? *I did not as I was in graduate school at that time.*

For the period between March 2, 1977 and the date Preterm offered you reinstatement to your former or substantially equivalent position (as reflected in section II above):

(a) please describe efforts you made to obtain other work (include names, and locations of places at which you applied for work, and when you did so):

see above

If you did not look for work, please explain fully why? see above—I was in graduate school & working a non-paying internship 3 days/week & in class one other weekday, leaving only weekends free for paid employment.

Were you unavailable for employment for any reason (sickness, maternity, absence from area or country, attendance at school, etc.) at any time during this period? (If so, please give specific reason and dates of unavailability).

I was in graduate school at that time tho remained available to work the hours I had been working at Preterm (i.e. Saturdays)—note such a work schedule is nearly impossible to come by at comparable wages, I decided not to seek out comparable employment.

The statement, executed by Present on October 13, 1981, contained the following question and answer excerpts:

Did you file for unemployment compensation after going on strike at Preterm? *No.*

If so, how long did you collect? from _____ to _____ at which office?

If you did not file for unemployment compensation, why not? (Please be as specific as you can in your answer).

I would have been ineligible at that time as I was then in graduate school.

. . . .

On what basis did you conclude that it would be nearly impossible to find comparable, or even suitable, work on Saturdays only? Please explain fully.

I was in contact with various people in similar agencies to find that such part-time positions (i.e. one-two Sats/month) were not available (if such positions existed at all.)

. . . .

Why did you not thereafter begin looking for another position?

As stated above, I could find no leads even to begin to pursue that would suit my unusual time specifications.

It is clear that it is the Respondent's burden to establish that there should be a diminution of damages with respect to the ascertainment of backpay due Present. Thus, the Board set forth in *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962):

> In this connection the Board reaffirms its long-standing rule that while the general burden of proof is upon the General Counsel to establish the damage which has resulted from Respondent's *established* discriminatory discharge, i.e., the gross backpay over the backpay period, the burden of proof is upon the Respondent as to diminution of damages, whether from the willful loss of earnings by the failure to either look for or keep a substantially equivalent job or from the unavailability of a job at Respondent's plant for some reason unconnected with the discrimination. [Footnote omitted.] As for the "willful loss of earnings" we note that that principle rests not so much on the common law theory of mitigation of damages as on a public policy of "promoting production and employment."[12] In the utilization of the principle the Supreme Court left the matter to the wide discretion of the Board to keep the matter within reasonable bounds and avoid remote and speculative claims by employers. Absent a showing by Respondent that the individual claimant acted unreasonably or willfully or that a job would not have been available had the discrimination not occurred, the General Counsel has established a *prima facie* case.

[12] *Phelps Dodge Corp.* v. *N.L.R.B.*, *supra*, 197–200. Even as to the common law theory of mitigation, the generally accepted rule is that the burden of proof for an employer's breach of an employment contract is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar nature, and that in the absence of such proof the plaintiff is entitled to recover the salary fixed by the contract. Williston, *Contracts*, § 1360. Also note that in the *Reed & Prince* case, *supra*, footnote 10, while the court states that the burden of proof in a contempt proceeding is upon the Petitioner, the burden of proving no contempt on the specific ground that the job would not have been available is upon the defendant. See also *Southern Silk Mills, Inc.*, *supra*

Considering the evidence presented by the Respondent, one must find that the Respondent has not established that Present's gross backpay should be offset by a diminution based upon either an abandonment of availability for the work market or a deemed constructive willful loss of earnings because of failure to search for work. Thus, the Respondent has not established that Present was not available and willing to be employed for the same work hours that she had been employed by Preterm. Nor has the Respondent established that Present's failure to search for work was done with willful intent to cause a loss of earnings. Rather, the Respondent's evidence reveals in effect that the failure to search for Saturday comparable work was based on a belief that it was virtually impossible to find such work. The presentation of Present's signed questionnaire and statements clearly did not satisfy the Respondent's burden of proof in establishing in effect a willful loss of earnings by Present. Perhaps evidence could have been presented to establish that Present did not believe that it was impossible to secure suitable Saturday employment comparable to her Preterm employment. Perhaps evidence could have been presented to reveal that there was in fact available suitable Saturday employment comparable to Present's Preterm employment and that Present's failure to search for work was unreasonable. Nevertheless, such evidence has not been presented, and the Respondent otherwise has not met its burden of establishing that Present had willfully caused a loss of earnings during her backpay period.[13]

The backpay due Present

In accordance with the backpay specifications and pleadings, the disposition of the issues previously set forth, it is clear that the backpay due Amy Present is as follows:

CALENDAR QTRS.	*NET BACKPAY*[14]
1977–I	$140.44
1977–II	147.14

d. *Gloria Poole*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of strikers to return to work constituted a valid unconditional offer. It is clear that Poole's backpay period ran from March 3 to May 10, 1977, that Poole's average weekly earnings for the purpose of computing backpay was $165 per week, based on a 5-day week, that Poole was able to work only 3 days per week during the backpay period, that her average weekly earnings for the purpose of computing backpay on a 3-day week basis was $103.95 per week, that Poole had no interim earnings, that gross backpay (subject to the question of whether backpay should be disallowed because Poole did not seek employment during the backpay period) was $436.59 for the first quarter of 1977, and $540.54 for the second quarter of 1977.

The only issue with respect to whether or not Poole should receive backpay is whether Poole incurred a willful loss of earnings by failure to seek interim employment during the backpay period. The only evidence relating to such issue consists of Beal's credited testimony that Poole stated to him that she had not sought interim employment during the backpay period. By the eliciting of such evidence, the Respondent met its burden of going forward with evidence relating to the question of an offset to gross earnings. The burden of going forward with evidence on such issue shifted to the General Counsel and/or the Charging Party. Such evidence as needed to overcome the Respondent's evidence relating to a willful loss of earnings was not presented.[15]

[13] See *Cornwell Co.*, 171 NLRB 342, 343 (1968).

[14] With minor corrections concerning inadvertent erroneous computations and with interest thereon as indicated later herein.

[15] The evidence relating to Poole's failure to seek interim employment differs from the evidence relating to Present's failure to seek employ-

Continued

The evidence relating to Poole's failure to seek interim employment during the backpay period reveals a failure to attempt to mitigate a loss of earnings and warrants a finding that there was a willful loss of earnings by Poole during the first and second quarters of 1977. Accordingly, the backpay allegations of net backpay due Poole shall be recommended to be dismissed.

e. *Harriet Ruffen*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of strikers to return to work constituted a valid unconditional offer. It is clear that Ruffen's backpay period commenced on March 3, 1977. It is disputed as to whether Ruffen's backpay period was tolled on June 4, 1977, or continued until December 4, 1977. The determination of this issue depends on whether or not Ruffen was entitled to be reinstated to a 5-day workweek instead of the 3-day workweek she was reinstated to on June 4, 1977. Further, there is an issue as to whether Ruffen should be disallowed backpay because she failed to diligently seek employment during the backpay period. And there is an issue of the appropriate average earnings to be used for the computations of Ruffen's backpay.

(1) The search for employment

The evidence relating to Ruffen's search for employment consisted of Ruffen's testimony and an executed questionnaire and attachment submitted to the Regional Compliance Officer during the investigation of the backpay issues as relating to Ruffen.

Suffice it to say that I credit Ruffen's testimony to the effect that she made application for work in late 1976 to the Peter Bent Brigham Hospital and to the Boston City Hospital. I discredit her testimony to the effect that she made telephone calls to various nursing homes after the strike commenced in October 1976.[16]

The facts relating to Ruffen's failure to search for work during her backpay period establish in effect conduct tantamount to a willful loss of earnings. Accordingly, gross backpay for the period of time March 3 to June 2, 1977, shall be dismissed.

(2) The reinstatement issue; the 5-day workweek schedule

The facts reveal that on or around May 18, 1976, the Respondent put Ruffen on a 40-hour week schedule. For 1 day (8 hours) on Saturday, Ruffen was employed in a position described as an "autoclave" position. For 4 days (32 hours) Ruffen was employed as a nurses aide. This 40-hour week schedule was set up to last until October 2, 1976. However, as of October 19, 1976, the time of the commencement of the strike, Ruffen was still employed on a 40-hour week basis. No explanation was presented into evidence to reveal why Ruffen was continued on a 40-hour week basis. Absent evidence to reveal otherwise, it is reasonable to presume that Ruffen's employment for 40 hours per week would have continued beyond October 19, 1977.

Respondent's obligation to Ruffen, an unfair labor practice striker, on March 3, 1977, and thereafter, was to return her to the job she held prior to the October 1976 strike. Such job consisted of work for 40 hours per week, 8 hours as an autoclave employee on Saturday, and 32 hours as a nurses aide during the rest of the week. Instead, on June 2, 1977, the Respondent offered Ruffen a job in a vacancy in her "former" position of Saturday autoclave technician. Ruffen was reemployed for such autoclave work on Saturday, June 4, 1976. Later, exactly when is not clear, Ruffen was given 2 more days (16 hours) of autoclave work per week.[17]

It is clear that the Respondent did not assign Ruffen work for a 40-hour week until December 4, 1977. It is undisputed that Ruffen was fully reinstated as of December 4, 1977.

Considering all of the foregoing, I conclude and find that the Respondent, on March 3, 1977, and thereafter, was obligated to reinstate Ruffen to a job having the equivalency of a 40-hour workweek. Thus, reinstatement of Ruffen was not complete and proper until December 4, 1977.

(3) The average earnings

The facts set forth with respect to the reinstatement issue reveal a reasonable basis for belief that Ruffen's hours of employment per week would have continued on the basis of 40 hours per week in the backpay period. This being so, a formula using average earnings based on a representative time period of similar employment is more reasonable than one using a mixed history of less than 40 hours per week with earnings based on 40 hours per week or on a workweek of less than 40 hours a week. I find the General Counsel's formula of average earnings based on a 40-hour week as represented by earnings in the third quarter of 1976 to be reasonable.

(4) The computations

Based on the foregoing and the pleadings and admissions therein, the computations for Ruffen's backpay are as follows:[18]

[16] Ruffen's questionnaire executed on November 12, 1980, and the "attachment" executed on September 18, 1981, is contradictory of her testimony that she sought work other than at the Peter Bent Brigham Hospital and the Boston City Hospital.

[17] This work was created by a problem relating to Gloria Poole, another autoclave employee.

[18] With minor corrections concerning inadvertent erroneous computations and with interest thereon as indicated later herein.

Calendar Quarters	*Weeks*	*Gross Backpay*	*NetInterim Earnings*	*Net Backpay*
1977-I	4.2 [19]$123.50	[19]0	[19]0	[19]0
1977-II	9 [20]$123.50	[20]$74.10	[20]0	[20]0
	4 $129.67	518.68	$409.20	$183.58
	(Total $592.78)			
1977-III	13 $129.67	$1685.71	$1077.56	$608.15
1977-IV	9 $129.67	$1167.03	790.48	376.55

(5) The issues of misconduct and certain other issues—Baskin, Erde, Harmon, Matson, Pinero, Reeves, Rice, Walker, Weinberg, and Williams

Introduction

This case involves an unfair labor practice strike which commenced on October 19, 1976. The strike was caused and prolonged by the Respondent's refusal to negotiate with the Union in good faith.

The testimony of witnesses for the Union and the Respondent demonstrated that the strike evoked hostility from both sides and that a great residue of such hostility still existed at the time of the backpay trial herein. Essentially, the overall facts reveal that the Respondent had refused to bargain with the Union, "replaced" strikers, attempted to operate throughout the strike, utilized buses and police protection, and had some strikers arrested. The facts reveal that there was much usage of insulting and profane language by some strikers, personal confrontation with employees and supervisors, picketing at individual homes, and some violence. As to some of the violence, the facts are insufficient to attach blame on the Union or individual strikers.

The critical events as to alleged misconduct occurred around 5 years before the trial of this backpay proceeding. Around the time of the events, the Respondent and the Union were represented by counsel, and all parties should reasonably have been aware of the importance of the question of misconduct as affecting the rights of strikers to be reinstated. It should also be noted that soon after some of the incidents, unfair labor practice charges were filed against the Union, and later a 10(j) injunction was sought. Since the underlying unfair labor practice case was being processed around the same time, all of the ingredients for an investigation of most of the salient incidents involved and a preservation of written statement for aid in pinpointing timing of events were clearly possible.

Despite the above-referred-to aids available for utilization in the narrowing of issues and in the presentation of evidence precisely related to time and detail, much of the evidence and testimony of many of the witnesses was presented in a generalized and conclusionary manner.

[19] Because Ruffen engaged in a willful failure to seek work (loss of earnings) during the period of time March 3 to 31, 1977, backpay is disallowed for such period.

[20] Because Ruffen engaged in willful failure to seek work (loss of earnings) during the period of time April 1 to June 2, 1977, backpay is disallowed for such period. Ruffen's gross backpay for June 2, 3, and 4 was at the rate of $24.70 per day.

a. *Rena Baskin*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Excepting for the question of whether Baskin engaged in serious misconduct during the strike (removing her from the remedial protection of the Act) and whether there should be an offset to gross backpay in the nature of equivalent interim earnings because of the value of a room furnished to her in interim employment, there are no other issues concerning backpay due Baskin.

(1) Misconduct by Baskin

During the events of 1976 and 1977 relating to the question of reinstatement of Baskin, Jane Levin was director and Diana Richards was assistant to the director of Preterm. The Respondent presented evidence relating to the Respondent's refusal to reinstate Baskin because of misconduct which was considered in arriving at a decision not to reinstate Baskin as of March 2, 1977. Thus, Levin and Richards testified to incidents of misconduct by Baskin, incidents either personally observed by them or reported to them.

The testimony of the witnesses relating to reports is largely conclusionary and wherein not amplified by other evidence is not sufficiently probative to warrant a finding of good-faith belief of disqualifying misconduct.

The evidence referred to above relating to misconduct by Baskin may be broken down as follows:

a. Levin credibly testified to the effect that on the first day of the strike (October 19, 1976) she observed Baskin at 9 a.m. engage in misconduct. Levin's testimony was as follows:[21]

> Q. What did you specifically see Miss Baskin do at 9 a.m. on the corner of Beacon and Englewood?
>
> A. It was a little like a boxing session. The person would try to move in one direction and then she would move in that direction, and then when she finally grabbed the person below the elbows and just sort of going like this. And I called down—
>
> Q. Can you describe in words the grabbing aspect that you are gesturing?
>
> A. She sort of took the person's arms right about here—
>
> Q. What is here? You have to describe it in words.
>
> A. Below the elbow, it was sort of trying to stir the person.
>
> Q. This person, was this a non-striking employee, was this a patient, was this a bystander?
>
> A. It was a non-striking employee.
>
> Q. And do you know who it was, do you recall?
>
> A. No, I don't remember.

[21] I discredit Baskin's denial of the described incident. Many of the denials elicited from the General Counsel's witnesses were elicited by questions phrased in part with verbiage of "do you recollect" or "do you recall." Denials elicited by such questions are not accorded great weight.

I sent a word down to the first floor to ask the police to please take note of what was happening. It was not in the immediate area where the police were, and the police intervened and escorted the staff person.

b. Levin credibly testified to the effect that several weeks later she observed Baskin with a patient, that Baskin "took the patient under her arm and was trying to steer her away," that the patient started to cry. Levin further described the situation as is revealed by the following credited excerpts from her testimony:

Q. Did you see her pull her some way or push her some way, or what?

A. She didn't push her, she sort of pulled her. It wasn't terribly hard, but the person was terribly frightened. It wasn't as much of a resistance, a resisting situation as the first incident, because the person didn't really resist that much. She just didn't understand what was happening.

Q. In what direction was she being pushed?

A. Down away from the clinic.

Levin testified to a belief that Baskin was "steering" the patient to a car that Levin believed was being used by strikers to take patients to another clinic.

c. Richards and Levin credibly testified to a number of incidents wherein Baskin screamed and shouted statements to Richards, Levin, or Coordinator Feinbloom as they entered or left Preterm's parking lot.[22]

One of the incidents testified to by Richards concerned an event occurring around November 1 to 19, 1976, wherein Baskin screamed at Coordinator Feinbloom and told her in effect that she (Feinbloom) had sold out women and was rotten and undesirable. Baskin's language included some words having sexual connotations.

Another incident, testified to by Levin, concerned an event occurring around November 1 to 19, 1976, when Baskin screamed and yelled at Levin. During such screaming and yelling, Baskin used terms of a profane, vulgar, or obscene nature and also set forth the following as is revealed by the following excerpts from Levin's testimony:

Q. Anything else you remember?

A. "Running that god damn murder clinic. You are murdering all the patients. You are running it without nurses and doctors. You are stealing money, paying everything to yourself and you are not paying anything to the staff."

. . . .

Q. Okay. Anything further about this incident?

A. Yes. She threw small objects through the grating.

Q. Did she throw a couple items, two dozen items—

A. No, I would say three or four.

. . . .

Q. With regard to these small objects that were being thrown through, I never heard you identify, for example, the small objects that Rena Baskin was throwing through the grate. Do you have any memory of what they were?

A. I believe they were all pretty much the same thing.

Q. What was what?

A. There are pebbles right near the area and leaves and paper, and I believe it was all the same type thing.

Richards, Levin, and others testified to other incidents wherein Baskin used profane or vulgar language directed to them or others.

Some of the testimony of Levin and Richards was to the composite effect that there were reports of misconduct by Baskin which constituted a part of the basis for their decision not to reinstate Baskin. Suffice it to say that the generalized testimony as to such reports lacked probative value to support the Respondent's burden of showing a basis for good-faith belief of such alleged misconduct. In any event, I find Baskin's denial of such incidents as referred to in such reports to be more credible than the naked unsupported reports and so credit Baskin's denial.

The General Counsel filed a petition for a 10(j) injunction with the Federal district court wherein certain allegations of conduct, of a serious misconduct nature, by Baskin were alleged. Baskin testified in denial that she engaged in such conduct as alleged in such petition. In the state of the record as presented, I find Baskin's testimonial denial credible and credit such denials.

Contentions and Conclusions

The Respondent's pleadings averred and the Respondent contended at trial and in its brief, in effect, that the Respondent did not reinstate Baskin on and after March 3, 1977, because Baskin engaged in serious misconduct of the type which removed her from the remedial protection of the Act. The Respondent further contends that the Respondent's underlying unfair labor practices did not constitute justification for Baskin's misconduct. The Respondent's presentation of evidence of contended misconduct or basis of belief of misconduct consisted of direct evidence relating to certain incidents of alleged misconduct, reports of misconduct, and of the allegations in a 10(j) petition.

The General Counsel and the Charging Party contend that Baskin did not engage in serious misconduct, and that the misconduct alleged to have been engaged in would have been justified by virtue of the Respondent's underlying unfair labor practice.

As to the "reports" of misconduct, the facts establish that such incidents, as "reported" but not supported by direct evidence, did not occur. As to the existence of a certain allegation of misconduct in a 10(j) petition, the facts similarly establish that such conduct did not occur.

[22] I discredit Baskin's denial of these incidents. I found Levin's and Richards' testimonial demeanor while testifying to such incidents more frank, forthright, and truthful appearing than I did Baskin's testimony in denial thereof.

As to the contention of supportive justification or lack of justification for misconduct by virtue of the Respondent's underlying unfair labor practices, the facts reveal that the underlying unfair labor practices consisted of a basic type refusal-to-bargain violation essentially unaccompanied by "unilateral" changes, "threats" or related unfair labor practices. There is, of course, some difference in the consideration of whether some leeway or justification should be accorded misconduct for an unfair labor practice striker as compared to an "economic" striker. In the instant case I am not persuaded that great leeway or justification should be accorded employees who engaged in misconduct. Essentially, the question of serious misconduct is to be viewed in the normal sense of the word.

The Respondent contends and the General Counsel and the Charging Party deny that Baskin used profanity toward Director Levin and others. Similarly, the parties dispute whether the usage of "profanity" or obscenity in a strike situation constitutes serious misconduct of the type to remove Baskin from the protection of the Act.

The facts reveal that Baskin did use insulting, profane, and vulgar language in remarks to Levin, Richards, and others. Such language certainly is not commendable and is to be deplored. Nevertheless, the Supreme Court of the United States in *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974), has in effect determined that usage of insulting, profane, and vulgar language, in a strike context, is to be tolerated. The question as to "language" of such a nature or of a disparaging nature concerns whether the same was made with malice or with reckless disregard. Included in such assessment is whether a hearer or reader would understand the same as rhetoric or not.[23] I am persuaded that the *Linn* and *Austin* cases have obliterated the validity of *American Tool Workers Co.*, 116 NLRB 1681 (1956), as a holding that "profanity" in a strike situation is not to be tolerated. In sum, I find that the usage by Baskin of vulgar and insulting language did not constitute serious misconduct removing her from the remedial protection of the Act.[24]

The Respondent contends that Baskin's remarks to Levin about a "murder clinic," about "murdering all the patients," and the other remarks were disparaging remarks of the type to constitute serious misconduct.

Although the language as referred to is not commendable, I am persuaded that Levin knew that Baskin's remarks were made only as strike rhetoric. For the same reasons as set forth above with respect to the argument about "profanity," I am persuaded that the above described language used by Baskin to Levin comes under the umbrella of the *Linn* and *Austin* doctrine and does not constitute serious strike misconduct when directed only at or heard by the employer's agents.

The Respondent contends that Baskin's throwing of objects at Levin constituted an act of misconduct. The facts reveal that some small objects, like pebbles, were thrown at Levin by Baskin. The sum of the facts reveal that no harm was done and that the incident was inconsequential in nature and clearly did not constitute serious misconduct by Baskin.[25]

The Respondent contends in effect that Baskin's encounter with a staff employee, described above, constituted an assault on a nonstriking employee. The Respondent contends that Baskin's encounter with said staff employee and with a patient set forth in the facts beforehand, constituted serious misconduct of the type to warrant removal of the remedial protection of the Act from Baskin. The facts relating to these incidents, if revealing of misconduct, reveal an insignificant degree of misconduct.[26]

In sum, the evidence does not reveal that Baskin engaged in misconduct (during the unfair labor practice strike) of such a nature as to remove her from the protection of the Act. It follows and I conclude and find that the Respondent was obligated to reinstate Baskin on March 3, 1977, following the Union's unconditional offer for her return to work.[27]

(2) Interim earnings

Baskin's backpay period ran from March 3, 1977, to May 26, 1978. During the backpay period Baskin became employed by the Boston Conservatory of Music in September 1977, and worked as a dormitory director throughout the remainder of her backpay period. Baskin received a salary of $100 a month as dormitory director. Baskin also received certain other wages in addition to the $100 monthly salary during the year 1978. As dormitory director, Baskin was required to stay in a school dormitory during the first and second semesters. Baskin's employment with the school was postulated on the basis that she would receive room and board as normally received by one who paid a residence fee. Such fee was $1250 for the first semester and $650 for the second semester. The board consisted of certain meals furnished by the school. Baskin entered into an arrangement with the school whereby she received $89 per month in lieu of meals. The school, for income tax purposes, reported the above-referred-to $89 as income. The school was not required to and did not report any equivalent value, for income tax purposes, for the furnishing of the dormitory room.

The backpay specifications set forth for Baskin's interim earnings a sum equal to the total of her salary and $89 per month for meals.

The Respondent argues that those who enforce the Fair Labor Standards Act construe the furnishing of a room to an employee as wages. The General Counsel argues that the Internal Revenue Service does not construe the furnishing of a room to an employee required to stay in such a room to be wages.

The Internal Revenue Service is concerned with the question of taxation and what should be taxed. There is and probably always will be dispute on the equitability

[23] See *W. C. McQuaide, Inc.*, 220 NLRB 593, 594 (1975).

[24] See *Firestone Tire Co.*, 187 NLRB 54 (1970); *Capital Rubber Co.*, 201 NLRB 715 (1973).

[25] *Moore Business Forms*, 224 NLRB 393, 404 (1976); *Overhead Door Corp.*, 220 NLRB 431, 440 (1975).

[26] The cases cited by the Respondent reveal a factual basis of extensive misconduct by the striking employee involved.

[27] See *W. C. McQuaide, Inc.*, 220 NLRB 593, 594 (1975).

of tax laws. The Fair Labor Standards Act is concerned with whether employees are treated fairly by the employer. The National Labor Relations Act, and the administration of the Act by the National Labor Relations Board, with respect to remedial orders and backpay determinations, is concerned with making the employee whole for loss of wages and benefits suffered as a result of discrimination. I am persuaded that the receipt of a furnished room, by an employee from an employer, may or may not be an item of constructive earnings to be computed in interim earnings. The receipt of such furnished room may be of value, may be of no value, or may be of less value to the backpay claimant than the same would be to someone else. Thus, if a backpay claimant lived at a family home nearby the site of the furnished room and had no cost, or substantially less costs than attributed normally to such room, the value of such room for constructed interim earnings would have to be adjusted or not accorded at all.

In the instant case, there is limited data to aid in determining the value of the room furnished Baskin by the Boston Conservatory of Music. The overall facts, indicating that Baskin stayed at the school and used the dormitory room after the backpay period and during the summer months of 1978 after the school year, preponderate for a finding that the dormitory room had value for Baskin. Baskin's statements submitted to the National Labor Relations Board indicated a belief that the total of the residential fees ($1900) prorated on a monthly basis for the entire year revealed a monthly value of $158 for the room. Baskin's statement indicated that she believed that $158 was a fair value for one room. I note that this determination ignored the fact that the $1900 residence fee covered both room and board. The record indicates that a reasonable fair market value of the meals (covered by the $1900 residence fee) was $89 per month. Further, the $1900 residence fee covered the first semester (4 months) and second semester (5 months). Baskin's statement to the Board reflected a reasonable basis of why the school charged a higher fee for the first semester. I find it reasonable and appropriate that the residence fee should be prorated for the 9-month period. Thus, $1900 (meals and room per residence fee) prorated for the 9 months equals $211 for meals and room per month. The evidence in the record reveals that $89 represents a fair market value for meals per month. It follows that $122 represents a fair value on a monthly basis for the room furnished Baskin. The referred-to $89, fair market value for meals, has already been included in the interim earnings for Baskin. Since the room had value to Baskin, and no offsetting considerations have been presented, the amount of $122 for the value of such room per month should be added to the interim earnings of Baskin for the backpay period from September 1977 to May 26, 1978.

[28] The facts persuade that Baskin had worked at the Boston Conservatory of Music for 1 month during the third quarter of 1977, had received $100 in pay, received $89 for meals, and that $122 should be included as interim earnings for the value of the room furnished by the school.

[29] The facts persuade that Baskin had worked for 3 months at the Boston Conservatory of Music during the fourth quarter of 1977, had received $300 in pay, had received $267 for meals, and that $366 should be included as interim earnings for the value of the room furnished by the school.

(3) Net backpay

In accordance with the foregoing, the computations of Baskin's backpay should be as follows:

Calendar Quarters	*Gross Back-pay*	*Net Interim Earnings*	*Net Back-pay*
1977–I	549.40	0	$549.40
1977–II	1726.69	0	1726.69
1977–III	1785.55	189.00 [28] + 122.00	
		311.00	1474.55
1977–IV	1785.55	567.00 [29] + 366.00	
		933.00	852.55
1978–I	1840.51	802.18 [30] + 366.00	
		1168.18	672.33
1978–II	1153.76	613.18 [31] + 225.23	
		838.41	315.35

b. *Anne Erde*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Excepting for the questions of whether Erde's backpay period should be tolled as of August 1, 1977, when she moved to New York, New York, from Boston, Massachusetts, and as to whether Erde engaged in serious misconduct during the strike which removed her from the remedial protection of the Act, there are no other issues concerning backpay due Erde.

(1) Erde's misconduct

a. The strike commenced on October 19, 1976. During the first 3 or 4 weeks of the strike, Erde "pounded" (with her fist) on two cars taking employees to work, as the cars were near the rear of the Preterm building. During the same period of time, but at another specific time event, Erde also pounded on the side of a school bus used to transport employees to work. On both the

[30] The facts persuade that Baskin had worked for 3 months at the Boston Conservatory of Music during the first quarter of 1978, had received $535.12 in salary or certain benefits, had received $267 for meals, and that $366 should be included as interim earnings for the value of the room furnished by the school.

[31] The facts persuade that Baskin had worked for 8 weeks for the Boston Conservatory of Music during the second quarter of 1978, during the backpay period, that her wages and certain other earnings for such period of time was $448.88, that she received $164.30 for meals (8/13 x $267) and that $225.23 (8/13 x $366) should be added to interim earnings for the value of the room furnished to Baskin. The above calculations are based on fair inferences drawn from the record as a whole. *In any event,* it is clear that $225.23 should be added to the interim earnings of $613.18, previously set forth in the pleadings and that the resultant net backpay is $315.35.

referred-to occasions, Erde was with a number of other strikers.[32]

b. During the first 2 weeks of the strike, Erde, around 8:30 a.m., stood in front of a car and when the car then passed by her, used some type of object to scratch the car on two door panels.[33]

c. On a number of occasions Erde made insulting or vulgar remarks at Director Levin.[34]

d. Levin testified concerning the usage by Erde and some other striking employees (in the presence of patients) of the terminology of "Murderers, don't go in there, there are murderers there." Considering the presentation of such testimony, I am persuaded that I must find that it simply lacks sufficient persuasiveness of objectivity or preciseness to have probative value for a finding of "misconduct." Levin's testimony in large part was generalized and conclusionary, reflected an intenseness and a difficulty in being related to specific incidents. It appeared more a blurred summary of overall recollection of similar incidents. I do not find it to have probative value. Accordingly, I do not find the evidence sufficient to establish that Erde made the remarks alluded to by Levin on a specific occasion.

e. Early in the strike, between 8:30 and 9:30 a.m., Erde told Yvonne Sullivan, a black Preterm supervisor, as she was entering the front of the Preterm building, that she (Sullivan) was a disgrace to her race.

f. The General Counsel's 10(j) petition alleged that "on or about October 23, 1976, picketers Anne Erde and Rena Baskin followed two nonstriking employees away from the picket line and threatened to kill the two nonstriking employees." No evidence was presented to affirmatively establish that such threats were made. I have previously credited Baskin's denial of such alleged threats. I also credit Erde's denial of such alleged threats.

Conclusions

Considering all of the foregoing, I am persuaded that Erde's scratching of the door panels on a car constituted serious misconduct removing her from the remedial protection of the Act. It follows that the Respondent's obligation to reinstate Erde had been eliminated as of March 2, 1977, and that Erde is not entitled to receive backpay.[35] Accordingly, it is determined that the Respondent owes no backpay to Erde.

I would not find that the three incidents of Erde's "pounding" on cars or buses sufficient to constitute serious misconduct warranting her removal from the remedial protection of the Act. The usage of the word "pounding" in describing conduct is conclusionary in nature. It is clear that some incidents of "pounding" might constitute serious misconduct and other incidents of pounding might not constitute serious misconduct.

I do not find other contended incidents of misconduct to have been established. Thus, I do not find the incident of Erde's usage of insulting or vulgar remarks to Levin to constitute serious misconduct warranting the removal of the remedial protection of the Act from Erde.[36] I do not find the facts to establish a properly litigated incident of Erde's having used the terminology of "Murderers, etc.," in front of pickets. Erde's remarks to Sullivan to the effect that Sullivan was a disgrace to her race does not remotely approach conduct of a serious misconduct nature. Further, the facts establish that Erde did not threaten to kill two nonstriking employees.

(2) The question of tolling of the obligation to reinstate

The Respondent's answer averred that Erde's backpay period ended on August 1, 1977, when Erde moved to New York City from Boston.

The sum of the facts clearly reveals that Erde diligently sought work during the backpay period while in the Boston area and while in the New York area. It is clear that Erde did not remove herself from the job market so as to disqualify her for the receipt of constructive backpay on the theory of a willful loss of earnings.

The Respondent's contention, however, may be viewed as a contention that Erde's removal to New York from the Boston area constituted in effect a constructive removal from her Preterm job or potential Preterm job reinstatement.

The facts are clear that Erde and her husband had been separated for 2 years prior to August 1977, that Erde continued to live in the Boston area from October 1976 to August 1977, that her husband lived in New York and was trying to start a video tape production business, that Erde and her husband decided to reconcile, that at the time (of such decision to reconcile) Erde and her husband discussed whether she should move to New York City or whether he would return to the Boston area, that Erde and her husband decided that she would move to New York since she did not have a job at Boston, and that Erde moved in August 1977 to New York.[37]

It should be noted that (absent the question of disqualifying serious misconduct) Erde had a statutory right as an unfair labor practice striker on and after March 3, 1977, to be reinstated to her former job at Preterm. In my opinion, the principles of waiver are applicable to the assessment of whether Erde abandoned her right of rein-

[32] The facts are based on aspects of the credited testimony of Richards. I discredit Erde's testimony inconsistent with the facts found. I have carefully considered the credibility of all of the witnesses and the presentation of the evidence. Much of Richards' and Levin's testimony was presented in a generalized and conclusionary manner. Much of said testimony was supplemented after leading questions were used. Consequently, the weight of such testimony is not overwhelming. Nevertheless, I found the facts as indicated to be more persuasive than Erde's denials. I do not, however, find the conclusionary testimony as to the "blocking" of cars to be of sufficient probative value and do not find such "blocking" of cars to have been established. Nor do I find the testimony that Erde and other pickets pushed and shoved against a police line to have real meaning as regards the question of misconduct.

[33] The facts are based on Levin's credited testimony. Erde's denial is discredited.

[34] The facts are based on Levin's credited testimony. Erde's denial is discredited.

[35] See *Bryan Infant Wear Co.*, 235 NLRB 305 (1978).

[36] *Firestone Tire Co.*, supra; *Capital Rubber Co.*, supra.

[37] I do not credit Erde's testimony to the effect that she had an understanding with Harmon that she (Erde) could retake her apartment, which was leased on an "at will" basis, if she decided to return to the Boston area.

statement to her Preterm job when she moved to New York City. Thus, the facts must reveal a clear and unequivocal waiver of such right. The facts in the instant case at most reveal a question of ambiguous inferences. For all the facts, concerning the nature of Erde's husband's employment, it is speculative as to whether Erde or her husband would have remained in New York City rather than returning to Boston had there been a reinstatement offer at any time prior to May 26, 1978. Accordingly, if it were assumed that Erde's conduct had not removed the remedial protection of the Act from her, it must be found that her backpay period extended to May 26, 1978.

c. *Nancy Harmon*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. There is an issue as to whether or not Harmon engaged in strike misconduct which removed the remedial protection of the Act from her. There is also an issue as to whether Harmon engaged in a willful loss of earnings.

(1) The alleged misconduct

The Respondent contends that its reason for refusal to reinstate Harmon was based on acts of misconduct by Harmon believed or known by the Respondent to have occurred.

Thus, Levin testified to having considered certain reports from staff or patients relating to misconduct by Harmon. Levin's testimony was self-revealing as to its generalized nature and as to questions of reliability as regards such reports. Even without Harmon's denials of such alleged events, I would not find Levin's testimony as to such reports to have probative value to establish a good-faith belief basis for such alleged misconduct. I note that Levin's testimony alluded to a report, possibly by "Rabbit" (apparently a reference to employee Ravech). Harmon credibly denied having engaged in misconduct as referred to in Levin's testimony of reports of misconduct. Ravech did not testify as to having made such reports or as to such alleged misconduct by Harmon. In sum, the misconduct, or belief thereof, as set forth in Levin's testimony as to reports about misconduct by Harmon, is insufficient to establish an objective good-faith belief that Harmon engaged in misconduct, and the overall facts warrant a rejection of any contention, based on "reports," that Harmon engaged in misconduct removing the remedial protection of the Act from Harmon.

There are three alleged incidents of misconduct that merit consideration with respect to whether Harmon engaged in serious misconduct warranting the removal of the protection of the Act from her.

The first incident involves the question of whether or not Harmon used a rock and broke out a side window of a schoolbus which was transporting employees to work on Saturday, November 20, 1976. The witnesses presented with respect to this issue were Levin, Makaretz, Ravech, Harmon, and Erde. The overall record reveals that there was an incident on Saturday, November 20, 1976, where someone damaged a windshield on a schoolbus, and someone damaged a side window on the same schoolbus which was transporting employees to work.

Levin testified to the effect that Harmon, on the occasion concerning damage to the bus, smashed a window on the schoolbus (which was transporting employees) by hitting the same with a rock. Levin's testimony is revealed in effect by the following excerpts from her testimony:

> Q. And when you returned what specifically did you see?
>
> A. Nancy Harmon with a white mittened hand had a rock and smashed it against the window. The glass went flying around in that area of the bus. Some of the members of the staff got hysterical, started to cry. I started to take glass out of some people's hair, it was hanging over their eyes.
>
> . . . .
>
> Q. And can you describe the size of the rock?
>
> A. It wasn't too big, that's the best way I could describe it.
>
> Q. You are holding up one hand—
>
> A. Size, that's right.
>
> Q. Your testimony is it was a rock that she could and did hold in one hand?
>
> A. One hand, it was not with two hands.
>
> . . . .
>
> Q. And I think I asked you how that particular window was broken, if you know?
>
> A. That was when I saw Nancy Harmon, with a mitten and a rock; and she was sort of tapping. It was brought to my attention before it actually happened, because she was sort of tapping with this rock on the window. And then the next thing I knew it was—and the staff who were—you see the bus area, the side comes down very low on this bus—

Makaretz testified to the effect that Harmon smashed a window on a schoolbus transporting employees by hitting the same with a rock. Makaretz' testimony is revealed in effect by the following excerpts from her testimony:

> Q. Anything else that you recall about this incident?
>
> A. As I was sitting in the bus and watching what was happening in front, Nancy Harmon ran to the side of the bus where I was sitting with a rock in her hand, and she smashed the window at the side where I was sitting, and the glass cracked in the window.
>
> . . . .
>
> Q. She had a rock in her hand?
>
> A. Yes.
>
> Q. How large was this rock?
>
> A. I would say about 4 inches in diameter.
>
> Q. Do you recall which hand she had it in?
>
> A. Right.

> Q. Could you describe the action or the motion that she used to smash the window, to the best of your memory?
> A. She just hit the window with the rock.
> Q. Was she still holding onto the rock?
> A. Yes. She was holding onto the rock.
> Q. She didn't throw it?
> A. No.

Makaretz further testified to the effect that a person had kicked in the windshield on the bus before Harmon had smashed the side window with a rock. Levin testified with respect to a "photography" of a bus and of someone apparently kicking at the windshield on the bus. Levin's testimony was to the effect that the side window had been smashed before the windshield had been damaged. The sum of the evidence persuades that Markaretz' testimony as to the events is not reliable.

Harmon testified to the effect that she was present on a Saturday when the windshield on a bus was damaged. Harmon's overall testimony was to the effect that her recollection of the events was not good. Harmon did, however, testify in denial that she had broken a side window of the bus with a rock. Harmon testified to the effect that she was 4 feet 9 inches tall, was left-handed, and normally did not use her right hand.

Harmon testified to the effect that she did not recall who she was with at the time of the events, that she might have had her child with her, that she did not remember Anne Erde's being present.

Anne Erde testified to the effect that she and her child were with Harmon and her child at the scene of the bus incident and that she did not see Harmon hit the bus side window with a rock.

The credibility resolution in this case presents a difficult task. The events occurred around 5 years prior to the time of the witnesses' testimony, and there is no indication that the parties have had the advantage of an investigation around the time of the events or of a preservation of investigatory type affidavits.

I have found Makaretz' testimony as to the bus incident to be unreliable.

Considering all of the events and Erde's testimony as a whole, I also find little value and attach virtually no weight to Erde's testimony as to the resolution of the dispute as to the facts relating to Harmon's alleged misconduct. The resolution of the dispute boils down to a consideration of whether to believe Levin or Harmon.

It is self-evident that a witness would have better recall of positive and special incidents as compared to negative type incidents. If Levin had seen Harmon smash a window with a rock, it is reasonable that she would recall the same. If Harmon had not smashed a window with a rock, it is reasonable that she would not recall nonexciting type of details as to who else was present at the time of a contended event. The demeanor impressions given by Levin and Harmon were equally good. Levin could be testifying truthfully that she saw Harmon use a rock and smash the side window. On the other hand, Levin could believe that Harmon smashed the window with a rock and as a result of rationalization be convinced that she saw Harmon use a rock and smash the side window. Harmon could either be testifying truthfully or untruthfully about the events. The burden is on the Respondent to establish a good-faith belief of or the fact of serious misconduct on the part of Harmon. Simply speaking, the Respondent has not met this burden by presenting persuasive evidence that his witnesses are testifying more credibly to facts to support the contention of serious misconduct by Harmon than Harmon is testifying in denial of such conduct.[38]

Levin also testified to the effect that on the same occasion on November 20, 1976, Harmon made certain remarks to her as she and others left the schoolbus to go into the Preterm building. Levin's testimony as to these remarks was as is revealed by the following excerpts from Levin's testimony:

> Q. Let me stop you. Is this after the window has been broken?
> A. That's right. And we formed a chain link, everybody held someone's hand and we proceeded to walk very quickly into the building. And at that time Nancy Harmon came up very close to me and shrieked, "We are going to get you. This is just the beginning."

Harmon testified in denial of having made such remarks as attributed to her by Levin. For the same reasons as previously set forth, I do not find Levin's testimony to appear more credible than the testimony of Harmon. Accordingly, the Respondent has failed to meet the burden of persuasion of credibility of witnesses and consequently has failed to establish the facts needed to prove the alleged misconduct. However, were the facts to be established as testified to by Levin, I would not find such remarks, allegedly made by Harmon, to constitute serious misconduct warranting the removal of the protection of the Act from Harmon.[39]

Levin also testified to the effect that Harmon was part of a large number of pickets that blocked and impeded a car, in which she was riding, on an occasion around 3 weeks after the strike started on October 19, 1976. Levin testified to the effect that Harmon made threats to her on this occasion. Levin's testimony as to what occurred is revealed by the following excerpts from the record:

> It was probably about three weeks after the beginning of the strike.
>
> . . . .
>
> And that was trying to enter into the garage in a car.
>
> . . . .

[38] *Blue Flash Express*, 109 NLRB 591 (1954). I note that the record reveals the presence of a number of policemen on the scene and that Harmon was not arrested for the damage to the side window. It would appear that if a policeman saw Harmon smash the window with a rock, an arrest of Harmon would have been made. An arrest not having been made, in view of the overall facts, is indicative that great commotion existed at the time, and that there could be honest confusion as to what occurred.

[39] Such remarks do not appear to constitute a serious threat. *Capitol Rubber Co.*, 201 NLRB 715, 722 (1973); *Firestone Tire Co.*, 187 NLRB 54, 56 (1970).

We were having trouble negotiating taking the corner and I guess the reason for it is that there were large numbers of people—

. . . .

You have to make a very sharp turn, no matter which way you are coming from you have to take a sharp turn.

. . . .

I believe there were a group of people that were close by and we were having trouble making the turn.

. . . .

Off of the sidewalk, close into the driveway. The driveway was totally blocked, but it was hard to maneuver the car around, which happened often.

. . . .

Q. Okay. And what then specifically happened at this incident involving Nancy Harmon?

A. She came up against the window where I was and banged very hard on the window and said, "We are going to show you. We are going to get you. We are going to finish Preterm."

Harmon testified in denial of the above incident. For the same reasons as previously set forth, I do not find Levin's testimony to appear more credible than the testimony of Harmon. Accordingly, the Respondent has failed to meet the burden of persuasion of credibility of witnesses and consequently has failed to establish the facts needed to prove the alleged misconduct. However, were I to find Levin's testimony more credible than Harmon's, I would not find the testimony to be reliable to establish that the pickets were blocking the passage of the car in which Levin was allegedly riding. Much of Levin's testimony was conclusionary. I am not persuaded that Levin's testimony, if believed, has essential reliability and sufficient probative value to establish that the car was blocked. If, however, the pickets blocked the car in which Levin was riding, such blocking of the car and such alleged remarks by Harmon do not constitute serious misconduct of such nature to warrant the removal of the remedial protection of the Act from Harmon.[40]

(2) The interim earnings issue (the search for work)

Prior to September 1976, Harmon had worked at Preterm on the basis of a 4-day (32-hour) week. Around September 1976, Harmon enrolled in the New England School of Law. Around this time Harmon changed her hours of employment from a 4-day (32-hour) to a 2-day (16-hour) week at Preterm.

After the commencement of the unfair labor practice strike on October 19, 1976, Harmon sought employment at hospitals and abortion clinics. Harmon credibly testified to contacting a large number of hospitals and abortion clinics and to having filed written applications for employment. Harmon credibly testified that she continued to check newspaper advertisements and to talk to people in other abortion agencies concerning job opportunities during the backpay period. Harmon only was able to obtain work of a law clerk type.

The sum of the above evidence clearly reveals that Harmon made due and diligent search for work during the backpay period. Having filed applications for employment with various potential employers, Harmon's efforts to secure employment otherwise clearly reveal that she was not attempting to cause a willful loss of earnings.

Harmon credibly testified to the effect that she had the responsibility for her child, needed a good paying job, and that she would have accepted other work than as a law clerk if such job were available at good wages. The sum of such evidence reveals that Harmon had not abandoned the abortion counseling type work to concentrate on legal type work. Further, Harmon's employment in legal type work reveals that Harmon was not engaged in a willful loss of employment.[41] At most, the Respondent's contention that Harmon had voluntarily removed herself from the job market is a speculative contention.

The sum of the facts does not reveal that Harmon engaged in a willful loss of earnings during the backpay period.

(3) Backpay due Harmon

Considering the foregoing findings, and the pleadings and admissions in this case,[42] it is concluded and found that the backpay due Harmon, plus interest, is as follows:

CALENDAR QTRS.	*NET BACKPAY*
1977–I	$305.63
1977–II	960.57
1977–III	317.33
1977–IV	578.47
1978–I	620.49
1978–II	381.84

d. *Lucy Matson*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. There are issues as to whether Matson engaged in strike misconduct which removed the remedial protection of the Act from her.

The incidents of misconduct or alleged misconduct by Matson are as follows:

1. On the first day of the strike Matson impeded the progress of three to four automobiles attempting to enter the rear Preterm parking lot by physically standing in front of the automobiles and pounding on the hoods of the cars.[43] The automobiles would stop and then start up slowly and proceed onward within an estimated 5 to 10 minutes. There is no evidence that Matson damaged any of the cars by her pounding on the hoods.

[40] See fn. 39.

[41] See *Ozark Hardwood Co.*, 119 NLRB 1130, 1133 (1957).

[42] With minor correction concerning inadvertent erroneous computation.

[43] The facts are based on the credited testimony of Richards. The credibility resolution is close. However, I found Richards to appear to be slightly the most credible witness as to such incident.

Considering the above incident, in context with all of the facts, I am persuaded that such conduct, by Matson, did not constitute serious misconduct warranting the removal of the remedial protection of the Act from Matson.

2. Richards testified to the effect that employee Pinero, during the early weeks of the strike, kicked and pounded on cars, and obstructed the progress of cars. Richards testified that Matson did exactly the same thing. Such testimony was generalized and conclusionary in nature. The Respondent did not elicit any specifics from Richards as to Matson's kicking of cars. Matson denied that she kicked cars. Considering the probative value of the testimony, I found Matson's denial to be more credible and believable than I did Richards' testimony as indicated.

3. On a morning in November 1976, Matson and around 10 to 12 pickets ran up the front steps at Preterm and in effect crashed or ran into the door.[44] There is no evidence that any damage was done to the door.

Considering the above incident, in context with all of the facts, I am persuaded that such conduct, by Matson, did not constitute serious misconduct warranting the removal of the remedial protection of the Act from Matson.

4. On an occasion, around 3 weeks after October 19, 1976, around 4:30 to 6 p.m., Matson yelled through the grating, near the garage, to Levin who was getting in her car. Matson told Levin that she had better take the strikers back or she would be sorry, that what had happened to her then was nothing compared to what was going to happen to her later.[45]

There was some evidence presented as to serious problems that had occurred at Levin's home and of activities directed toward Levin. It suffices to say that the evidence as a whole is insufficient to reveal that Matson's remarks related to such events.

Considering the facts as a whole, the remarks of Matson are insufficient to establish that such remarks in and of themselves, or in the context of other events, constitute serious misconduct warranting the removal of the remedial protection of the Act from Matson. At most, such remarks appear no more than talk and do not appear to reveal a serious threat.[46]

5. In February 1977, on three occasions, Matson and Levin had encounters involving patients who were entering into Preterm's premises. On such occasions Matson moved or placed herself in such a position as to attempt to block Levin's access to the patients. On one occasion Matson spoke to the patient and told the patient in effect not to believe anything that came from Levin's mouth, that it was not safe to go into the clinic, that Preterm had hired people who were not properly trained. On another occasion Matson told a patient that it was dangerous to go into the clinic, that the patient could be seriously hurt and that Preterm did not know what it was doing.[47]

Considering the foregoing facts, in context with all of the facts, I am persuaded that Matson engaged in serious misconduct of the type which removed her from the remedial protection of the Act. In making such determination, I do not find that the temporary blocking of Levin to constitute serious misconduct. I do find, however, the statements to the patients that it was not safe to go into the clinic, that it was dangerous to go in the clinic, that the patient could be seriously hurt, and that Preterm did not know what it was doing, constituted serious misconduct of such a nature as to remove Matson from the remedial protection of the Act.

In determining that such conduct constituted serious misconduct outside the protection of the Act, I have considered the latitude to be allowed strikers in their rhetoric and whether such statements were with malice or with reckless disregard of the truth. The instant strike involved abortion counselors. There is no basis from the overall facts to reveal that Preterm was not prepared to furnish proper professional services by doctors and similar professionals for those who desired abortions. There is no evidence to reveal a sincere or reasonable belief that any patient was being placed in danger by the services offered by Preterm. Nor do the facts reveal that "patients" would reasonably construe Matson's remarks as mere rhetoric. Rather, patients attempting to enter an abortion clinic reasonably could be expected to have concern for whether anticipated surgical procedures were unsafe or dangerous. It is further clear that Matson and the other strikers should have been aware of such concerns. Under such circumstances, Matson's remarks reveal a reckless disregard for the truth and to be outside the protective ambit of tolerance to be accorded to strike speech. In sum, the facts reveal Matson's remarks, relating to dangerous and unsafe conditions, to constitute serious misconduct removing Matson from the remedial protection of the Act.

6. In early November 1976, on a morning between 7:30 and 8 a.m., Matson encountered nonstriking employee DeAngelis on a subway train. Matson, in a loud voice, told DeAngelis that she was a scab, that she stole employees' jobs, that Levin was "in it for the money," and that DeAngelis was a fool and naive.[48]

Considering the above facts, or any contended presented version of facts about the incident, I find the facts do not reveal serious misconduct by Matson warranting the removal of the remedial protection of the Act from Matson.

7. In December 1976 Matson and a nonstriking employee named Grace Stead had an altercation on a street in Cambridge, Massachusetts. It is clear that the incident was triggered by the individuals' actions, remarks, and respective views relating to the Preterm strike. Stead re-

[44] The facts are based on Richards' credited testimony. To the extent that Matson's testimony is contradictory to the facts found, such testimony is discredited.

[45] The facts are based on the credited testimony of Levin. To the extent that Matson's testimony is a denial of this incident, such testimony is discredited.

[46] *Capital Rubber Co.*, supra; *Firestone Tire Co.*, supra.

[47] The facts are based on the credited aspects of Levin's testimony. Matson's testimony, inconsistent with the facts found, is discredited.

[48] The facts are based on the credited aspects of DeAngelis' testimony. There is little dispute between DeAngelis' and Matson's testimony. The ultimate findings of facts would not be affected if either were to be credited in whole or in part or not at all.

ported the incident to Levin and told Levin in effect that Matson was the aggressor and had hit her.

Matson credibly testified to the effect that an altercation with Stead occurred and that Stead was the agressor.

Considering the foregoing facts, the report to Levin by Stead constituted evidence to support a good-faith belief of serious misconduct by Matson. Matson's credited testimony, however, reveals that in fact she had not engaged in such serious misconduct as alleged. Accordingly, the incident, as a report or not, does not constitute serious misconduct warranting the removal of the remedial protection of the Act from Matson.

In sum, it has been found that Matson engaged in certain conduct, specifically found herein to constitute serious misconduct removing her from the remedial protection of the Act. Such conduct occurred prior to the Union's March 2, 1977 unconditional offer for the strikers to return to work. It follows that the Respondent's obligation to reinstate Matson at such time had been eliminated by such serious misconduct and that, therefore, no backpay is due Matson by the Respondent.

e. *Lillian Pinero*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Considering the foregoing and the pleadings and admissions therein, it is clear that Pinero's backpay period ran from March 3, 1977, to May 26, 1978, if certain alleged misconduct had not removed the remedial protection of the Act from Pinero.

(1) Misconduct

a. Richards testified concerning alleged incidents wherein Pinero blocked cars, pounded on cars, and kicked the sides of cars, attempted to kick employees, kicked two employees, and shouted vulgar remarks to persons who were entering the front entrance to Preterm.

The above testimony of Richards did not reach the necessary degree of probativeness to meet "due process" standards necessary for constituting that a specific incident had been litigated. The events allegedly involved occurred 5 years before the trial. Richards' testimony as to the alleged incident was generalized, conclusionary, and lacked preciseness as to details. The facts are insufficient to establish that Pinero engaged in specific incidents of misconduct as suggested by such testimony.

b. On an occasion on the first day or two of the strike, Pinero, around 8:30 a.m., encountered a nurse named Rappaport who was attempting to report to work. What occurred is revealed by the following credited excerpts from Levin's testimony:[49]

> Q. What did you see?
>
> A. One of our new, younger nurses was coming down the street across, this is right near the street, and Lilliane put herself in front of the nurse. And the nurse kept trying to get by her. She was very slight.
>
> Q. Who was the nurse you are referring to?
>
> A. I think her name was Rappaport, Laurie or something Rappaport.
>
> Q. Okay. You said Lilliane Pinero put herself in front of this nurse?
>
> A. And there was a lot of jockeying and gesticulation and talk, but obviously I don't know what the talk was except that the nurse really tried to move around and Lillie wouldn't let her, and finally grabbed her and shook her.
>
> Q. Who grabbed whom? I am not certain.
>
> A. Lillie grabbed the nurse and shook her. And the nurse started to cry, and at that point I was about to call downstairs to ask someone to get a police person and a policeman intervened and separated them—or, I should say, asked Lilliane to leave.

Considering the above facts, in context with all of the facts, I conclude and find that Pinero, in the described incident, engaged in serious misconduct of such a nature that said misconduct removed the remedial protection of the Act from Pinero.

c. One morning, early after October 19, 1976, Pinero damaged a car as it went through or by the picket line. On such occasion, Levin was a passenger in such vehicle. As the car passed Pinero, Pinero kicked the side of the car and dented the side to such an extent that it had to be repaired.[50]

Considering the above facts, in context with all of the facts, I conclude and find that Pinero, in the described incident, engaged in serious misconduct of such a nature that said misconduct removed the remedial protection of the Act from Pinero.

d. On another occasion, within the first 3 weeks after October 19, 1976, Pinero damaged another car as it crossed the picket line. On this occasion, DeAngelis was a passenger in such car. Pinero was on the right side of the car and kicked the right side of the automobile as it passed. As a result Pinero caused a dent in the side of the car.[51]

Considering the above facts, in context with all of the facts, I conclude and find that Pinero, in the described incident, engaged in serious misconduct of such a nature that said misconduct removed the remedial protection of the Act from Pinero.

e. On the first day of the strike, October 19, 1976, Nora Watts, a Preterm nurse, was in a car, around 5

[49] The facts are based on the credited aspects of Levin's testimony. As to this incident, I found Levin to appear a more frank, forthright, and credible witness than Pinero.

[50] The facts are based on the credited aspects of the testimony of Levin. As to this issue, Levin appeared a thoroughly frank, forthright, and truthful witness. Pinero's testimonial denial of this incident did not have the persuasiveness of truth. I credit Levin's testimony over Pinero's testimony where in conflict.

[51] The facts are based on credited aspects of the testimony of DeAngelis. I credit DeAngelis' testimony over Pinero's, as to the facts found, where there is dispute. DeAngelis also credibly testified to the effect that Pinero engaged in strike rhetoric at the time. I do not find DeAngelis' testimony to be of probative value to establish that Pinero blocked cars or that other similar incidents occurred.

p.m., leaving work. On such occasion, Pinero and a number of pickets surrounded the car and impeded its progress for several minutes. Pinero pounded on the window of the automobile and screamed.[52] Watts was "frightened" that the window would break.

Considering the above facts, I am persuaded that the evidence is insufficient to establish that Pinero, as to the described incident, engaged in serious misconduct warranting the loss of remedial protection of the Act. Similar to much of the testimony in this case, the evidence is of insufficient probativeness to determine that misconduct, if it occurred, reached the degree of serious misconduct warranting loss of remedial protection of the Act. Watts and other witnesses used general descriptive terms of blocking, pounding, and screaming. The overall testimony does not reveal that the car was blocked for more than an insignificant amount of time. There is no evidence that the pounding caused any damage. And there is no indication that the screaming was more than strike rhetoric.

f. The Respondent appears to have presented another alleged incident in support of its contentions that Pinero engaged in serious misconduct which was considered in its refusal to reinstate Pinero. Thus, the Respondent presented testimony by Makaretz relating to an alleged incident on the first day of the strike.

Makaretz testified to the effect that she and several nurses, including a nurse named Sandra White, were in a car on October 19, 1976, around 7:30 a.m., that Pinero jumped on the hood of the automobile as it entered into Preterm's back parking lot, that Pinero started pounding on the windshield, and that Pinero was yelling "scab" and "son of a bitch."

The general and conclusionary quality of the testimony has insufficient probative value to reveal that the conduct of jumping on the hood and pounding on the windshield constituted serious misconduct. It is clear that the alleged language did not constitute serious misconduct.

Assuming the facts to reveal serious misconduct by Pinero, the facts are insufficient to reveal that the Respondent considered such alleged misconduct in its failure to reinstate Pinero from March 3, 1977, to May 26, 1978. Makaretz testified to the effect that she reported this incident to Richards. Richards' and Levin's testimony, however, is of such a nature that the necessary tie in of the incident as a reason for the Respondent's failure to reinstate Pinero has not been made.

Finally, Makaretz' overall testimonial appearance was of such a nature that it is not more persuasive as to the establishment of facts than Pinero's denial.

Considering all of the foregoing, the facts do not reveal that Pinero, in the described alleged incident, engaged in serious misconduct of such a nature that said misconduct removed the remedial protection of the Act from Pinero.

g. Richards and Levin credibly testified in composite effect that, in determining not to reinstate Pinero, they took into consideration a published article wherein Pinero had stated that at Preterm she was forced to encourage Spanish-speaking women to be sterilized.

This article appeared in a Spanish-American Newspaper entitled Community News, in a March 1977 issue. A story, "A Preterm Worker Explains the Strike," contained an interview with Pinero. The story quoted Pinero as saying:

> On two different occasions I was asked to push sterilization on Spanish-speaking women. Once this had been suggested by an administrator, who hadn't even seen the individual woman's chart. I guess it was assumed Spanish-speaking women just had too many children. I was outraged.

The facts reveal that the Respondent's policy is not to push sterilization on Spanish-speaking women and that Pinero was aware that it was not the Respondent's policy to push sterilization on Spanish-speaking women.

Testimony was presented by Pinero and by Rosoff as to the Respondent's policy and as to the apparent basis or lack of basis for support of the facts asserted in the article. Suffice it to say, I am persuaded that the overall facts reveal that Pinero made the statements asserted, that they were incorrect, that they were not, however, made with malice or reckless disregard.

Considering the tolerance to be allowed strike rhetoric, the fact that the article was clearly set forth in a strike context, I am persuaded that the facts do not reveal that Pinero, by such statements, engaged in serious misconduct of such a nature as to remove the remedial protection of the Act from her.[53]

(2) Conclusions

In sum, it is concluded and found that Pinero's engagement in certain specific serious misconduct, as previously set forth, removed the remedial protection of the Act from her, and the Respondent was not obligated to reinstate Pinero on March 2, 1977, and thereafter, because of such misconduct, and that such misconduct and the Respondent's reliance thereon tolled any backpay period as of March 2, 1977.

f. Elizabeth Reeves

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Considering the foregoing and the pleadings and admissions therein, it is clear that Reeves' backpay period ran from March 3, 1977, to May 19, 1978, if certain alleged misconduct had not removed the remedial protection of the Act from Reeves.

(1) The misconduct

a. The strike commenced on October 19, 1976. On one of the first days of the strike, Reeves ran into the reception area family room. At the time there were around 15 persons in the room. Some of these persons were employees, patients, and friends or families of patients.

[52] The facts are based on the credited testimony of Watts. I credit Watts' testimony over Pinero's where such testimony is in conflict.

[53] See *Firestone Tire Co.*, supra; *Capital Rubber Co.*, supra.

Reeves told those who were there that they should get out and leave, that it was a dangerous place to be, that there was no one capable of handling any kind of medical care.[54]

Considering the foregoing facts, I conclude and find that such conduct constituted serious misconduct which removed Reeves from the remedial protection of the Act. For reasons expressed with regard to similar misconduct by another striker, such conduct constituted a reckless regard for the truth and took such speech outside the ambit of tolerance normally utilized in evaluating strike speech.[55]

b. Levin testified to the effect that she was present on another occasion when Reeves made similar remarks to patients. Levin also testified to the effect that she also received some reports from patients that Reeves had made similar remarks.

From my consideration of Levin as she testified and her testimony as a whole, I am persuaded that her testimony referred to above is not reliable to establish a specific incident. Accordingly, such evidence is insufficient to establish serious misconduct of the type to remove Reeves from the remedial protection of the Act.

c. On a morning within a month after October 19, 1976, an employee named Ravech rode to the Preterm premises in a bus. After arriving at Preterm, Ravech and other employees left the bus and proceeded to walk through the picket line. What occurred is revealed by the following credited excerpts from Ravech's testimony.[56]

> Q. Okay, what happened then?
>
> A. As I walked past Becky Reeves, who was in the front row, she put out her foot as if she—she was trying to trip me. And she did not trip me, but she ended up really kicking me in the shins very hard.
>
> Q. Did the kick leave any mark or anything?
>
> A. I was quite black and blue after that.

Ravech later reported this incident to Levin and Richards. Some of Levin's and Richards' testimony seems to suggest that they discussed all employees, their personal recollection of misconduct, and reports from staff and patients as to misconduct of strikers. Their testimony, however, is extremely muddled and appears to be in answers to questions about specific strikers. I am not persuaded that the evidence as a whole warrants a finding that Levin and Richards considered the incident of Reeves kicking Ravech as an incident of serious misconduct as part of the reasoning to refuse to reinstate Reeves.

The issue of serious misconduct and the refusal to reinstate Reeves was litigated on the basis that the Respondent was relying only on the serious misconduct which constituted a part of the reasoning for the refusal to reinstate Reeves. This being so, the Respondent has not established that the incident involving the kicking of Ravech had a bearing upon the failure to reinstate Reeves. Since I find that Reeves has engaged in serious misconduct of another type, removing her from the remedial protection of the Act, I do not find it necessary to determine whether this misconduct, the kicking of Ravech, warrants the denial of backpay to Reeves.

d. On three or four occasions during a 2- or 3-week period, Reeves impeded the movement of cars entering the Preterm parking lot. On such occasions, Reeves stood in front of the cars. Such cars either stopped or slowed almost to a standstill and then inched slowly ahead. As the cars moved slowly ahead, Reeves pounded on the hoods.[57]

Considering the foregoing facts, in context with all of the facts in this case, I do not find that the facts as to these incidents reveal serious misconduct of such a nature as to remove Reeves from the remedial protection of the Act.

(2) Conclusions

The sum of the facts relating to Reeves' misconduct during the strike reveals serious misconduct relied on by the Respondent in denying reinstatement to Reeves and that such misconduct during the strike constituted serious misconduct which removed Reeves from the remedial protection of the Act.[58] Such conduct occurred before the March 2, 1977 unconditional offer by the Union for the strikers to return to work. Therefore, the Respondent's remedial responsibility to Reeves of reinstatement and backpay had been eliminated by such misconduct. Accordingly, it is determined that the Respondent owes no backpay to Reeves.

g. *Louise Rice*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of strikers to return to work constituted a valid unconditional offer. Considering the foregoing and the pleadings and admissions therein, it is clear that Rice's backpay period ran from March 3, 1977, to May 27, 1978, if certain alleged misconduct had not removed the remedial protection of the Act from Rice.

(1) The alleged misconduct

a. Levin and Richards testified in composite effect that they relied on reports from staff concerning misconduct by Rice in denying reinstatement to Rice. These reports related to Rice's picketing of employees' homes, following employees home in her car, and transporting patients to other clinics and making defamatory remarks about the Respondent's clinic. In connection with the conduct referred to in the above "reports," the unfair labor practice complaint against the Union and the 10(j) petition

[54] The facts are based on a composite of the credited aspects of the testimony of Levin and Richards. I discredit Reeves' denial that she engaged in such misconduct.

[55] *Restaurant Horikawa*, 260 NLRB 197 (1982).

[56] I found Ravech to appear to be a more credible witness than Reeves and credit her testimony over Reeves' where there is conflict.

[57] The facts are based on the credited aspects of the testimony of DeAngelis. I discredit the testimony of Reeves to the extent inconsistent with the facts found. I found DeAngelis to appear to be a more frank, forthright, and truthful appearing witness as compared to Reeves.

[58] See sec. III,(f),1,a, above.

filed by the General Counsel averred that Rice and others had, on October 27, 1976, followed nonstriking employees to and from work in their automobiles. The only direct evidence presented with respect to alleged misconduct by Rice was the testimony of Makaretz.

Makaretz testified to the effect that she had an encounter with Rice on a Saturday, several weeks after October 19, 1976, that she was with a Dr. Borman and a Dr. Levy, that Rice was with a group of strikers at the Preterm back entrance. Makaretz testified that Rice yelled to her and the physicians. What Rice allegedly said is revealed by the following excerpts from Makaretz' testimony:

> Q. What specifically happened in that incident involving Louise Rice?
>
> A. We were walking through the back parking lot and we were sort of heading toward the second—the one to the back entrance, and there was a group of strikers at the first entrance, and Louise Rice was at the head of them. She yelled very, very loudly to us, "You must be very proud of that, what you are doing." And the remark was directed to the doctors. "You call yourselves doctors, and you must be proud to be the murderers."
>
> Q. That last statement, can you tell me—let me make sure I have it right. "You call yourselves doctors. You must be proud—?"
>
> A. "—proud of what you are doing to be murderers."

Rice credibly testified that she (1) had not engaged in the misconduct as had been reported to Levin and Richards, (2) had not followed employees as they entered or left Preterm's premises, (3) had not picketed employees' or supervisors' homes during the strike, and (4) had not made the remarks to Makaretz and the physicians as attributed to her by Makaretz.[59]

(2) The net backpay

Considering the foregoing, the pleadings, and the admissions therein,[60] I find the backpay due Louise Rice to be as follows:

CALENDAR QTRS.	*NET BACKPAY*
1977-I	$ 534.79
1977-II	1680.73
1977-III	1744.65
1977-IV	1065.32
1978-I	195.42
1978-II	124.30

h. *Catherine Walker*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Considering the foregoing and the pleadings and admissions therein, it is clear that Walker's backpay period ran from March 3, 1977, to May 26, 1978, if certain alleged misconduct had not removed the remedial protection of the Act from Walker.

(1) The misconduct

a. On the first day of the strike, October 19, 1976, Walker spat on Susan Kell, the assistant to the treasurer at Preterm, as Kell went through the picket line when leaving work. Thus, on the first day of the strike, around 4:15 p.m., Kell, and two others connected with Preterm, left work and were walking by or near Catherine Walker and 15 or 20 pickets on the front sidewalk. On such occasion, Walker yelled at Kell, called her a "scab," and asked how she could keep working there. Walker spat at Kell and hit Kell on the right cheek and chin and across the front of her jacket.[61]

Considering the above facts, in the context with all of the facts relating to Walker's misconduct, I conclude and find that the spitting on Kell constituted serious misconduct removing Walker from the remedial protection of the Act. I would not find the language or remarks used by Walker to constitute misconduct. Nor would I find that one instance of spitting at a person by a striker to constitute serious misconduct warranting the removal of the remedial protection of the Act from Walker. However, considering the overall facts, I am persuaded that the act of spitting was not a spontaneous act and was not an exercise of animal exuberance. Rather, the facts reveal other instances of spitting at employees or personnel of Preterm by Walker. Thus, in total context, I conclude and find that the act of spitting on Kell constituted serious misconduct which removed the remedial protection of the Act from Walker.[62]

b. One morning around 8 a.m., on a day in mid- to late-November 1976, Walker, while picketing with others, spat at but did not hit Donna DeAngelis, a nonstriking employee. At the time DeAngelis had been going to work and was on the front steps of Preterm.[63]

Considering the above facts, I conclude and find that Walker engaged in serious misconduct which removed the remedial protection of the Act from Walker. Considering the overall facts, I am persuaded that the act of spitting was not a spontaneous act and was not an exercise of animal exuberance. In context with the other acts of spitting at employees or personnel of Preterm, I conclude and find that Walker's spitting at DeAngelis con-

[59] I credit Rice's testimony over Makaretz' as to whether Rice made the remarks attributed to her by Makaretz. The overall facts revealed Makaretz to be less than objective and an unreliable witness. As to the other alleged incidents, the testimony as to reports was extremely general and conclusionary. Considering the quality of all the facts, I found Rice's testimony to have the ring of truth. Rice's testimonial demeanor was that of a forthright, frank, and honest witness.

[60] With minor corrections concerning inadvertent erroneous computations and with interest as indicated later.

[61] The facts are based on a composite of the credited testimony of Kell and Richards. I credit Kell's and Richards' testimony over that of Walker on this point. Kell's testimony was also to the effect that later she was lightly bumped by Walker as she went through the picket line. It is clear that such touching was accidental. I do not believe that Walker, who was pregnant, would use her stomach as an offensive weapon.

[62] Cf. *Sea View Industries*, 127 NLRB 1402 (1960).

[63] The facts are based on credited testimony of DeAngelis. I credit DeAngelis' testimony over Walker's where in conflict.

stituted serious misconduct which removed the remedial protection of the Act from Walker.

c. DeAngelis testified to the effect that there were other incidents of spitting by Walker, one of which occurred several weeks after the one set out above. It is sufficient to say that I do not find DeAngelis' testimony as to such incidents to reveal such sureness of detail as to warrant a finding of a specific incident.

d. On a morning during the first couple of weeks after October 19, 1976, Walker spat on Leslie Bernstein, a supervisor, as she went through the picket line around 7:30 a.m. Bernstein had been transported to work in a private schoolbus. When Bernstein left the schoolbus to go to the front door of Preterm, Walker was with other pickets. Walker yelled to Bernstein that she was stealing her job. Walker spat at Bernstein. Bernstein had put her hand up, and the spit hit Bernstein's hand. Bernstein pushed Walker in the face with her hand.[64]

For reasons previously set forth, I conclude and find that the above incident constituted serious misconduct of such a nature that the remedial protection of the Act was removed from Walker.

e. In October 1976, the Respondent was considering the employment of Janice Irvine as an assistant to the coordinator of counseling. Feinbloom, the coordinator of counseling, did not want to make a decision about the assistant to her position. As a result, Irvine was hired as a consultant and commenced answering the telephone and interviewing people for work.

After the strike started, on October 22, 1976, around 5:30 p.m., Irvine was leaving from work and headed for her automobile. Walker and Weinberg approached Irvine and yelled at her. Irvine turned around and headed back to the Preterm clinic. Around this time Weinberg placed her hand on Irvine's arm.[65]

Assistant Director Richards saw the above incident. Later, Richards, Irvine, and a lawyer appeared to have discussed the events. It appears that several days later Irvine signed a statement relating to the incident referred to above. In any event, around November 18, 1976, Irvine signed a sworn statement containing the following:

> On Oct. 22, approx. 5:30 p.m., I left Preterm to walk to my car. A few people yelled "scab" and "how does it feel to be training scabs?" I kept walking, and when I got to the curb, Katherine Walker ran up to me and grabbed my arm. She asked me if I was working at Preterm. I ignored her and tried to keep walking but she wouldn't let me go. Another woman (Susan Weinberg) came up to me and grabbed my other arm. They both started shoving me and yelling "scab" and various obscenities. After 3-4 minutes a policeman came up and told them to leave me alone. He began to walk me to my car and the two women walked along yelling that "they would find me and get me." They continued threatening me and I decided not to go to my car. I informed the policeman that I would not go to my car with the women following me. They (the women) said that they would wait six months if they had to. We began to walk back to the clinic and they kept yelling at me. I had to leave the clinic by car.
>
> Janice Irvine
>
> The above statement is true to the best of my knowledge and belief.
>
> Janice Irvine
>
> Sworn to and subscribed before me this eighteenth (18) day of November 1976 in Brookline, MA.
>
> Jonathan S. R. Beal
> Examiner NLRB

It also appears that some sort of legal complaint was filed relating to the incident, some type of hearing (informal or otherwise) was held, and the complaint was dropped.

Considering the testimony of the witnesses and all of the facts, the facts are insufficient to reveal that Walker or Weinberg engaged in misconduct during this alleged incident. The only evidence of any real value as to this incident consists of those facts previously set forth as based on the testimony of Irvine, Richards, Walker, and Weinberg. I note that Richards initially testified that Weinberg physically took hold of Irvine. Later, a leading question was propounded on the postulation that Weinberg had physically restrained Irvine. Richards' further testimony was simply that Weinberg had her hands on Irvine's arms. I also note that Irvine appeared to have a sufficient recall of the events. I am not persuaded that her failure to testify in more detail is a result of loss of memory. It would appear that Irvine either did not want to testify to the events because she, at the time of the trial, had become friendly with the former strikers, or did not want to testify to the events because the alleged facts in the written statement were not true. In any event, the statement prepared for litigation has an aura of unreliability. Further, even if the statement as written were true, I am persuaded that the facts as to this incident do not reveal serious misconduct of a nature to remove the remedial protection of the Act from Walker or Weinberg.

f. The Respondent in its brief asserts facts as revealed by the following excerpts from the Respondent's brief.

> Ms. Levin testified that on four or five occasions during the first several weeks of the strike, Ms. Walker yelled obscenities like "go to hell, fuck you, you're a piece of shit" at her through the garage grating. She also threatened her that "we'll get you" and "you'll be sorry." [Tr. 1079–81.]
>
> Ms. Levin testified that toward the end of October, 1976, she observed Ms. Walker in the front of Preterm one morning tell a patient who was trying to enter Preterm that Preterm was not providing any patient care. When the patient still tried to

[64] The facts are based on a composite of the credited aspects of Bernstein's, Richards', and Walker's testimony. I discredit the aspects of any of the testimony of the witnesses inconsistent with the facts found.

[65] The facts are based on the credited aspects of the testimony of Irvine, Richards, Walker, and Weinberg. The testimony of any witness inconsistent with the facts found is discredited.

> enter, Ms. Walker physically blocked her progress, to the point of pushing her back. Finally, when the patient became upset, a policeman intervened and escorted the patient in. [Tr. 1082–88.]

It suffices to say that I did not find Levin's testimony in support of these contended facts to appear objective or reliable to establish litigated incidents.

g. In February 1977, Walker was involved in an incident with Levin and Lansky on the subway. What occurred is revealed by the following credited excerpts from Levin's testimony:[66].

> She came over, stood over us, started to yell and scream and say how irresponsible we were and what a disgrace the clinic was. Aren't we ashamed to be seen in public, what a terrible thing we were doing to womankind. Don't we have any sense of responsibility, how long do we think we can get away with this.

Considering the tolerance in rhetoric in strike situations, the above facts do not reveal serious misconduct of a nature to remove the remedial protection of the Act from Walker.[67]

h. In addition to the above incidents, the Respondent alludes in his brief to certain conduct alleged to have been engaged in by Walker as asserted in a complaint issued by the General Counsel. Walker denied having engaged in such misconduct. I find Walker's denial to be credible in such denial of allegations unsupported by testimony of evidence otherwise. Further, evidence as to such incidents is not sufficiently tied up so as to be revealed to constitute a part of the Respondent's refusal to reinstate Weinberg during the period of time March 3, 1977, to May 26, 1978.

(2) Conclusions

In sum, it is concluded and found that Walker's engagement in certain specific serious misconduct, as previously set forth, removed the remedial protection of the Act from her, and the Respondent was not obligated to reinstate Walker on March 2, 1977, and thereafter, because of such misconduct, and that such misconduct and the Respondent's reliance thereon tolled any backpay period as of March 2, 1977.

i. *Susan Weinberg*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Considering the foregoing and the pleadings and admissions therein, it is clear that Weinberg's backpay period ran from March 3, 1977, to May 27, 1978, if certain alleged misconduct had not removed the remedial protection of the Act from Weinberg.

(1) The alleged misconduct

a. The incident of the alleged misconduct involving Janice Irvine has previously been set forth and discussed in the section concerning alleged misconduct by Walker. Suffice it to say, for the reasons previously set forth, the facts do not reveal that Weinberg engaged in misconduct in such incident.

b. There is a pharmacy, not a part of the Respondent's enterprise, located in the same building as the Respondent (Preterm). One morning Richards was in the pharmacy. Weinberg came into the pharmacy. Richards testified to the effect that Weinberg screamed and yelled at her. Richards' testimony as to what was said appeared to be largely a characterization of what was said rather than what actually was said. Such testimony was essentially as is revealed by the following excerpts from Richards' testimony:

> Q. Would you please describe, therefore, to the best of your memory, what she said to you?
>
> A. I don't remember the precise words.
>
> Q. Do you remember the topic of her conversation, if you will?
>
> A. Well, it was, as I said, that I was an idiot, and basically a rotten person; and screaming. There were other people in the pharmacy. I was up at the counter. She came up to the counter, so that I felt some physical intimidation, in terms of the manner in which she was doing this.

It suffices to say that I did not find Richards' testimony to be of probative value so as to offer a basis for real factfinding. Assuming the details to be as indicated, however, such facts do not reveal serious misconduct by Weinberg. The premises were not Preterm's premises. The language used, considering the tolerance given to strike rhetoric, clearly does not reveal serious misconduct. In sum, the incident is not established to be serious misconduct of such a nature as to remove the remedial protection of the Act from Weinberg.

c. Levin testified to a number of occasions wherein Weinberg allegedly yelled profane and vulgar remarks at her, threw pebbles or paper wads at her and belittled the clinic. Levin also testified to certain reports concerning Weinberg.

Levin's testimony as a whole, relating to the "misconduct" by Weinberg, did not appear objective or specific. In effect, I am not persuaded, under standards of due process, that specific incidents could be said to have been litigated. However, assuming specific incidents to have been litigated, the facts do not reveal serious misconduct by Weinberg. The language used is not to be admired. However, considering the tolerance accorded strike rhetoric, Weinberg's remarks do not reveal serious misconduct.

There were "reports" concerning Weinberg and the harassment of employees by usage of the telephone. I credit Weinberg's denial that she made the alleged harassing telephone calls.

d. A few weeks after October 19, 1976, Weinberg and DeAngelis, a nonstriking employee, had an encounter in

[66] The facts are based on credited aspects of Levin's testimony. I credit Levin over Walker as to this incident.

[67] *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975).

Preterm's back parking lot.[68] DeAngelis had ridden to work with another employee named Flink. After Flink had parked her automobile, DeAngelis got out of the automobile and started to leave. At such time, DeAngelis encountered Weinberg who was standing between Flink's automobile and the automobile which was parked adjacent to DeAngelis' automobile. Because of the location of the automobile and a fence, Weinberg's position was directly in the way that DeAngelis had to go in order to proceed to work. Weinberg, in a loud and yelling tone, argued with DeAngelis about DeAngelis' continuing to work during the strike. DeAngelis, in effect, asked Weinberg to move and let her pass by. Weinberg did not move and continued to argue with DeAngelis. DeAngelis asked Flink to go to get someone. Flink left and returned shortly with a security guard. The security guard spoke to Weinberg and then escorted Weinberg away. The total encounter covered only 5 or 6 minutes.

Considering all of the foregoing, I conclude and find that the described incident did not constitute serious misconduct of the type that removed the remedial protection of the Act from Weinberg. There is no evidence of physical touching or threats. Rather, the facts indicate a degree of animal exuberance in communications.[69]

(2) Conclusions

In sum, the facts do not establish that Weinberg engaged in serious misconduct of such a nature as to remove the remedial protection of the Act from her. Considering the determination of the issues herein, the pleadings and admissions therein, it is clear that the backpay[70] due Weinberg is as follows:

CALENDAR QTRS.	*NET BACKPAY*
1977-I	$ 554.40
1977-II	1742.40
1977-III	692.98
1977-IV	202.67
1978-I	202.67
1978-II	124.72

j. *Jean Williams*

The determination has been made that the Union's March 2, 1977 unconditional offer on behalf of the strikers to return to work constituted a valid unconditional offer. Considering the foregoing and the pleadings and admissions therein, it is clear that Williams' backpay period ran from March 3, 1977, to May 26, 1978, if certain alleged misconduct had not removed the remedial protection of the Act from Williams.

(1) The alleged misconduct

a. There was an incident that occurred during the first few days after October 19, 1976, where Jean Williams temporarily blocked the movement of someone who was on Preterm's staff and who was attempting to enter into Preterm's front entrance.[71]

Considering the above facts, or facts assumed if Levin's testimony were credited in all aspects, the facts of Williams' bumping or blocking of a staff person for a few moments, does not constitute serious misconduct of such a nature as to remove the remedial protection of the Act from her.

b. Levin testified concerning an alleged article about abortions written by Williams and published in a woman's magazine in February 1977. Levin's testimony about the article was in generalities as revealed by the following excerpts from her testimony:

> Q. What is your best memory as to what it is she said concerning Preterm?
>
> A. My best memory is that it talked about how Preterm abuses the rights of women in that we do not give them the opportunity to make decisions, that it is in essence forced upon them.

The above article was not presented in evidence. Apparently the Respondent could not locate such article at time of trial.

Williams denied that she had written said article. I found Williams to appear to be a truthful witness. I credit Williams' denial that she had written the referred-to article. I discredit Levin's testimony to the extent that it can be construed to the effect that Jean Williams wrote and signed the article testified to by Levin.

Considering all of the facts referred to above, I am persuaded that the facts do not establish that Williams engaged in serious misconduct by writing for publication an article on abortion. Assuming Levin's testimony to be correct insofar as establishing that Williams wrote an article on abortion, Levin's testimony is of such a general nature that it is not sufficient to establish the precise facts needed to support a finding of serious misconduct of such a nature as to remove the remedial protection of the Act from Williams.

c. Levin also testified that she received reports concerning Williams' misconduct and that such reports constituted part of the basis for denial of reinstatement to Williams on and after March 3, 1977. Levin's testimony as to such reports was generalized and imprecise. I found Williams to be a truthful appearing witness and credit her denial that she engaged in such alleged misconduct.

[68] The facts are based on DeAngelis' credited testimony. I found DeAngelis to appear a more credible witness than Weinberg on this issue. I discredit Weinberg's testimony contradictory of the facts found. Again, I note counsels' and the parties' difficulties in establishing events within a reasonably accurate time period. The incident involved herein is of such a nature that Weinberg would clearly be aware of the same.

[69] It is not established that this incident constituted a part of the Respondent's reason for refusing to reinstate Weinberg from March 3, 1977, to May 26, 1978. Furthermore, it is clear that such conduct did not render Weinberg an unsuitable employee.

[70] With interest thereon as indicated later herein.

[71] The facts are based on the credited aspects of Levin's testimony. Much of Levin's testimony was conclusionary and general in nature. I discredit Levin's testimony to the extent that it can be interpreted to indicate facts different from the facts found. I am persuaded that Williams attempted to testify truthfully. I am also persuaded that the incident described herein was so insignificant that Williams would not have construed it to be a blocking incident and would with reasonable probability have forgotten the same. Williams appeared surprised by the allegations of misconduct. If one had not engaged in misconduct, such surprise is reasonable.

Considering the above facts, I conclude and find that the facts do not establish that Williams engaged in serious misconduct of such a nature as to remove the remedial protection of the Act from her. Even in the absence of credited testimony by Williams, I would not find Levin's testimony of sufficient probative value to establish a good-faith objective belief that Williams had engaged in specific acts of serious misconduct.

(2) Conclusions

In sum, the facts do not establish that Williams engaged in serious misconduct of such a nature as to remove the remedial protection of the Act from her. Considering the determination of the issues herein, the pleadings and admissions therein, it is clear that the backpay[72] due Williams is as follows:

CALENDAR QTRS.	*NET BACKPAY*
1977–I	$ 582.12
1977–II	1829.52
1977–III	1891.89
1977–IV	1439.11

k. *Miscellaneous*

The Respondent also presented other evidence (concerning the employees denied reinstatement because of alleged misconduct) apparently relating to misconduct. It is not clear that such other alleged misconduct was considered as part of the reasons for failure to reinstate the employees discussed herein. In any event, such other alleged misconduct does not constitute serious misconduct of the type to remove the remedial protection of the Act from the striking employees. Such conduct, as an example, involved striking employees engaging in chanting or picketing away from Preterm premises, on the street, or at homes of nonstriking employees or supervisors. Such conduct mainly consisted of strike rhetoric and picketing. Considering the tolerance to be allowed strike rhetoric, such conduct does not approach the degree of serious misconduct of the type that removes the remedial protection of the Act from striking employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[73]

ORDER

The Respondent, Preterm, Inc., Brookline, Massachusetts, its officers, agents, successors, and assigns, shall pay the individuals named below,[74] a sum of money equal to a composite of the sums indicated as due on a quarterly basis to such individuals, plus interest thereon accruing with the last date of each such quarter and continuing to date of payment, minus such deductions as may be required by Federal or state law and which are appropriately paid to such governments.[75]

CALENDAR QTRS.	*NET BACKPAY*
Kathryn Alexas Adams	
1977–I	$ 625.93
1977–II	1967.19
1977–III	1564.80
Rena Baskin	
1977–I	549.40
1977–II	1726.69
1977–III	1474.55
1977–IV	852.55
1978–I	672.33
1978–II	315.35
Claudia Bostick	
1977–I	450.24
1977–II	1415.04
1977–III	1536.47
1977–IV	283.66
Sandra Brody	
1977–I	214.33
1977–II	576.59
1977–III	696.54
1977–IV	246.47
Betsy Budd	
1977–I	772.84
1977–II	1310.42
1977–III	787.12
Ann Chronis	
1977–I	90.00
1977–II	240.60
1977–III	221.34
Susan Cohn	
1977–I	708.08
1977–II	638.19
1977–III	160.35
Elizabeth Cone (O'Connell)	
1977–III	11.46
Janice Dawe	
1977–I	206.89
1977–II	650.22
1977–III	674.95
1977–IV	249.83
Alice Fine	
1977–I	108.64
1977–II	369.28

[72] With interest added thereto as indicated later herein.

[73] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[74] In the case of Azariah Phipps and Claudia Bostick, payment shall be made into escrow funds and ultimate disposition of such payments shall be as set forth above in sec. C, 3.

[75] With respect to interest computations, see *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

1977–III	450.62
Nancy Harmon	
1977–I	305.63
1977–II	960.57
1977–III	317.33
1977–IV	578.47
1978–I	620.49
1978–II	381.84
Carolyn Jones (LaFleur)	
1977–I	138.60
1977–II	435.60
1977–III	459.10
1977–IV	472.94
1978–I	472.94
1978–II	472.94
1978–III	434.34
1978–IV	454.20
1979–I	496.60
1979–II	524.08
1979–III	366.43
Cynthia Jones	
1977–I	145.53
1977–II	126.29
1977–III	151.32
1977–IV	6.98
Kathleen Kelley	
1977–I	515.60
1977–II	1602.29
1977–III	1378.78
1977–IV	63.64
Vivian Kemp	
1977–I	252.25
1977–II	724.08
1977–III	785.73
1977–IV	675.34
Joan Levine	
1977–I	383.71
1977–II	1205.96
1977–III	222.94
1977–IV	30.71
Paula Murray	
1977–I	630.12
1977–II	1383.79
1977–III	77.72
1977–IV	109.20
Frances Newcombe	
1977–I	300.09
1977–II	574.87
1977–III	33.22
Anne O'Leary	
1977–I	5.45
1977–II	5.70
Elizabeth Phillips	
1977–II	522.93
Azariah Phipps	
1977–I	462.00
1977–II	1452.00
1977–III	518.81
1977–IV	751.87
Amy Present	
1977–I	140.44
1977–II	147.14
Chlorae Prince	
1977–I	145.53
1977–II	152.46
Judith Rice	
1977–I	727.65
1977–II	2305.09
1977–III	2483.13
1977–IV	2303.13
1978–I	191.01
Louise Rice	
1977–I	534.79
1977–II	1680.73
1977–III	1744.65
1977–IV	1065.32
1978–I	195.42
1978–II	124.30
Harriet Ruffen	
1977–II	183.58
1977–III	608.15
1977–IV	376.55
Gail Shulman	
1977–I	526.68
1977–II	1680.36
1977–III	1637.81
1977–IV	52.63
Paula Spires	
1977–I	551.25
1977–II	166.09
1977–IV	12.88
Phyllis Sweet	
1977–I	611.18
1977–II	1920.84
1977–III	1973.95
Ann Wax (Loeb)	
1977–I	312.35
1977–II	624.70

Susan Weinberg

1977–I	554.40
1977–II	1742.40
1977–III	692.98
1977–IV	202.67
1978–I	202.67
1978–II	124.72

Jean Williams

1977–I	582.12
1977–II	1829.52
1977–III	1891.89
1977–IV	1439.11

IT IS FURTHER RECOMMENDED that the backpay specifications be dismissed for employees for whom backpay is not specifically recommended.

Ryder Truck Lines, Inc. *and* **Melvin D. Taylor.** Case 10–CA–19042

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 21 September 1983 Administrative Law Judge Philip P. McLeod issued the attached decision in this proceeding finding that the Respondent violated Section 8(a)(1) of the Act by discharging Melvin D. Taylor. On 30 April 1984 the Board issued an Order remanding the proceeding to the judge for further consideration in light of the Board's Decision in *Olin Corp.*, 268 NLRB 573 (1984). The judge issued a supplemental decision on 17 July 1984 reaffirming his earlier decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

In his decision of 21 September 1983 the judge found that Taylor was unlawfully discharged for refusing to drive a truck that he reasonably believed was unsafe. The judge found it inappropriate to defer to the grievance committee's denial of Taylor's grievance because there was no evidence that the committee considered the statutory issues involved.[3]

In *Olin Corp.* the Board adopted Member Hunter's dissent in *Propoco* and declared it would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.[4] The Board further held that the party seeking to have the Board reject deferral and consider the merits of a given case has the burden of affirmatively demonstrating the defects in the arbitral process or award.[5]

In his attached supplemental decision the judge examined the minutes of the Southern Multi-State Grievance Committee meeting and found that the contractual issue raised by Taylor's grievance was factually parallel to the unfair labor practice issue and that the Committee was presented generally with the facts relevant to resolving both issues. The Multi-State Committee was unable to reach a decision on Taylor's grievance and referred it to the Southern Area Grievance Committee. The judge noted the brevity of the Area Committee's minutes, which include a statement that "the transcript of the Multi-State hearing will be made a part of the record," and found the minutes insufficient to show that the Committee was presented generally with the facts relevant to resolving the unfair labor practice or that it adequately considered the issue. The judge particularly relied on the absence of evidence that the Area Committee actually discussed or considered the facts contained in the Mutli-State Committee minutes.

We find that the General Counsel has not met his burden of affirmatively demonstrating that the unfair labor practice did not receive adequate consideration in the parties' joint-panel grievance procedure. As found by the judge, the contractual and statutory issues are factually parallel and the parties generally presented the Multi-State Committee with the facts relevant to the statutory issue. The judge erred, however, in partitioning the grievance proceeding and requiring that a further showing be made that the relevant facts were discussed or considered by the Area Committee. We find that the parties' presentation of the facts relevant to the unfair labor practice at the Multi-State Committee stage of the grievance proceeding, together with the General Counsel's failure to affirmatively establish that these facts were not presented to the Area Committee,[6] satisfies the requirement set forth in *Olin*. Since the Area Committee's decision is consistent with the standards promulgated in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), we shall defer to the grievance decision and dismiss the complaint.[7]

ORDER

The complaint is dismissed.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We find no merit in the Respondent's contention that the judge was predisposed to find in favor of the Charging Party.

[3] In deciding not to defer, the judge relied on *American Freight System*, 264 NLRB 126 (1982); *Propoco, Inc.*, 263 NLRB 136 (1982), enf. with unpublished, nonprecedential opinion, Case 83–4058 (2d Cir. 1983); and *Suburban Motor Freight*, 247 NLRB 146 (1980).

[4] 268 NLRB 573.

[5] Id. *Suburban Motor Freight* was overruled to the extent it provided for a different allocation of burdens in deferral cases.

[6] As noted above, the transcript of the Multi-State hearing was made part of the record of the Area Committee.

[7] In view of our dismissal of the complaint, we find it unnecessary to pass on the Respondent's motion for hearing de novo before a different administrative law judge.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, and for the reasons set forth in my separate opinion in *Olin Corp.*, 268 NLRB 573 (1984), I would have affirmed the administrative law judge's initial decision in this case, in which he declined to defer to the instant arbitration award, and found that the Respondent unlawfully discharged Charging Party Melvin Taylor for engaging in protected concerted activity by refusing to drive a truck which he claimed was unsafe to operate. More specifically, I agree with the judge's conclusion in the initial case that it would be inappropriate to defer to the result reached by the Teamsters Multi-State Grievance Committee, since there was not even a written decision by that committee from which it would be possible to determine whether the committee considered the statutory issues presented in this case.

For the same reasons as those stated above, I would affirm the judge's supplemental decision in which he continued to decline to the arbitration award, reaffirming his initial decision. More specifically, I agree with the judge that the brief cursory minutes of the Southern Conference Area Committee are not sufficient to show that the committee was presented with facts relevant to the unfair labor practice. In affirming the judge's supplemental decision, I find it unnecessary to pass on the judge's determination that he would have deferred to the arbitration proceeding before the Southern Multi-State Grievance Committee if that proceeding had resolved the grievance.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. This case was heard by me on July 28 and 29, 1983, in Birmingham, Alabama. It originated from a charge filed by Melvin D. Taylor, an individual, against Ryder Truck Lines, Inc. (Respondent). On April 11, 1983, a complaint and notice of hearing issued alleging, inter alia, that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), by discharging, and thereafter failing and refusing to reinstate, employee Melvin D. Taylor because he engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection. In its answer to the complaint, Respondent admitted certain allegations, including the filing and serving of the charge, its status as an employer within the meaning of the Act, and the fact that it discharged Taylor on December 2, 1982. Respondent denies that it discharged Taylor for reasons which violate the Act and denies having engaged in any conduct which would constitute an unfair labor practice.

At the trial herein, all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, both Respondent and the General Counsel filed timely briefs with me which have been duly considered.

On the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Ryder Truck Lines, Inc. is a Florida corporation with offices and truck terminals located in various cities throughout the United States. The facility involved here is in Birmingham, Alabama. During the past calendar year, which period is representative of all times material herein, Respondent derived gross revenues in excess of $50,000 from the interstate transportation of freight and commodities from its Birmingham facility directly to customers located outside the State of Alabama.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ISSUES

The complaint alleges that Respondent discharged Taylor because he engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection. Counsel for the General Counsel contended in his opening statement that Taylor was "terminated for engaging in protected, concerted activities when he refused to drive an unsafe truck." The complaint does not specifically allege that Taylor engaged in protected activity by refusing to drive unsafe equipment. Respondent argues that because the complaint does not specifically set forth the latter allegation, the General Counsel should not be heard to propound that argument, but rather should be limited to the concerted activities theory specifically alleged. I reject Respondent's argument and find that the complaint language is sufficiently particular to encompass the "unsafe equipment" theory.

Respondent admits that it discharged Taylor in the early morning hours of December 2, 1982, because Taylor refused to drive a particular truck tractor assigned to him. Therefore, with regard to the discharge, two issues are presented: first, whether Taylor refused to drive the particular tractor as a result of concerted activities engaged in by him with other employees for their mutual aid and protection; and second, whether Taylor's refusal to drive the truck, if not the result of concerted activities with other employees, was the result of a reasonable belief on Taylor's part that the tractor was unsafe.

In addition to these, a third issue is presented as a result of Respondent's affirmative defense that the Board should defer to the Teamsters Multi-State Grievance Committee's denial of Taylor's grievance regarding his discharge and, as a result, dismiss the complaint herein.

III. THE FACTS

A. *Background*

Melvin D. Taylor was employed by Respondent as a truckdriver at its Birmingham, Alabama facility for 26 years. Respondent's truckdrivers, including Taylor, are represented for purposes of collective bargaining by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Respondent is signatory to the National Master Freight Agreement and Southern Conference Area Over The Road Supplemental Agreement. Two portions of the collective-bargaining agreement have relevance to this proceeding. First, article 16, section 1, provides in part, "The employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition." Second, the collective-bargaining agreement contains provisions for the resolution of disputes through final and binding grievance and arbitration procedures.

From the Birmingham facility, drivers are dispatched to haul freight to other Ryder facilities in various locations throughout the country. Drivers do not have tractors permanently assigned to them which they drive day after day. Rather, tractors are assigned to drivers from a pool on a first-in-first out basis, i.e., tractors which have arrived at the Birmingham facility from other locations are assigned to Birmingham drivers in the order in which they arrived in Birmingham. When a driver is assigned a particular load, he is given bills of lading and other documents, including a Department of Transportation (DOT) "Equipment Inspection Report" which the driver is required to complete before leaving on his run. In order to complete this report, the driver is required to inspect both the tractor and trailer assigned to him and to report any deficiencies to the dispatcher. The dispatcher then communicates with the repair shop with regard to any repairs that need to be made. Because of arguments which have occurred in the past between drivers and repair shop employees, drivers are not permitted to communicate directly with the repair shop. If the repair cannot be completed in a reasonable time, the shop foreman will notify the dispatcher, and different equipment will be assigned to the driver from the existing pool.

Truck tractors used by Respondent are predominantly GMCs and Fords. The interior of these two tractors is somewhat different, and generally speaking the Ford tractors have less space in the cab than the GMC model. In years past, large drivers experienced difficulty being able to fit in the Ford models. As a result, an agreement was reached sometime ago between Respondent and the Union that certain individuals would not be required to drive Ford tractors. This agreement has been applied to two drivers at the Birmingham facility, a Mr. Starnes and a Mr. Morris. There is, however, no evidence that this agreement was given general application to any driver who thought himself too large to fit comfortably in the Ford cab. Rather, it appears that Respondent and the Union reached agreement that certain named individuals would be exempted from driving Ford tractors, and the rule has been applied to them alone.

The 1979 Ford tractors used by Respondent have an adjustable telescoping steering column. The telescoping mechanism contains an inner frame with spring-loaded pins which engage in adjustment holes located in an outer stationary frame. Two bolts located in the outer frame regulate the amount of play in the steering column between the inner and outer frames. If the bolts are loosened to allow the telescoping mechanism to adjust, play is experienced in the steering wheel. If the bolts are tightened to eliminate this play in the steering wheel, the telescoping mechanism will not adjust. In 1980, because of driver complaints about play in the steering wheel, Respondent welded the steering columns in a fixed position. Sometime during 1982, other drivers complained that the steering wheel would not adjust. A grievance was filed, and Respondent agreed to restore the telescoping mechanism to its original condition so that it would adjust. Restoring the mechanism to its original condition required the use of a cutting torch to remove a tack weld which had been used to fix them in place.

B. *Taylor's Refusal to Drive 1979 Ford 79–597*

On the night of December 1, 1982, when Taylor reported to work at the Birmingham facility, he was first assigned a GMC tractor to drive on his regular bid run to Monroe, Louisiana. After inspecting the tractor, Taylor turned in to the dispatcher a DOT report that the tractor had a broken seat. The dispatcher so informed the repair shop, which attempted necessary repairs. The repair shop informed the dispatcher that the seat could not be repaired, and Taylor was then assigned the next available tractor, 1979 model Ford 79–597.

After inspecting this Ford tractor, Taylor prepared and turned in a DOT report time-stamped 21.9 hours (9:54 p.m.) stating, "unable to adjust steering wheel" and "engine leaking oil."[1] The dispatcher informed the shop of the necessary repairs. At approximately 10:36 p.m., the repair shop informed the dispatcher that the unit was ready. Taylor returned to the "ready line" to check the vehicle. After this inspection, Taylor turned in to dispatcher Miller a DOT report at 10:48 p.m. stating, "steering column loose part of" [sic]. This was reported to the shop by Miller. Shop Superintendent Ed Mize informed Miller with a written note that the repair work had already been performed earlier and there would be "no come back/no pay."[2] Taylor then went to the vehicle, which had been returned to the "ready line" and drove it himself to the repair shop. Taylor attempted to confront Mize directly and convince him that the repairs were not complete. Mize interrupted Taylor, however, told Taylor that the shop was not going to work on the truck any more, that Taylor would have to drive it like it was, and that if Taylor had problems with the truck

[1] The General Counsel claims in brief that Taylor found the "exhaust manifold defective" and that "exhaust fumes leaked into the cab." The General Counsel is either very mistaken or making up facts to suit his needs, for they are found nowhere in this record. In either case, I reject this assertion and do not rely on it in any way in reaching my decision herein.

[2] This designation means that in Mize's opinion no further repair was necessary and the driver should not be paid for the additional time spent while the vehicle was being looked at a second time.

Taylor should go to the dispatcher.[3] Taylor then drove the truck back to the "ready line."[4]

Upon returning to the "ready line" from the repair shop, Taylor met two other drivers, Jack Simpson and W. R. Worthington. Taylor asked Simpson and Worthington to help him adjust the steering slide so that Taylor could fit behind the steering wheel. They were unable to do so. Worthington told Taylor that Taylor could not drive that tractor, that Taylor was too big. Taylor then returned to the dispatch office to speak to Miller. Taylor told Miller he could not drive the truck. Miller replied that the shop was not willing to work on the steering column any more, that it had made the necessary repairs, and that Taylor was going to have to drive the truck. Taylor went back out to the truck and a few minutes later returned to the dispatch office with a DOT report time-stamped 11:06 p.m. stating, "part of trailer's [lights] out. Brakes grabbing on tractor." Dispatcher Miller communicated the need for these repairs to the shop.

After filing this DOT report, Taylor returned to the ready line. Taylor was standing at the ready line by the truck with employees Joseph Shelby and Simpson when mechanic John Smith approached to repair the lights. Taylor asked Smith to examine the truck's steering. According to Smith's testimony, he found that the steering mechanism was loose, the steering column had been cut with a welding torch, and the ball bearings had been let out. According to Smith, the steering column did not slide properly and did not allow the driver to have all the room the cab was designed to allow. Smith testified that in his opinion the condition of the steering column could cause a driver to have steering trouble and possibly an accident. According to Smith, the steering column was "shot" and needed to be replaced.[5] Smith told Taylor, however, that he was assigned only to fix the lights. Taylor then left the ready line and went back to the dispatch office. Smith proceeded to fix the lights, and the truck was again returned to the ready line shortly after midnight.

After the truck was again released from the repair shop, at 12:24 a.m. Taylor turned in yet another DOT report which stated, "unable to adjust steering wheel." This report was relayed to the shop by dispatcher Miller. By this time, Shop Superintendent Mize, who left work at midnight, was gone. Mize's replacement, Shop Superintendent Keys, again had the vehicle inspected. Shortly after 1 a.m., Keys informed Miller that two mechanics had checked the steering, that the steering wheel was retracted as far as it would go, and that the mechanics had certified that to be so. The truck was again returned to the ready line. At 1:12 a.m., yet another "come back" was written to the shop that the trailer lights were out. This was again checked by the shop, repaired, and returned to the dispatcher as ready at approximately 1:36 a.m.

Taylor and dispatcher Miller then had a conversation which ultimately led to Taylor's discharge. The conversation was initiated by Taylor, who told Miller that he would not drive the tractor until the steering was fixed. Miller told Taylor that the shop had fixed the steering and that two mechanics had certified such to be the case. Taylor told Miller that he could not drive the truck, that he was too big, and that the shop had not fixed the steering mechanism so that it would properly adjust. Miller then asked the employee Thomas Floyd to be a witness to what was about to take place. Floyd agreed but said he wanted to inspect the truck first. Taylor and Floyd went to inspect the truck. Miller did not accompany them. Instead, while they were gone, Miller telephoned Terminal Manager Scotty Appleton and told him what had taken place. Miller informed Appleton that Taylor had made several writeups on the truck, but that it had come down to the fact that the steering did not adjust. Miller told Appleton that Taylor now refused to drive the truck. Appleton instructed Miller to order Taylor to drive the truck and that if Taylor refused, to discharge Taylor.

Floyd testified about what he found when he and Taylor went to the ready line to inspect the truck. As I have indicated above, of all the witnesses in this case, Floyd struck me as the most credible. When Floyd and Taylor went to inspect the truck, Floyd took a flashlight with him to make the inspection. When they got to the truck, Taylor got up into the cab and sat behind the steering wheel. As Floyd testified, "the steering wheel was hitting him in the stomach." Taylor then got out of the truck, and Floyd got in to inspect. Floyd testified, "the steering wheel would slide but there was something holding it off; it wouldn't go all the way against the dash like it normally would go." Floyd testified that he could place his two-cell flashlight in the space left behind the steering wheel and the dash board. Floyd testified that he could see that a cutting torch had been used to cut the weld loose and that "liquid wrench or break away fluid" had been used to lubricate the sliding mechanism.

[3] Testimony of Taylor and Mize conflicts with regard to the statement made by Mize to Taylor, but I accept a composite of their testimony on this point.

[4] I do not credit Mize's testimony that at this time he was able to observe Taylor sitting behind the wheel of the tractor, that the steering wheel may have been touching Taylor's shirt, but that the steering wheel was not "buried in" or substantially protruding into Taylor's stomach as Taylor asserted at trial. Rather, I credit the testimony of employee Floyd described below.

[5] I credit that portion of Smith's description of the actual physical condition of the steering column wherein he states that the steering column did not slide properly and did not allow the driver to have all the room the cab was designed to allow. I credit Smith on this point not because of his own demeanor, but because this point is corroborated by employee Thomas Floyd, whose testimony is described below and who impressed me as the most disinterested and credible witness in this case. In crediting this portion of Smith's testimony, I am mindful that, in general, Smith was clearly biased in Taylor's favor. His testimony was extreme and his demeanor unsettling. Smith admitted that he did not want to do anything to hurt Taylor. I have also considered the fact that following Taylor's discharge, union business agent Simmons requested a meeting with Smith and Shop Superintendent Paul Hergot to investigate Taylor's grievance. During this meeting, Smith told Simmons and Hergot that he did not want to cause trouble for Taylor and did not want to give a written statement, but that the steering wheel had actually been recessed as far as it would go when he examined it on the night of December 1, and that he had told Taylor so. The fact that Smith would make such a statement in the presence of Shop Superintendent Hergot is consistent with my impression of Smith's credibility that he would say anything he thought the listener wanted to hear. Thus, I credit only this limited portion of Smith's testimony because it is corroborated by Floyd.

Floyd testified, "It was dripping down in the floorboard." Floyd also testified that on the steering column there is a universal joint which allowed the steering column to turn the truck wheels regardless of the column's position. According to Floyd, "they had taken something and beat it to drive it in, and they had beat the rubber bushing off of it, and the bushing was hanging down on it." After inspecting the truck, Floyd told Taylor that in his opinion, if the telescoping mechanism would allow the steering wheel to slide as it normally would, Taylor could probably drive the truck. Floyd testified that, if such were the case, Taylor would have about 2 inches between his stomach and the steering wheel. As it was, however, the steering wheel hit Taylor in the stomach.

When Floyd and Taylor returned to the dispatch office after inspecting the truck, Miller did not ask, and Floyd did not have occasion to report, what he had found. Instead, Taylor told Miller that when the tractor was fixed, he would drive it. Miller replied that the shop had stated the truck was ready to go, and Taylor would have to drive it "or else." Miller then issued written instructions to Taylor to drive the truck. Taylor took the written instructions and placed them in his pocket. Taylor told Miller he would drive the truck when it was fixed. Miller asked for the written instructions back and Taylor refused to return them to Miller.[6] Miller then wrote out a second set of written instructions, showed them to Taylor, and told Taylor that if he did not drive the truck he was discharged. Taylor said he was going home, and left the office.

Before Taylor could leave Respondent's facility, he first had to perform some minor repair on his personal vehicle in Respondent's parking lot. While doing so, Miller came out to the parking lot and asked Taylor for the bills of lading for the load which he was to have taken that night. Taylor refused to give Miller the bills of lading, telling Miller to leave him alone, that he had had all he could stand.[7]

Another driver, Roland McLaurin, was called in to take the run which Taylor was to have taken to Monroe, Louisiana. McLaurin was told by dispatcher Miller that Taylor had refused to drive the truck because the steering mechanism would not adjust. McLaurin checked out the tractor, found that it would adjust to his satisfaction, and drove to Monroe and back without incident. It should be noted, however, that McLaurin weighs 200 pounds, while Taylor weighs approximately 240 pounds. McLaurin simply did not encounter the same problem experienced by Taylor.

On December 3, 1982, Taylor was sent a letter informing him that he was discharged. On December 4, Taylor filed a grievance pursuant to the National Master Freight Agreement protesting his discharge. As Respondent notes, the grievance does not specifically allege that the truck was "unsafe" for Taylor to drive. Nor does Taylor specifically refer to article 16 of the collective-bargaining agreement dealing with an employee's right to refuse to drive unsafe equipment. The grievance does, however, grieve the fact that "other drivers have been allowed to turn these Fords down because of the steering wheel being in their stomach." A hearing was held regarding Taylor's grievance which Taylor attended. After the grievance was deadlocked at the Multi-State Committee, the grievance was referred to the area committee, which denied the grievance. Taylor did not attend the area committee meeting. Respondent did not offer into evidence a transcript of any stage of the grievance proceeding.

[6] I find Taylor's refusal to return the instructions to be of no consequence. There was no indication it was considered insubordination or played any part in Respondent's decision to discharge Taylor.

[7] I also find this incident to be inconsequential. Taylor had already been discharged when the incident occurred.

Analysis and Conclusions

Regarding the issue whether the Board should defer to the Teamsters Multi-State Grievance Committee's denial of Taylor's grievance regarding his discharge and, as a result, dismiss the complaint herein, Respondent in its brief recognizes "the relatively recent, misguided, decisions of the Board which hold contrary to Respondent's position." *American Freight System*, 264 NLRB 126 (1982); *Propoco, Inc.*, 263 NLRB 136 (1982); *Suburban Motor Freight*, 247 NLRB 146 (1980). These are, of course, the same cases relied on by the General Counsel in support of the argument that the Board should not defer, and they clearly support the General Counsel's position. Accordingly, I find that it would be inappropriate to defer to the Teamsters Multi-State Grievance Committee's denial of Taylor's grievance regarding his discharge where there is not even a written decision by that committee from which it would be possible to tell whether the committee considered the statutory issues presented here.

With regard to Taylor's discharge, the General Counsel argues that when an employee complains about safety matters which are subjects of the collective-bargaining agreement, he is engaged in protected concerted activity because such conduct affects the rights of all unit employees. *McLean Trucking Co.*, 252 NLRB 728 (1980); *Interboro Contractors*, 157 NLRB 1295 (1966), and other similar cases. The General Counsel argues that in refusing to drive Ford 79–597, Taylor was exercising a right pursuant to article 16, section 1, of the collective-bargaining agreement which provides, "The employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition." Thus, according to the argument, Taylor's refusal of Ford 79–597 was the result of complaints about a safety matter which is the subject of the collective-bargaining agreement, and he was thereby engaged in protected activity. Additionally, the General Counsel argues that Taylor's refusal to drive Ford 79–597 was protected because he was exercising a right pursuant to Federal Motor Carrier Safety Regulations which provides, inter alia, that motor vehicles shall not be driven unless the driver satisfies himself that the steering mechanism, brakes, lighting devices, and other parts and accessories are in good working order. As a result, the argument continues, Taylor's refusal to drive Ford 79–597 was of common concern to all employees, and was therefore "concerted" activity accorded the protection of the Act.

This theory of concerted activity has been specifically adopted and applied by the Board in *Interboro Contractors*, supra, and its progeny.

Respondent argues that in refusing to drive Ford 79–597, and in his actions which led up to that refusal, Taylor was not acting in concert with other employees, but rather was acting by himself and only for himself. Respondent further argues that the *Interboro* doctrine has been rejected by the U.S. Court of Appeals for the 11th Circuit in which this case arose[8] and therefore should not be applied here. Respondent argues that even if the *Interboro* principle is applied here, in refusing to drive Ford 79–597 Taylor was not attempting to enforce any provision of the collective-bargaining agreement and had no reasonable belief that the vehicle was unsafe. In a nutshell, Respondent argues:

> A review of the transcript reveals clearly that what this entire case amounts to is that for reasons of personal comfort and convenience Taylor did not want to drive that Ford tractor on the night in question, and he was bound and determined to get out of it.
>
> The real crux of the matter is to be found in Taylor's statement:
>
> > I don't drive them [Fords] when I can get out of it, I agree with you. Because they hurt my stomach.

After hearing this case, there is no doubt in my mind that, in refusing to drive Ford 79–597, Taylor was concerned solely *for* himself. There is nothing in the Act, however, which requires an employee to be motivated by altruistic concerns in order to be afforded its protection. Nor does it follow from the fact that Taylor was concerned solely for himself that Taylor was therefore acting *by* himself and not in concert with other employees, even though he may have been the only one to refuse to drive a truck on the night of December 1, 1982.

My analysis of the facts herein leads me ultimately to the conclusion that in refusing to drive Ford 79–597 on the night of December 1, 1982, Taylor was acting not only in conformity with the Motor Carrier Safety Regulation which provides in part that a driver must satisfy himself that the steering mechanism works properly and that provision of the collective-bargaining agreement which states that an employer shall not require employees to drive any vehicle that is not in safe operating condition; nor solely because Taylor reasonably believed it was dangerous to drive Ford 79–597; and, lastly, not solely as a result of concerted activities engaged in with other employees. Rather, all of these factors are present in Taylor's refusal to drive Ford 79–597.

That Taylor was acting in conformity with the Motor Carrier Safety Regulation described above and article 16, section 1, of the collective-bargaining agreement is so apparent as to require no further explication. Taylor's belief that driving Ford 79–597 on the night of December 1, 1982, would present a dangerous situation was indeed reasonable, for I find that the result would have been *in fact* unsafe. This is not to say that driving Ford 79–597 was necessarily unsafe for all drivers. When Taylor refused, McLaurin drove the vehicle without incident, and the record shows that many miles have been put on that vehicle since that night. As the vehicle existed on the night of December 1, 1982, however, it was unsafe for many large drivers, including Taylor, because the steering wheel in fact protruded into Taylor's stomach and no doubt would have done the same for other drivers of equal girth. On the night of December 1, as well as throughout this proceeding, Respondent reacted to Taylor's complaints about the steering mechanism as if they arose only from his desire for comfort. I specifically credit Taylor that he explained to Miller that he could not fit behind the steering wheel of this truck because he was too big and the steering wheel would not adjust properly. Not once did dispatcher Miller bother to check to see whether Taylor could fit reasonably behind the steering wheel. Miller asked Floyd to be his witness, and yet did not himself bother to witness the problem being complained of, even when Floyd himself insisted on doing so. Floyd, Miller's witness, testified credibly before me that in fact the steering wheel protruded into Taylor's stomach. By simple inspection Miller could have determined that even though the steering column may have been worked on by the repair shop, the steering wheel did not recess as far as it was intended to, that the truck could not safely be assigned to a driver of Taylor's girth but could be assigned to a thinner smaller driver. Miller, who had it within his power, could then have simply reassigned the vehicle. The problem on the night of December 1 did not represent a conflict between Taylor and the repair shop, nor between Miller and the repair shop. The unsafe condition could easily have been corrected by Miller without any conflict, but Miller turned a deaf ear to Taylor's complaints that the steering wheel would not adjust as far as it was intended to and Taylor could not fit behind the wheel. Miller assumed, and Respondent now argues, that Taylor was motivated solely out of a desire for personal comfort. This argument would have me ignore, as Respondent itself ignored, the fact that on Ford 79–597 the steering wheel in fact protruded into Taylor's stomach to such a degree as to impair proper steering of the vehicle. While Respondent may have chosen to ignore this, I cannot.

Turning now to the concerted nature of Taylor's action, I wholly reject Respondent's argument that Taylor did not seek out other employees and solicit their opinions regarding the condition of the truck he refused to drive. Rather, this record is replete with evidence that throughout the night of December 1 and into the early morning hours of December 2, 1982, Taylor solicited the opinion and the support of other employees that it would be unsafe for him to drive Ford 79–597. Taylor attempted to confront Shop Superintendent Mize about the problem and was rebuffed because company rules prohibit drivers from communicating directly with the repair shop. Taylor then approached employees Jack Simpson and W. R. Worthington. Worthington told Taylor that Taylor could not drive the tractor in ques-

[8] *Roadway Express v. NLRB*, 700 F.2d 687 (11th Cir. 1983). See also *Enerhaul, Inc. v. NLRB*, 700 F.2d 748 (11th Cir. 1983).

tion, that Taylor was too big. Taylor asked shop mechanic John Smith, who had been dispatched to repair lights on the trailer, to inspect the steering column. Smith found that the steering column did not slide properly and did not allow the driver to have all the room the cab was designed to allow. Employee Floyd also inspected the vehicle with Taylor, and he too found that the steering wheel would not recess against the dashboard as it was supposed to and that it hit Taylor in the stomach. In summary, Taylor not only spoke to but had the support of other drivers before he ultimately refused to drive Ford 79–597.

I find that Taylor's refusal to drive Ford 79–597 was concerted activity for yet another reason. In the past, other large drivers have complained because they could not fit in Ford tractors, and specifically the 1979 model, without the steering wheel touching, or even being imbedded in, their stomachs. The fact that such a condition presents not only an uncomfortable but a hazardous situation because it interferes with steering the vehicle must necessarily have been part of the reason for Respondent and the Union entering into an agreement to exempt certain drivers from driving Fords. Further, numerous complaints have been made, and at least two grievances filed, regarding the adjustable steering column. Neither the General Counsel nor Respondent offered these past grievances as exhibits. Instead, both chose to rely on oral testimony with regard to them. Whether those grievances still exist is not revealed by the record. Thus, while there is no direct evidence to prove conclusively that the complaints and the first grievance regarding the telescoping steering mechanism were related to complaints by large drivers that they could not fit in Ford tractors, I believe it is reasonable to draw the inference that they were. Initially, large drivers complained because they could not fit behind the steering wheel. Other drivers complained because, when the adjusting bolts were left loose so that the telescoping mechanism would adjust, there was play and vibration in the steering wheel.[9]

Respondent attempted to resolve all of these complaints by exempting certain drivers from driving Ford tractors and welding the steering columns in a fixed position with steering wheels as close as they would go to the dashboard, thereby eliminating play in the steering wheel and at the same time providing most room in the cab. A later grievance in 1982 resulted in Respondent agreeing to remove the welds and return the steering mechanism to their original condition. It was Respondent's inability to do this successfully on Ford 79–597 which resulted in the steering wheel not being able to retract as far as it was intended to be that caused the wheel to protrude into Taylor's stomach. In order for activity to be concerted, it does not necessarily have to be simultaneous, or even contemporaneous. It is sufficient if the actions of various people, though engaged in at different times, are in fact shown to be related to the same subject, or are sufficiently related to be of a common concern. Taylor was fully aware of the history of complaints and grievances regarding the steering mechanism and the lack of room in Ford tractors when he refused to drive Ford 79–597 on the night of December 1, 1982. Respondent was equally aware of this history of complaints and grievances. I find that in refusing to drive Ford 79–597 on the night of December 1, 1982, Taylor was engaged in activity in concert with other employees who had complained in the past, and filed grievances, regarding the steering mechanism and the lack of room in Ford tractors.

Accordingly, I find that because Taylor's refusal to drive Ford 79–597 on the night of December 1, 1982, was in conformity with Motor Carrier Safety Regulations; was a right accorded him pursuant to the collective-bargaining agreement; was the result of a condition which was in fact unsafe; was action that Taylor took only after speaking to, and obtaining the support of, other employees; and was activity engaged in in concert with other employees who had complained in the past, and filed grievances regarding, the steering mechanism and the lack of room in 1979 Ford tractors, Respondent's discharge of Taylor for engaging in this activity violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Ryder Truck Lines, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Taylor's refusal to drive Ford 79–597 on the night of December 1, 1982, was in conformity with Motor Carrier Safety Regulations; was a right accorded him pursuant to the collective-bargaining agreement between Respondent and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; was the result of a condition that was in fact unsafe; was action that Taylor took only after speaking to and obtaining the support of other employees; and was action engaged in in concert with other employees who had complained in the past and had filed grievances regarding the steering mechanism and the lack of room in 1979 Ford tractors, and Taylor was thereby engaged in concerted activity protected by the Act.

3. Respondent discharged Melvin D. Taylor on December 2, 1982, because of his protected concerted activities described above, and Respondent thereby violated Section 8(a)(1) of the Act.

4. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease

[9] Testimony here shows that this vibration was not so excessive to affect actual steering of the vehicle. It was, however, of such a degree that it tended to mask or hide various malfunctions which might arise and which would otherwise have been detected through their effect on the steering.

and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

PHILIP P. MCLEOD, Administrative Law Judge. On September 21, 1983, I issued my decision in this proceeding finding, inter alia, that Respondent discharged Melvin D. Taylor in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). I also concluded that the issues involving the alleged unlawful discharge of Taylor should not be deferred to the grievance-arbitration procedures of the parties' collective-bargaining agreement. Thereafter, Respondent filed exceptions to my decision with the Board.

On January 19, 1984, after the issuance of my decision, the Board issued its Decision and Order in *Olin Corp.*, 268 NLRB 573 (1984). In *Olin Corp.*, the Board articulated the standard it would use for the deferral of cases to arbitration as that policy was renewed in *United Technologies Corp.*, 268 NLRB 557 (1984), issued that same day.

By Order dated April 30, 1984, the Board remanded this proceeding to me to prepare this supplemental decision setting forth further findings of fact, conclusions of law, and a recommended Order regarding the applicability of *Olin Corp.* to the instant case.[1] Accordingly, the record in this case was reopened to afford the parties the opportunity to introduce evidence and to file supplemental briefs setting forth their positions on this issue. Supplemental reply briefs were also provided for. Both counsel for the Acting General Counsel and Respondent filed timely briefs with me. Respondent also filed a reply brief. These briefs have been duly considered. Neither party desired additional hearing to introduce further evidence. In the brief filed by the Acting General Counsel, the representation was made that the parties telephonically stipulated to the authenticity and admissibility of certain documents attached to its brief which constitute minutes of the Southern Multi-State Grievance Committee and the Southern Conference Area Grievance Committee which reviewed and considered Taylor's grievance regarding his discharge.[2] In its reply brief, Respondent does not dispute the accuracy of the Acting General Counsel's representation regarding this stipulation.

In *Olin Corp.*, supra, the Board stated in relevant part (268 NLRB at 574):

> Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we would defer.
>
> Finally, we would require that the parties seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.

It should be noted from the outset that this case does not involve the usual situation in which a grievance has been presented to an independent outside arbitrator who has individually heard the facts and rendered a written decision considering those facts in disposing of the contractual issue presented to him. Rather, this case involves a grievance filed by a discharged employee pursuant to the National Master Frieght Agreement in which an arbitration panel is made up of equal numbers of management and union representatives. If those individuals, who in this case comprised the Southern Multi-State Grievance Committee, are not able to reach a majority decision with regard to the grievance, it is considered "deadlocked." Such a grievance is then referred to another committee, also made up of equal numbers of management and union representatives, which in this case was the "Southern Conference Area Grievance Committee." It is at this latter stage that Taylor's grievance was resolved.

The issue which was placed before the grievance committees regarding Taylor's discharge arose pursuant to article 45 of the collective-bargaining agreement which provides in part that "the employer shall not discharge . . . any employees without just cause." The issue in the unfair labor practice proceeding is whether Taylor's refusal to drive a truck assigned to him was protected activity within the meaning of the Act, such that his discharge for such conduct violated Section 8(a)(1) of the Act. As the Acting General Counsel argues, the grievance committees were not asked to consider whether Taylor was engaging in activity protected by the Act. On the other hand, the minutes of the Southern Multi-State Grievance Committee reflect that an issue which was fundamentally similar to the issue before me was at least given passing consideration. During that grievance meeting the point was made that "In accordance with the national interpretation to guidelines handed down by

---

[1] I note that *Meyers Industries*, 268 NLRB 493 (1984), which might also be argued to be applicable herein, issued on January 6, 1984. The remand, however, only directed me to consider the deferral issue raised by *Olin Corp.*, supra. Accordingly, I did not direct the parties to brief, nor have I attempted to consider herein, the applicability, if any, of *Meyers Industries*, to my earlier decision.

[2] I note that the minutes of these meetings attached to the brief of the Acting General Counsel are misnumbered by oversight. Minutes of the January 25, 1983, Southern Multi-State Grievance Committee are referred to in the brief as appendix 1 but are, in fact, marked appendix 2 as attached to the brief. This misnumbering should cause no confusion because the two appendices speak for themselves.

the Safety Committee . . . it says that if a man because of his physical size cannot drive a unit and you have other equipment on the yard, you will switch it out for him." Moreover, the minutes of that committee reflect that substantial argument was devoted to Taylor's position that the truck he was assigned to drive was unsafe. That committee was also presented with Taylor's claim that regardless of whether the truck was safe for drivers smaller than Taylor, it was unsafe for him because of his physical size. Finally, I note that the minutes of the Southern Multi-State Grievance Committee, which was first asked to consider Taylor's grievance, are contained on nine legal-size typewritten single-spaced pages. After reviewing this document, I am satisfied that in all major respects it is a capsulized version of the record in the trial before me. Based on all the above, I find that the contractual issue raised by Taylor's grievance, though not identical, was factually parallel to the unfair labor practice issue and that the Southern Multi-State Grievance Committee was presented generally with the facts relevant to resolving both issues.

If the Southern Multi-State Grievance Committee had decided the merit of Taylor's grievance, I would have little trouble deferring to that decision. Despite the differences between the joint-panel procedure utilized here and the more usual situation, the Board has deferred to decisions of such a joint panel. See *United Parcel Service*, 270 NLRB 290 (1984). The last sentence of the Board's footnote in that decision, however, when viewed in the context of the administrative law judge's findings in that case, leaves considerable room for doubt whether the Board would accord equal weight to the decisions of such joint panels in every case. In the instant case, the Southern Multi-State Grievance Committee, which heard the actual evidence, could not reach a majority decision and instead became "deadlocked." The grievance was then referred to the "Southern Conference Area Grievance Committee." The minutes of that committee are contained on a single typewritten page. The only reference to the lengthy proceedings before the Southern Multi-State Grievance Committee is a single line which reads, "The transcript of the Multi-State hearing will be made a part of the record." The parties, who at this later proceeding were only the Employer and the Union, were then given the opportunity to "add anything at this time." Respondent's representative then made a statement which comprises the vast majority of the minutes of that committee meeting. Following Respondent's statement, the minutes contain the following: "Local Union don't have anything to add." Following that is the single line which reads:

> DECISION: Case number 15 DENIED, COST TO THE UNION.

In my judgment, the brief cursory minutes of the Southern Conference Area Committee are not sufficient to show that it was presented with the facts relevant to the unfair labor practice, much less that it adequately considered those facts, and I would not defer to this award. Though the issue before the Southern Conference Area Committee was identical to that before the Southern Multi-State Grievance Committee, and the contractual issue therefore remains factually parallel to the unfair labor practice issue, the minutes of the Southern Conference Area Grievance Committee are wholly inadequate and provide no basis for finding that it was presented generally with the facts relevant to resolving the unfair labor practice or that it adequately considered that issue. The only reference in the minutes of the Southern Conference Area Grievance Committee to the minutes of the Southern Multi-State Grievance Committee is the single line quoted above that "The transcript of the Multi-State hearing will be made a part of the record." The minutes of the Southern Conference Area Grievance Committee contain nothing to show that the facts contained in the minutes of the Southern Multi-State Grievance Committee were discussed or considered in any way. They were simply "made a part of the record." I find that it would be inappropriate to defer to the decision of the Southern Conference Area Grievance Committee where the minutes of that committee are so cursory so as not to reflect whether it was actually presented with the facts relevant to resolving the unfair labor practice, and I reaffirm my earlier decision herein.[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Signetics Corporation *and* The United Electrical, Radio & Machine Workers of America. Case 32–CA–4606

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 9 December 1983 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Signetics Corporation, Sunnyvale, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility resolutions, we rely solely on his findings based on demeanor and disavow all other gratuitous comments.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried on various dates between January 6 and May 11, 1983, at hearing locations in both Santa Clara and San Jose, California. The proceeding is based on a complaint alleging that Signetics Corporation (Respondent) violated Section 8(a)(1) and (3) of the Act by issuing written warnings to Rachel Marshall, placing her on 60 days' probation and then terminating her from employment, all in sudden succession during June 1982 and assertedly because she joined or assisted The United Electrical, Radio & Machine Workers of America (the Union) or engaged in other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.

On the entire record,[1] my observation of witnesses and consideration of posthearing briefs, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSIONS OF LAW

I. CASE BACKGROUND

Respondent is a major electronics firm employing approximately 4000 persons in numerous buildings spread primarily throughout the high technology industrial area popularly termed "Silicon Valley." Michael Eisencher has, since at least mid–1981, been principal field organizer working on a campaign of unionization among Respondent's employees. One technique in the campaign is the preparation and dissemination of a printed flyer entitled "The Union Voice," which is expressly attributed in its publication to the "UE Electronics Organizing Committee."[2]

Respondent's corporate information services (CIS) department includes a telecommunications center known as the TWX room. This is housed in a building on Lawson Lane that is several miles distant from the firm's headquarters, and is also separate from a related facility located on Tannery Way in which one TWX employee is assigned for a late shift. The function is managed by John Dinan, while actual TWX room supervisor from mid-1981 onward have been Richard Bartels, Michael (Mike) Barrett, Joseph S. (Steve) Lindsey, and Brian Fukuba. Personnel services have from that same point in time been provided by Mary Monfared, who on August 17, 1981, was promoted from an entry-level administrative position to industrial relations manager for CIS. Relatedly the TWX room was then perceived as having various problems, warranting the involvement of an organizational development consultant named Jerry Pike.

At material times approximately a half dozen employees staffed the TWX room on day shift, while the afternoon "swing" shift was comprised of Rachel Marshall, the most senior telecommunications operator, Esther Singh, Peggy Martin, and Mary Serna. Marshall and Singh, and more prominently the former, had become early supporters of the Union. This manifested by their talking openly of benefits to be derived from unionization, and the wearing of UE buttons while at work. On January 28, 1982, Eisenscher filed an unfair labor practice charge alleging that during the preceding 6 months Respondent had violated Section 8(a)(1) of the Act by, among other things, surveillance, threats, intimidation, retaliatory disciplinary actions, and discriminatory enforcement of rules. Stephen Kociol, Respondent's associate house counsel, filed an appearance in the matter and

[1] Certain errors in the transcript are noted and corrected.

[2] Respondent, a California corporation with an office and place of business in Sunnyvale, California, has engaged at all material times in the business of manufacturing electrical semiconductors, in the course of which it annually sells and ships goods or services valued in excess of $50,000 directly to customers located outside California. On these and other admitted facts I find Respondent to be an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and otherwise that the Union is a labor organization within the meaning of Sec. 2(5).

responded by letter setting forth the Employer's position on relevant issues. Ultimately on May 6, 1982, a bilateral settlement agreement was approved by the Regional Director. The document was expressly confined to a resolution of the specific case and it contained a nonadmission clause. The related notice to employees recited that Respondent would not promise additional benefits to employees, would not create the impression of surveillance over lawful distribution of materials by employees on behalf of the UE or any other labor organization, would not threaten to discipline employees or order them to leave company premises when so engaged, would not discipline employees for serving as representative of fellow employees at investigatory interviews, and would not threaten to take adverse personnel action against employees who exercised rights under the National Labor Relations Act, such as transfers to .solated work areas or increases in workload. Such notices were posted commencing May 26, 1982, and by letter dated July 27, 1982, Kociol advised the Region's compliance officer that a full 60-day posting period had been completed.[3]

II. NARRATIVE CHRONOLOGY FROM MID–1981 UNTIL JUNE 1982

Shortly after Monfared assumed her industrial relations position she became involved in a payroll problem. Singh had been newly hired in September 1981, and mistakenly not paid a night-shift differential. She complained about this to Dinan, but quickly became exasperated with failure of prompt adjustment and chose not to report for work on a Friday in protest. On the following Monday Singh was offered a private meeting to discuss resolution of the problem, which was arranged at Monfared's office with Dinan also to be present. Singh sought to have Marshall accompany her as a representative, but this was prohibited by those from management. In connection with the incident Bartels isxued Singh a memorandum dated September 15, 1981, which was confirmatory of a verbal warning for not coming to work on the given Friday. Soon thereafter, on November 3, 1981, Bartels placed Singh on 30 days' probation for excessive absenteeism, using Respondent's official "Corrective Action/-Probation" form.

After having been recruited to the cause around late 1981 by Marshall, Singh began openly wearing a union button to work in January 1982. Late that same month Marshall was engaged in passing out a current issue of "The Union Voice" to day-shift employees. She collaborated in this with Joseph Sacco, senior electronic technician in Respondent's calibration lab, and a person who had been active on behalf of the Union for more than 2 years. This took place at 6 a.m. and neither Marshall nor Joseph Sacco were on working time while so engaged. They were challenged in this activity by supervisor Mike Ogle, and after inconclusive debate concerning their entitlement he simply stationed himself nearby and prominently positioned a trash can for approaching employees.[4]

On February 1, 1982, the first of several relevant changes occurred with respect to staffing the TWX room on swing shift. One change involved Serha transferring to days for personal reasons, and being replaced by Gina Daugherty after the latter underwent 2 weeks training on the day shift. Events of early February 1982 caused Martin to commence keeping extensive notes of what she was experiencing at work. She ultimately transferred to the Tannery building, a move that involved switching with Carol Jordan who moved to swing shift at Lawson Lane. There was, however, about a 2-week overlap during which Martin and Jordan worked together at the Tannery on swing shift. Martin later transferred to a senior data entry operator position in a separate department around April 1982, and unrelatedly Dina Maracut was hired and assigned to the TWX room on swing shift as an additional operator.

Preceding and about the time of these changes there had also been turnover in personnel that provided immediate supervision to this operation. Around late 1981 Bartels had been replaced by Barrett, who was in turn succeeded by Lindsey. In early February 1982 Lindsey became head of the TWX room on days and was replaced by Fukuba, who had bid into the job from his prior position as a fabrication supervisor.[5]

Singh testified that on February 5 she had filled out her timecard in advance as expected by supervision for the Friday night shift, but thereafter became ill to the point that she left for home 2 hours ahead of normal quitting time. Singh recalled telling Marshall, the "lead operator" as most senior of those on swing shift, that she would make an appropriate correction of actual hours worked the following Monday. At start of the new week, however, Lindsey had spoken to her about the incident, saying first that there would be no trouble. She then participated in a meeting with Monfared, Dinan, and Dinan's superior, in which she was given a written warning for "leaving the work area 2 hours early on 2/5 without prior approval" and "falsifying the total time worked for 2/5." Lindsey elaborated on the pertinent "Corrective Action/Written Warning" form that the infraction actually constituted a "serious matter and was the second falsification of time during the same week," because it involved not only the early leaving and failure to correct time when given the opportunity but the same dereliction for a separate lateness of 45 minutes. Marshall was allowed to attend the meeting at which discipline was administered to Singh, after management personnel deliberated for a time over her entitlement to do so.

[3] During that same period the instant charge was filed, and by letter dated June 17, 1982, Eisenscher unsuccessfully requested that the settlement agreement be revoked.

[4] This episode was a basis for one aspect of the previously described bilateral settlemeht agreement. In correspondence during the pendency of the pertinent unfair labor practice charge, Kociol referred to occurrences on January 25, 1982, as "isolated" and representing an "atypical supervisory response." By memorandum dated February 8, 1982, a superior counseled Ogle on the subject of "Solicitation/Distribution/No-Access Rules" as set forth in Respondent's formal personnel policies and procedures. The memorandum noted that the two involved employees "appear to have been acting within their rights."

[5] All dates and named months hereafter are in 1982, unless shown otherwise.

Marshall essentially corroborated these happenings, including statements by her and Singh that a legal right existed for Marshall to serve as such a representative and failure to accord this would result in the filing of charges.

Martin's recollection of February 5 is that Singh had left early on a night when the workload was fairly heavy. Martin testified that Singh had left abruptly without logging out her work or performing any necessary copying. She had told Martin to say, if questioned, that Singh had left work ill at 10 p.m. The next day, a Saturday, Singh was due into work and Martin was scheduled to work at the Tannery building. Believing that trouble would occur because of the manner in which work had been left undone on February 5, Martin wrote out a statement before finishing her shift that Friday night. It read:

> Steve—
>
> From 5:30 to 2:00 a.m. on 2/5/82 there were a total of 179 messages to be sent during my shift. At the close of my shift, there were 33 messages left in the room to be typed. This equals *146* messages typed during 5:30–2:00 a.m.
>
> I typed a total of *73* of those msgs. leaving 73 for the other 2 persons on my shift. I don't think it's fair. I have run into similar circumstances recently & it seems to be forming a pattern, I don't feel I should have to do half the work of 3 people.
>
> Please check the figures like I tried to "hint" at before & the times. I can't continue on like this. I feel responsible for the work left in the room and I feel like I'm the only one who cares.
>
> I am "getting along" with the girls & I don't want to complain & upset the apple cart. But I think we need some "pushing." If they knew I'm complaining they'd really make it hard on me and I don't want to go through that again. But I honestly feel like I'm caught between a "rock and a hard place." I need help. I don't want to leave the company but I don't know how much more I can take. Call me at home when no one's around. We need to talk!
>
> Peggy

The following day, while at the Tannery, Lindsey telephoned her to angrily ask what had happened the previous eveining, and he then came over to speak personally with Martin. At that point she presented the handwritten statement to him and asserted, as Singh had requested she do, that Singh had left work early the night before at 10 p.m. On the following Monday Martin had a conversation with Singh, and learned to her surpise that Singh had told Lindsey she did not leave work on February 5 until 12 o'clock. This resulted in a realization between the two of them that Singh had been "caught in a lie."[6]

Martin continued her testimony by recalling that on February 9 she had a conversation with Marshall during which the latter accused Martin of insinuating to Lindsey that a missing key, with which manipulation of actual hours worked as shown on a timecard could be done, was something attributable to Marshall. Martin described Marshall's tone as "elevated" but not "really harassing," and that the gist of her remarks were that while Singh or Martin might have "snitched" on the subject Marshall tended to think it would be Martin because of general probabilities between the two of them and Martin's "gutless nature."[7] This experience was followed shortly by another in which Singh was thought to be complaining to Lindsey about Martin not doing her share of work and leaving early. This prompted Martin to write out a three-page statement at home, which she delivered personally to Lindsey on arriving for work on February 13. This document traced a Variety of incidents, remarks, and perceptions leading Martin to feel "pressured" in her work, and it included the following passage as well as a request that confidentiality be maintained:

> I feel that the reason for most of the pressure I have undergone and still have has derived since both girls have joined the union. Because I am not for the union at Signetics, then they automatically assume that I am against them and what they stand for. Therefore, I am continually suspect and continually questioned.

Lindsey was switched to day-shift supervisor of the TWX room and replaced by Fukuba on February 15. Martin's regular assignment at Lawson Lane had overlapped by only 1 day with Fukuba as new incoming supervisor for swing shift. She remained in TWX room operations through March, and although typically working at the physically separate Tannery facility she continued to report unpleasantries emanating from Singh or Marshall, particularly as to the latter's abruptness during telephone contact. Martin submitted a formal transfer request to Monfared in early March, citing constant discord with Singh and Marshall as her chief motivation for wanting a change. A transfer to data entry work soon materialized, and by April Martin was in the new department. On April 8 Fukuba entered an "Incident Report" respecting Marshall and his perception of her written notations to the TWX room log book as these might reflect on Lindsey. The recording stated, "Talked to Rachel.

[6] Martin testified how during January Singh claimed that Supervisor Bartels had accused Martin of "back stabbing" and "snitching," causing everyone else to be "against" her for being that kind of person. Martin denied this and promptly contacted Bartels at his home, receiving his assurance that no such things had ever been uttered about her by him. The next day Martin confronted Singh at an on-premises cafeteria frequented by employees, and told of Bartels' denials. From this Singh admitted that Martin had "caught [her] lying," and this concession was relayed to Serna so that she, at least as among TWX room operators of the shift, would know the truth.

[7] This experience was associated by Martin to earlier exchanges with Marshall. These followed the occasion of Martin having accompanied Marshall and perhaps other employees to a meeting in late January at a restaurant where representatives of the Union were in attendance. Martin remained noncommittal on the matter of supporting the Union's organizing attempt, and subsequent to this she recalled that Marshall later accused her of being promanagement simply because she was seen in private coversations with Barrett and later with Lindsey.

Told her not to make personal remarks in log book—that it could be construed as undermining the authority of a supervisor [Steve]."

On April 19 Marshall received written confirmation of a "30 day verbal warning period" based on "Insubordination." This was issued by Fukuba concerning an incident in which Lindsey had removed a posted cartoon from the TWX room. As originally prepared this "Corrective Action" read that it was based on "Comments made to S. Lindsey in the TWX room in front of other operators referring to him as childish and a liar." Fukuba reissued the document as a final version bearing the same date with the phraseology "in the TWX room in front of other operators" deleted.

In early May a bimonthly issue of "The Union Voice" was disseminated. It contained an article for which Singh and Marshall had supplied material, but which employee editor Patricia Sacco shortened considerably as a matter of publication logistics. One column, mockingly entitled "Supervisor's Spotlight," read in part as follows:

> *John Dinan* takes the cake for recruiting union members. His repeated harassment of Corporate Communications Center (TWX Room) workers has led Rachel Marshall and Esther Singh to put on U.E. buttons.
>
> But John did not give up; He tried twice to assign Rachel to an isolated work area as a first step to "getting rid of trouble-makers." Due to support she got from co-workers and other union members, both attempts failed. "WAY TO GO" Rachel & Esther and friends!

This condensation of what had involved a day's effort by Singh and Marshall in what they composed annoyed the former, and she voiced this disappointment to Marshall. In the several weeks that followed Singh cooled toward the Union. This was manifested by her discontinuing the display of a button on her person, by disinclination as voiced to Marshall toward participation in further authoring of material for the Union's publication, and by explanation to Marshall, when the latter inquired, that Singh wanted to concentrate on promoting her boyfriend's computer-related business enterprise. As to this Singh carried out at least on meeting with an official of Respondent, during which she commenced specific promotional efforts in terms of her boyfriend's business and associated invention. Singh was continuing on generally friendly terms with Marshall during this period, and on learning of such contacts the latter termed her "naive" to think that industry functionaries would not look askance at such overtures by readily associating her with the subject of unionization.

III. PRELIMINARY EVENTS IN JUNE

By early June Singh had refined her thinking with respect to how she might best contribute to the boyfriend's entrepreneurial goals. She decided to seek self-improvement by transferring to Respondent's computer operations function, and broached this prospect with Dinan. At this point in time Singh assessed her relationship with Monfared as poor, based on a perception that they could not communicate well after the sequence of incidents in which Singh was clearly aligned with Marshall in matters that arose at work. Dinan however directed her to "proper channels," and in consequence of this Singh requested a meeting with Monfared.[8]

Such a meeting occurred at the Industrial Relations office with only Singh and Monfared present. Singh announced her desire for self-improvement transfer, adding that she was no longer associated with the Union. Singh's version of how the meeting continued is that Monfared seemed startled about the gratuitous revelation, and asked why such disassociation happened. Singh testified that she termed the Union "lowlife," but continued to highlight her basic objective of contributing to the boyfriend's business enterprise. Singh recalled Monfared then asking if Marshall was harassing her about the Union, to which Singh replied this was not the case at the time. Following this Monfared assertedly said that the transfer would not be a problem, if justified by a written statement showing a "special reason" that was "work-related" and not merely "personal" as had affected Martin.[9]

Monfared's version of the meeting agrees that Singh had begun with the statement that she wanted management to know she was no longer interested in the Union. Monfared testified to telling Singh that her chances for a transfer were not promising because of a dearth of current or anticipated openings, and that a response of Singh was that she wanted the transfer because Marshall was harassing her. From this Monfared advised that any complaints about Marshall should be put in writing, to which Singh assertedly said that she could take care of such problems herself.

The meeting with Monfared caused Singh to be slightly late in starting her shift on the afternoon of June 7. She recalled having spoken to Fukuba before he left work that day, asking whether she could do crocheting if it turned out that work was slow on the shift. He assented.[10] During early phases of the shift she performed

---

[8] Monfared recalled that in February Singh had attended a "job fair" designed to accommodate CIS staffing needs, and at that time expressed an interest in transferring. Monfared's further recollection was that she had explained to Singh at the time how Respondent's internal "job opportunity system" worked, with reference to bidding procedure and attention to stated job opening qualifications. Monfared concluded her testimony on this point by adding that Singh seemed at the time only eligible for a change to data entry work, and after interviewing for this function Singh then lost interest. Singh contradicted this testimony by recalling that she once dropped in to an "open house" being held on what was for her a Saturday workday, but as to which she had no then current desire in transferring out of the TWX room. Singh asserted that Monfared solicited her to consider a transfer as had (or was) occurring with Martin, premising this, to Singh's recollection, as an escape from "any sort of harassment." Singh did confirm that she interviewed, but soon told Monfared that aside from the marketing function she was not really interested. The matter then went dormant except as a "seed planted" in Singh's mind.

[9] Singh testified that the context of these remarks was her general awareness of Respondent's "bid board" system Monfared had previously acquainted her with, and that a "freeze" on job transfers was in effect at the time.

[10] Fukuba testified that on several occasions prior to June 7 he had explained job transfer procedures to Singh in "general conversation." In the period around June 7 Fukuba was temporarily working a split shift of noon–8 p.m. because of Lindsey being on vacation from his day-shift supervisory position.

logging, copy work, and distribution, then avoided further assisting as work "piled up" and instead sat crocheting. Marshall spoke to Singh asking why she seemed so gripped by indolence.[11] Singh testified that she responded by accusing Marshall of "picking on" her because of no longer being associated with the Union. Singh escalated her remarks to Marshall by shouting that unions were "lowlife," and it was simply "tough shit" that Marshall was "pissed" about this new attitude.

The next day Singh reported to Monfared that Marshall had fought with her the previous night and, from this, a meeting ensued between them in the cafeteria with Fukuba joining in. Singh testified that Monfared verbally envisioned Marshall being fired, but alluded to Martin's earlier situation in which there were not enough witnesses. Monfared continued by emphasizing that any transfer of Singh or termination of Marshall would necessitate a written statement and could not be founded on a personal matter.

Marshall's version of the episode is that she was herself working the "Hong Kong" machine at the time, which had both receiving and sending capacity. Incoming messages were piling up and not undergoing distribution as she understood Singh was to do. Marshall testified that in this context she asked Singh what the procedure was "regarding her assignment that week," and was loudly told in response that Singh was "sick and tired of you expecting everybody in here to kiss your ass." This upset Marshall and her riposte was to ask Singh rhetorically why she didn't "kiss management's ass." Singh accused Marshall of not liking people who were not in the Union, and Marshall testified that while she made some reply to this it did not involve further swearing.

This exchange stimulated both Marshall and Singh to contact Eisenscher by telephone. Marshall did so on June 7, reporting the seeming strangeness of Singh's behavior, and hearing Eisenscher advise that she should exercise caution while at work. Singh's call occurred on June 8, one in which she was ostensibly demanding that Eisenscher get Marshall "off her [back]" in relation to further support of the Union.

Monfared's version of her involvement on June 8 was that Singh had requested a meeting with her but it could not be arranged until late afternoon. She went to the TWX room at that time and a meeting at the cafeteria evolved between her and Singh with Fukuba also present. Monfared testified to Singh telling of pressured discord with Marshall the night before over "writing an article for the newspaper." Monfared added that Singh had "divulged" many vulgar details of what had been said to her, and vowed that Marshall would not intimidate her as had happened with Martin. Singh also told of telephoning Eisenscher to complain about Marshall, but that he felt an exaggeration was present and was disinclined to help. In closing Monfared prompted Singh to write out a statement as a basis for her to be assisted. She did so, signing and dating it before returning to work as then instructed. This handwritten statement by Singh expressed the wish that Respondent would "get Rachel Marshall off my back" and listed "fucken cunt-snitch/no respect for anyone who betrays the Union/I will be a child if I please to become one/I don't need you nor your support in the Union," as among remarks Marshall had directed to Singh on June 7. Fukuba testified in only limited fashion with respect to this cafeteria meeting of June 8, generally corroborating Monfared.

Monfared and Fukuba then drafted out a written warning to Marshall dated June 8. The "plant rule violation" was stated as "harassing co-workers and others; and interfering with production by making the work environment [sic] tense." Previous warnings of note were listed as "comments to Steve Lindsey (4–16), notes in log book (4–8)." The specific infractions or incidents on which the written warning was based were couched as "personal remarks to and about Peggy Martin, abusive statements about Steve Lindsey, personal remarks made to Esther Singh [including] name calling and innuendos." Immediate improvement was demanded insofar as Marshall being expected to "cease from making such remarks and creating a tense non-productive working environment (sic)." Fukuba signed and presented this to Marshall on June 8, however, she refused to acknowledge it with her own signature. In regard to the immediate moments of delivery, Fukuba testified that he got "input" from Daugherty about what had happened during the incident this written warning addressed, while Marshall testified that her response to being handed it was to voice a blanket request to TWX room employees for somebody to "tell Brian what exactly happened." Marshall recalled that Daugherty volunteered how Marshall had only asked a work-related question the night before, to which Fukuba dismissed her from the conversation. Daugherty's own version was memorialized with notes taken from her by Monfared, in which Marshall was remembered as only making a polite inquiry to Singh about the handling of incoming messages.

During the evening lunch break on June 8 Marshall went to her sister's house nearby, and told her of having an upsetting experience of receiving the written warning. Later that evening the sister telephoned into the TWX room. Marshall soon received word of the call, and on returning it was told by her sister that there had been vulgar words exchanged between the sister and Singh. Fukuba testified that on the evening of June 8 he was prompted to telephone Marshall's sister, who complained to him that she had been repeatedly calling into the TWX room and was being hung up on until after several such calls a person answered, cursed at her, and hung up again. Singh testified that she had seen Marshall make a telephone call from Fukuba's office during the shift on June 8, and that shortly thereafter a callback came for Marshall. Singh answered this. It turned out to be Marshall's sister, and on identifying herself, the sister asked if she was "the whore who's trying to get my sister fired." The two then exchanged peevish remarks and their conversation ended as another factor causing tenseness on the shift that night.

All witnesses agree that tension existed in the TWX room during the balance of that week as bickering con-

[11] It is concededly customary that a senior operator, as Marshall typically represented on this occasion, would take a lead role in seeing that work proceeded appropriately throughout a particular shift.

tinued between Singh and Marshall. Among the occurrences were Singh trashing a supposedly radical tabloid regularly read by Marshall, ominous talk about the possession of knives or purchase of attack dogs, cross-accusations about car-scratching, general verbal sniping about the giving of a lobotomy or particular family slurring, and Singh taunting Marshall with the statement that Singh could get Marshall fired. On June 9 Fukuba, who was working a shift that extended to 11 p.m., spoke pointedly to both Marshall and Singh, telling them that the fighting between them had created an intolerable work atmosphere and must stop. He warned that if either did anything "antagonistic" toward the other he would react strongly and could impose termination. He specified that such cautionary words covered name calling, innuendos, or demeaning reference made to others. Fukuba summarized this verbal warning in an incident report record he had kept on TWX room employees since arriving there. These same incident report pages contain the basis of a second written warning given Marshall on June 10. As to this, formally a "Corrective Action/Probation," Fukuba testified that he had heard Singh reminiscing about feeling apprehensive when first hired and finding former TWX room employee Mary Marra "on her case" (equating this to a then current situation of day-shift operator Karla Fessenden bothering Daugherty). On this Marshall had "interjected" aloud that Singh was "scared shitless." The second entry, reflecting what Fukuba had heard, was that noting a remark by Marshall to Daugherty "about how insecure people jump from organization to organization."

Singh testified that she had maintained daily contact with Monfared during this first full week of June. Ostensibly these contacts were to report continuing harassment by Marshall, and to press the increasingly persistent inquiry as to whether or not her transfer request could be accommodated. Much of what Singh reported was meticulously recorded by Monfared, and Fukuba's incident report documentation covered several pages of remarks or episodes that involved Marshall and arose during the same time period. On the composite basis of these recitations, Monfared and Fukuba composed a probation notice for Marshall dated June 10 which he presented to her that night. Its context largely paralleled the written warning 2 days earlier, except for reference to a prior warning on June 9 (and omission of reference to one on April 8), plus that it expressly established a 60-day probationary period, during which, by its printed terms, any infraction "could result in further disciplinary action, which could [include] termination."

Fukuba left Monfared a note that the creation of probationary status had yielded a "peaceful night," although Singh continued to claim that when he left the room Marshall made snide remarks. He also noted that relatedly Marshall complained to him of Singh's threat to have her fired, and he felt that the many conflicting views paralyzed any ability to act on the matter. For her part Marshall had protested the probation to Fukuba when it was presented, arguing that her "interject[ed]" remark of the night before had been made to Jordan and so should not be deemed an innuendo toward Singh.[12] The point was discussed between them with Marshall being left unclear as to what she might permissibly say while at work.

On June 11 Marshall sought out Monfared and met with her about the imposition of probationary status. Marshall complained that the warnings were unfair and asked inconclusively about an appeal process within the organization. She also alluded to the then posted notice to employees for settled Case 32–CA–4238, recalling that this caused Monfared to opine that the National Labor Relations Board was chartered to help unions organize. Monfared made notes during this meeting, and caused them to be transcribed from which a typed "documentation" was later produced. As further refined in detail by Monfared its complete text read (grammatical and spelling errors disregarded):

> Rachel came up at 5:30 p.m. to appeal her probation base on the objection that all the information was given to us from Esther Singh who was doing it because she was receiving favors from the company. Rachel stated that John Dinah had said to Esther that she would be able to bid out of the TWX area which was a favor and I indicated to her that bidding out of the TWX area was normal procedures for anyone who had been in there more than six months, which certainly Esther had been and that I had several sheets of paper from various individuals stating they wanted to get out of the area and that I keep track of that as a normal basis and call them when I find positions that are open. Rachel said that she felt she was being harassed based on one person's statement. Namely Esther's statement and that was totally unfair.* She wanted to also say that Esther had made innuendos and threatening remarks such as Esther being on the phone and describing breaking peoples arms and other things like that. She had also stated previously how she could not get Rachel fired. My response was that I had yet to have heard that, and that I would certainly look into that. At this point, however, we didn't know who to believe. We tended to respond to things we could reasonably believe were true. She said we were believing everything Esther said. I said "that wasn't true." We had asked Brian to monitor the room and we were going on things he had witnessed, which she proceeded to write down in her book. I also remarked that we at this point needed a witness because they both were telling us so many stories that we didn't know who to believe and that we were going to act upon things overheard by Brian, their supervisor. I indicated to her that Brian was to spend all the time he could in the TWX area to monitor the room. Rachel replied

[12] Marshall testified that the actual episode had involved Singh boasting to Jordan about how Marra had not really intimidated her and that, in late 1981 when the circumstances existed, Singh had effectively deflated Marra. Marshall conceded that she seized the moment to remark aloud, intending Singh to hear and think about the mimicry, "Gee Carol, Mary Marra sure must have been terrified or scared shitless."

we are believing one person and not the other and we are discriminating against her. I told her that wasn't the case. We again could not believe either one of them because they were retaliating and fighting between themselves we didn't know what to believe, they had us in a tizzy. Rachel then said she would object formally through the union to all these things and if we wanted to go ahead and post another order by the National Labor Relations Board that we could go ahead and do this. She said that the National Labor Relations Board had found us guilty of previous acts like this and we were again in violation. I told her that they didn't find us guilty that indeed whenever there was an issue between a company and an employee they tended to take the employees' side. She disagreed with me and said the National Labor Relations Board was not pro-union it was pro-management. I told her that I felt the National Labor Relations Board was there to protect the union, the organizer and was not there for management. I asked her to tell me in which way she felt it was pro-management? She asked me if I had ever read the National Labor Relations Act, instead of replying to my question. I replied, I had read it. I looked at my watch and then said to her "unless she had other issues she wanted to bring up I didn't have time to discuss the philosophy of the National Labor Relations Board with her." She said "oh-oh-okay, you're out of time." Then she left.**

* Rachel said "I don't expect you to be fair, never have."

** I called Brian and asked him if he had heard anything at all that could have sounded like "breaking arms etc." Brian's remarks are in the log. "Said Esther did make phone calls last night but he didn't hear anything like that, if he had heard anything Esther would be on a warning also." I reinforced we must handle them both fairly and consistently.

IV. THE "COOLEY" INCIDENT

Marshall was suspended and later discharged on the basis of happenings during an afternoon shift in the TWX room on June 14. Previously, beginning on June 9, Marshall had spoken repeatedly to Fukuba about possibly transferring out of the TWX room saying that she did not want to stay because of Singh's behavior. He had disclaimed the authority to grant this, explaining instead that he would check things with Monfared. Her request became formalized to the point that beginning June 14 she was expecting a meeting with Fukuba in order to be updated on its status. When he was free to meet with her in his office he so informed Marshall, and the two of them poised to start in that direction. At that moment a telephone call came into the TWX room, and was answered by Maracut. For reasons that will become apparent later in this Decision, I shall first set forth Marshall's version of how this call originated and what transpired from the point Maracut took it.

Marshall testified that by June 14 she and Singh were not on speaking terms. Singh's assignment on the shift that night was to work the Hong Kong machine. A company functionary named Cooley originated a message for transmission,[13] and this had been indiscriminately routed to Marshall's incoming message box by Maracut. Marshall recognized the message as one that would necessarily be transmitted on Singh's machine, and that an appropriate TWX identification number for its Tarrytown, New York destination was missing. Marshall spent a few minutes with source books, but was unable to establish what the missing number might be. She therefore telephoned Cooley's office to leave a message that she was calling from the TWX room to say his message could not be transmitted that night unless the missing information was supplied. This routing background to the incoming callback taken by Maracut and passed to Marshall, who spoke with Cooley only briefly enough to advise that another person would handle the matter. This remark associated to her then current understanding that the Cooley message was fundamentally one for the Hong Kong machine and, since this was Singh's bailiwick, Marshall got Singh's attention and handed the phone over to her saying, "Esther, it's for you." Marshall then observed Singh react immediately to the call by expressing an unawareness of what it concerned, at which point Marshall stated to the nearby Fukuba that "It should be obvious, Brian." Fukuba and Marshall, with the former leading, then resumed their movement toward his office as that had been interrupted only moments before by the incoming call. When they were ensconced inside his partitioned and physically separate office, she clarified for him what the message was about. Marshall testified that she continued by expressing a concern for possible repercussions, because Singh had seemed upset about having been given the call. Fukuba voiced a bland reassurance to Marshall, adding glibly that Singh was just being "wacko."

Discussion of Marshall's prospects for transferring out the ensued, following which she returned to her work station located just in front of Singh's and typed away on messages for approximately 15 minutes. Fukuba reappeared in the TWX room and stood near Singh as she worked. Marshall testified that Singh remarked to Fukaba that Cooley was really upset about his "important" message, and she did not understand what the situation was all about. Singh continued by referring to Marshall with the assertion that "Her actions are interfering with the work process./Can't you get her fired?" With this Marshall entered the conversation by contending to Fukaba that Singh's words were innuendos and accusations, adding her own interrogative about whether Singh would be allowed to say such things. Fukuba attempted pacification while Marshall pressed the distinction that she had assiduously confined her responsive remarks to Fukuba himself. Fukuba asked again for a cooling off and Marshall sat down to resume work. Marshall testified that Fukuba then turned to leave the TWX room, and as he did Singh launched a tirade of insults against Marshall saying, "Fuck you and fuck the Union./You fucking Union bitch." Singh continued screaming and followed Fukuba into his office where for the next 5–10

[13] Respondent's brief further identifies the individual as "Jerry Cooley from Purchasing" (p. 29).

minutes Marshall could still detect her being loud and upset. Ultimately about an hour passed before Singh returned to the TWX room; however, Fukuba also came in and announced they were both being suspended for fighting.

Singh's description of the incident was that after the Cooley call was passed from Maracut to Marshall and on to her, she instantly recognized his voice and attempted to return the phone to Marshall as she and Fukuba proceeded toward his office. Failing this she hung up on Cooley and spoke through the sliding window to Fukuba's office, urging that he clear up the matter with Marshall because Singh did not know what to do about it. When they returned a quarter hour later, Marshall to resume typing and Fukuba to stand near Singh, she reminded him about the unresolved Cooley call. Singh asserted that Fukuba perfunctorily asked Marshall about it, who said all that had to be done was to look through the messages at Singh's terminal. Fukuba pulled the message and while looking at it asked Marshall what was wrong. Marshall persisted in saying that the deficiency was there to see, and this triggered Singh into feigned anger. She loudly labeled the moment a "work-related matter" and began screaming at Marshall. Singh recalled saying that Marshall was a child who would have her "fucking ass kicked," and that if Marshall should get a knife about what Singh had to put with in the office then Singh would get a gun. Her agitation and screaming increased as Marshall remained oddly tranquil, and momentarily Fukuba guided her out the door.

Fukuba's testimony tracked the essential unfolding of this episode, adding that when Singh first signaled that Cooley's was a problem call he searched her message stack and took it out. Fukuba recalled starting to explain what the situation was about, and sensing that Singh seemed to feel she was being made a tool of by Marshall. Within moments Singh became upset and initiated name calling of Marshall, saying too that the incident was "work-related" and Marshall should not "be interfering in the work process." Fukuba termed Singh as "pretty hysterical" at this point, and recalled her calling Marshall "a Union bitch." The response noted by Fukuba was that Marshall nonverbally sneered, smiled, or smirked at Singh for a few seconds,[14] and then remarked that innuendos were really emanating from Singh. Ultimately Singh's increasingly "hysterical" conduct impelled him to escort her out of the room. While then in his adjoining office with Singh, Marshall appeared at the sliding window to say that Singh's messages were getting late and inquired if Marshall should send them. Singh flared again at this remark and she told Marshall not to touch her work. Soon following this Singh calmed again, and returned to the TWX room saying to Fukuba that she needed to "protect" her messages.

It still being late afternoon, Singh hurriedly fulfilled a previously requested appointment with Monfared, during which she explained some details of the just-experienced Cooley incident and said she had lost her temper. Fukuba then appeared at Monfared's office and, after excusing Singh, the two of them decided to suspend both employees pending an investigation. This was carried out by Fukuba, who prepared a summarizing note which read:

> Pulled both Rachel & Esther out and told them they were both on a 3 day suspension. Rachel asked if this was the coup de grace, and I didn't reply. Esther said that she could use the vacation." Then Rachel asked why she was being suspended, and I said because of the incident in the room. She said what incident and I said the phone call, and the blow-up. Then Rachel interrupted and said "you mean Esther's blow-up." I replied, "The whole thing." I confiscated their badges, and then presented them to security to be escorted out.

V. AFTERMATH

Monfared spearheaded Respondent's inquiry into what had happened and what should be done. After copiously recorded preliminary groundwork interviews, she convened a meeting on June 17 with Dinan, Corporation Employee Relations Manager Judith Ann Williams, and Corporate Compensation Manager Gil VanValkenberg present, as well as Kociol participating by long-distance telephone. Monfared testified that she presented all relevant versions of the Cooley incident, and fielded questions about the significance of Marshall's concededly strong showing during her several years as an operator. Monfared described deliberations in which Marshall was associated with past harassment of Serna on "union issues in the TWX area," as well as the countervailing thought that Respondent would surely be faced with a claim of unlawful discrimination should it terminate Marshall. Ultimately Monfared obtained a consensus that discharge was the appropriate course as to Marshall, while Singh's less extensive disciplinary record of merely one recent verbal warning warranted only a confirmation of 3 days' suspension without pay.

Fukuba notified Marshall of this action by telephone, stating the reason to be "violation of probation." A few days later she went into the facility to retrieve personal belongings and obtain her last check. She also conversed unconsequentially with Williams while there. Singh was presented a corrective action/written warning dated June 17 which referred to her last "confrontation" with Marshall as a rule violation that made the "work enviornment [sic] tense" as well as involving the infractions of "abusive statements and innuendos against other operators." Singh received this at Monfared's office with Fukuba also present, and testified that when she protested being disciplined Monfared said the action was only "to make the company look good in court" as a technique to "cover our tracks" for firing Marshall.

Singh returned to Monfared's office about a week later to again press her transfer request and say that TWX room work was becoming unbearable. This arose in part because other operators seemed resentful over the unfairness of Marshall having been hired. Singh testified how

[14] Jordan was called as a witness by Respondent, and she testified that the "flare-up" of June 14 involved Singh screaming about how it was "job-related" which spurred Marshall to assume "a slight grin on her face."

on that or a related occasion Monfared had asked whether she was then truly disassociated from the Union by having resigned. She recalled Monfared expressing distrust of her, and advising that she resign by letter and keep a copy. This episode later influenced Singh to tell Serna how to similarily resign from the Union, and to claim that she could retaliate through her power to get other employees fired if Serna (or Fessenden with whom Singh was on the outs) did not comply. Singh continued in checkered employment with Respondent until about July 29. During July she was suspended for harassing Daugherty and ultimately Singh telephoned her resignation to Fukuba.

VI. THE GENERAL COUNSEL'S FURTHER EVIDENCE AS EDUCED IN SUPPORT OF THE COMPLAINT

Marshall testified that around late September 1981 she spoke with Dinan about his seeming change in attitude toward her. He was attributed as then saying that he disliked her having sided with Singh about the pay differential matter, saying that she should refrain from "being someone's witness" in the future.

Singh testified uncontradictedly, but with prompting, that about November 25, 1981, Barrett had labeled Marshall a "troublemaker" in the course of saying that she could be constructively discharged by creative supervisory tactics.

Patricia Ann Wheeler, a wafer fab operator, testified that she had become active for the Union during 1981, and in January had also distributed "The Union Voice," accompanied by Joseph Sacco, in front of the lobby of the OM building where she worked. Her supervisor, Larry Phillips, was ridiculed in an article of this particular issue. When conducting her formal job review on January 27, Phillips alluded to the "slander[ous]" nature of the article, adding that she should see him about problems and not think that the Union could do more for her. Wheeler testified that Pillips continued with a reference to her $6-per-hour wage rate and, in connection with the review process resulting in a 4-percent pay increase, added that she should think about having to pay dues should the Union get in.

Serna testified that in January she had affirmatively responded to a supervisory inquiry about persons interested in transfer to solo work at the Tannery, but was told that Martin was similarly interested. In the course of this experience as a proposed volunteering transferee, Serna was further told by Bartels that Marshall would be the person moved. Marshall had, to Serna's best knowledge at the time, made it known that she was not interested in work at the Tannery. This sentiment became clearly known to Respondent in connection with events that commenced on February 19. On that date Fukuba called Marshall to his office to say that she was being mandatorily transferred to a new afternoon shift at the Tannery. The transfer was to be effective February 22, and she would have worked alone as a communications employee stationed there after all corporate employees finished their day shift. Marshall testified that she expressed dismay over this, saying that she was a high seniority person who had not sought such a change. Fukuba did not relent, but Eisenscher interposed himself to Monfared via Kociol, and the plan to transfer Marshall was dropped in lieu of sending Martin instead. Monfared testified that this adjustment was a managerial recognition of the "volatile" situation in the TWX room, one from which Martin in any event wished to escape.

This was also the approximate point in time at which the timecard falsification involving Singh occurred. Lindsey prepared a corrective action written warning to her about this dated February 11 and, in that connection, Marshall attempted to witness for her at a meeting called in Dinan's office. On arrival there, Dinan attempted to disassociate Marshall from the matter; however, after checking with Monfared, this was not pressed and Marshall was present when Singh's discipline was administered. Marshall testified that in the process Singh became upset to the point of using loud and obsence language.

The General Counsel also contends that a periodic written employee performance review of Marshall done by Fukuba on April 15 was "unlawfully . . . substandard." I find insufficient materiality in this regard to warrant setting forth any particulars, noting, too, the numerous variables that would impinge on such a review by a new supervisor and given the business climate at that time.

The principal evidence of this case, taking on, by its very nature, more that of a pervasive theme than mere testimony, is the composite of Singh's offerings. She had executed three prehearing affidavits, one in February, one on July 7, and one on October 19. The first affidavit is inconsequential, however the second one dealt largely with events of early to mid-June when Marshall was being progressively disciplined for assertedly disruptive conduct in the workplace. Singh repudiated all salient aspects of her July 7 affidavit which would relate to the issue of Marshall's discharge, and correspondingly affirmed the contents of what she later advanced on October 19. This final affidavit was a total about-face, and depicted Singh as having deliberately orchestrated, with Monfared's conniving knowledge and assent, a series of confrontations with Marshall that were designed to show the insufferableness of working in proximity to Marshall. Singh expressly told of how her bona fide interest in a departmental transfer was cleverly deflected by Monfared into a vehicle for spawning the notion that Marshall was exasperatingly antagonistic, disruptive, and uncooperative in work-related matters. Singh explained that from an opening suggestiveness to full-blown confirmation, Monfared induced and encouraged her to vex Marshall, while at the same time acting victimized by the process. Singh claimed a careful schooling by Monfared in how the duplicity must not, as in the case of Martin earlier that year, be personal in nature or insufficient of proof, but must, instead, meet the narrower test of work-relatedness and preferably involve a stream of documentation. On the deeper motivational level Singh spelled out the twin dynamics of how she frantically provoked Marshall (Tr. 338, 598–599), and that Monfared was at all times fully implicated (Tr. 341, 464, 466–468, 526–529, 633).

This then, according to Singh's testimony, was the unvarnished basis of how, why, and when during June's

first half the TWX room was bedeviled with vulgar discord ranging from crocheting's effect on productivity to the normal, prudent handling of an intracompany business call made by Cooley late on a Monday afternoon. Singh fully admitted to these unworthy motivations and staunchly depicted Monfared as a cool participant in the conspiracy, one who constantly spurred her on with the undertaking and, in the process, showed total awareness of its audacious artificiality plus chortling amusement at Marshall's presumed bewilderment.

VII. RESPONDENT'S FURTHER EVIDENCE AS EDUCED IN OPPOSITION TO THE COMPLAINT

Here the countervailing theme of defense is that Monfared was suddenly faced with the perplexing problem of how to assist Fukuba in maintaining order and decorum as two prominent staffers were suddenly at such odds after a history of overt sisterhood. In the process Monfared accumulated a mass of documentation that tracked or confirmed much of what was advanced by Respondent's witnesses.

Fukuba testified that he had personally heard Marshall's name-calling of Lindsey in mid-April, and that both in the supervisor's office and the TWX room itself, with operators present, she had termed him a "liar and childish." Fukuba explained that the reason Marshall's reprimand on April 19 required modification was because Lindsey could recall only the name-calling in his office where rank-and-file employees would not have heard what was said. In regard to happenings beyond this, and particularly the eventful period of early June, Fukuba verified that he had counseled Marshall in late May concerning attendance, and was then soon immersed in the Singh-Marshall "rift" as first pointed out to him by Daugherty about June 7. Fukuba monitored their respective behavior closely from that point, making detailed notes of interpersonal badgering, obscenities hurled, and miscellaneous pugnaciousness. In the process he communicated closely with Monfared, testifying that they were each looking for an effective way to root out the cause of the discord and eliminate it from the workplace. Fukuba testified that his inability to be present in the TWX room each moment of the shift seemed to be a factor that permitted the situation to fester.

Williams was the authenticator of personnel records showing 13 instances during 1981–1982 in which employees were disciplined as a result of disputes with other employees. She recounted the important "decision-making meeting" of June 17, and how her own recommendations became that of terminating Marshall after taking into account all background and the "immediate" situation of what had been occurring in 1982. Williams was also best situated to describe the "shift wars" that had once wracked the TWX room. This "continuum" was associated to early 1981 onward, when Marshall was perceived as feuding with shift counterpart Suzi Parlette, and these two being "primarily" responsible for an undercurrent of conflict. Williams testified that she was mindful of this facet of Marshall's overall employment profile while participating in the June 17 meeting.

Monfared was presented as Respondent's "key witness" with her extensive documentation constituting the "heart of [its] case" insofar as reflecting employer reliance on the diverse information coming to its officials' attention. Monfared's elaborating testimony was in essential accord with her documentation about Singh's originating visit on June 7, a recording that reads, in part, as follows:

> Esther . . . said there was a lot of pressure, especially from Rachel, to remain active in the Union. It took her quite a while to gradually withdraw from the Union. Esther at first told Rachel that she forgot her button, then later that she wasn't going to wear it. Finally she was able to stand up to Rachel and tell her she wasn't going to be in the Union. Esther said, with all the other activity in her life, she didn't need the extra pressure from Rachel to be a part of the Union. Esther said Rachel could do a lot to hurt an employee's performance. Rachel has been in the TWX area 3 years and could erase a person's disk or affect their performance so they got in trouble.
>
> I asked Esther if she'd be willing to sign a statement that Rachel was pressuring her and her peers in the TWX area. She said she wouldn't do that, she was afraid of what would happen to herself or the others in the area. She explained that an effort to stop Rachel might adversely affect the group and they might be pressured to unionize. I told Esther, the company was very concerned about the mental anguish people like Peggy Martin went through in these situations and that I wanted to be able to stop Rachel.

Monfared told of applying discipline to Marshall during June, and departing from the strict form of Respondent's written corrective action policy because of the delicacies involved in so dealing with one of Respondent's "strongest" operators. She recalled that by June 9 Fukuba was advocating termination of Marshall, while Singh visited her office several times that week to report Marshall having made aggravating comments without Fukuba around. Monfared termed the week as one in which Fukuba was extremely tense and TWX room operators generally upset. Also, responding to persistent reports of Marshall possessing a dangerous knife, Monfared authorized Respondent's security department to confront Marshall about such a weapon but nothing of consequence materialized. Monfared testified that by the end of that difficult week she reflected on things with Fukuba, and they took satisfaction in feeling that by then Marshall should have a "clear understanding" of the resolve to put a stop to the "sort of behavior" being exhibited.

Monfared expressly denied that she was "working together" with Singh to frame Marshall, or that in any remote way an agreement of that type existed. Further, she denied having conversed with Singh about how a person might go about resigning from the Union.

VIII. THE GENERAL COUNSEL'S CONTENTIONS (AS GENERALLY ADOPTED BY THE CHARGING PARTY) AND FURTHER COLLATERAL EVIDENCE

The General Counsel contends that a prima facie case has been presented to the effect that disciplinary actions against Marshall in June leading soon to her termination were unlawfully motivated. This argument was premised on the "basic contention" that is embodied in Singh's testimony, plus an array of points to the effect that Respondent's actions are illogical, arbitrary, inconsistent, and generally so unexplained that in the aggregate an inference of actionable discrimination is warranted. The General Counsel claims that secret motivation was rife in how Respondent evaluated Marshall's overall employment history, in its belated concern for Martin's serenity, in carping criticisms of Marshall's minor foibles, in generating a spurious sheaf of reprimands during the June gyrations, and finally by a perverse analysis of who was at fault, how so, and why during the Cooley incident. In an overall regard the General Counsel contends that Marshall has been nothing but a dedicated, superior employee at all times, that the entire phase of the trial involving Martin's experiences favored its case at best and was irrelevant at worst, and that Respondent has utterly failed to rebut a showing that Marshall was discharged for totally pretextual reasons.

IX. RESPONDENT'S CONTENTIONS AND FURTHER COLLATERAL EVIDENCE

Respondent contends that the General Counsel has failed to meet its burden of proving that Marshall's protected activity was a motivating factor in employer decisions affecting her. Alternatively, it is contended that in either event any prima facie showing of discrimination has been "neutralized" by sufficient evidence to establish that her failure to correct "disruptive ways" would have resulted in the discharge at issue. Respondent impugns Singh's general credibility, other than the extent to which Singh attributed vulgar name-calling to Marshall as on June 7 during the crocheting incident. Respondent also claims that Marshall's testimony is discreditable, and that she has sought to dodge a conclusion that her seriously disruptive behavior, coupled with menacing characteristics of thought, deed, and capacity, was a sufficient basis for termination after fair warnings were to no avail.

X. CREDIBILITY

In the course of her testimony, but particularly during cross-examination spanning 2-1/2 days of trial, Singh was successively and variously contrite, argumentative, earthy, impertinent, whimsical, or defiant. More importantly, however, she was assiduously consistent in explaining, conceding, and confessing that she shamelessly pounced on Monfared's adroitly oblique invitation to insidiously incriminate Marshall as a prelude to her extirpative removal from employment.

Singh has shown herself often to succumb when situations present in which the advancement of self-interest is done at the expense of truth. She is admittedly devious, manipulative, streetwise, caustic, and, above all, driven by consumingly selfish motives. I recognize that, as with most individuals, she has personal and daily problems with which to cope, and she liberally told of these in the witnessing process insofar as they entailed child care by a single parent and an arthritic condition in a relatively young person. I am thus influenced by a totality of how this witness presented herself, and have attempted to compile telling factors of demeanor as observed in the course of her extensive testimony. I note, too, that on at least four occasions she sought excusal from the rigors of cross-examination and, in the process, made mildly ingratiating remarks from her position in the witness seat a scant few feet away from me. I have extensively reflected on this intriguing credibility resolution and, in the course of the effort, have carefully considered classic demeanor factors such as hesitation, seeming discomfort, body language, tonal change, and visible emotionalism. The undertaking is complicated further by her candid admission of having totally fabricated practically the entire investigatory affidavit of July 7, and the fact that she is a dramatizer of some skill by training, experience, and, I suspect, naturally ingrained talent. After undergoing this process, I am satisfied that, fanciful as many of her embellishments might have been, and even on noting the several instances in which she was pointedly contradicted by Marshall, Singh has nevertheless now truly revealed her role in a deliberately conspiratorial, diabolically tacit, and patently unlawful scheme to rid Respondent of a key union activist. I am satisfied that the strategem arose as a fortuitous opportunity for an industrial relations functionary to self-delusionally forge a coup. I find that the original seeds of what would unfold were planted when Singh made her initial early June visit to Monfared seeking a job transfer for strictly personal reasons. There was a fast-dawning realization of potential which imbued the situation as to both participants and that, scorpionlike in the same bottle, they stumbled onward with the amateurish farce. It is this much of Singh's testimony that I emphatically credit, for while she may be a legend of prevarication in her time, Respondent's contradicting witnesses are woefully unpersuasive, and the overall fact situation leaves its defense more than improbably suspect; indeed, instead, pitifully unworthy of belief. In summary, Singh persuasively established that she has eschewed all past disingenuousness, and for purposes of this case finally made a clean breast of things.

The counterpart of this credibility assessment is my rejection of Monfared's testimony, finding that in every crucial sense it scaled from the dubious to the absurd. Beyond a fundamentally preposterous rendition of how Respondent honestly deemed Marshall to be suddenly a source of disruption, how the Cooley incident could tar Marshall, and how her overall employment history, but with particular reference to Martin's troubles, could have made her vulnerable to discharge, Monfared's delivery was shifting, inconsistent, evasive, vague, and advanced with such demeanor characteristics as cause me to fully discredit what she depicts. As with Singh, the extensive amount of time spent on the witness stand by Monfared provided ample opportunity to ponder her veracity and,

having done so, I am unreservedly convinced that her important testimony is false.

Fukuba is discredited insofar as any conflict with Marshall is concerned; however, generally, his testimony amounts to little more than continuity as a docile participant in bizarrely swirling events either beyond his capacity to control or, equally significant, based on secret tactics to which he was not fully privy. Williams, a functionary of rich labor relations experience and personal sophistication, is even further removed from the crucible of events. As to her I observe only that there is no sincere way for the subordinate Monfared's intricate fable to be swallowed without Williams making a conscious decision to depart from prudence and reason in this one instance. It becomes anticlimatic to write the obvious: that Marshall is the one person among key witnesses in whom I have total confidence. Her impressive testimony stands every appropriate test of demeanor, internal harmony, brightly delineated distinguishing, and candor. In few words she is a superbly convincing witness, and credited in full as to all recollection, assertion, or denial.

XI. ANALYSIS

The principal accusation made in the General Counsel's amended complaint has merit for two distinct and independent reasons. The first of these is grounded directly on Singh's credited testimony for, when this is accepted as truth, the entire case telescopes into a narrow finding that Marshall was deliberately discriminated against. As so revealed, the dynamics of June were all nothing more than the maneuverings of a particular employer agent, done in smug expectation that enough puppet strings had been pulled. The undertaking was so brazen as to defy much conventional analysis, for there is little basis or reason to consider routine indicia of animus, disparate treatment, or even timing of the action. Singh's testimony, standing alone, establishes that Monfared, as a sufficiently experienced industrial relations official of Respondent, engaged in a course of behavior that coaxed a rank-and-file opportunist into manufacturing job-related incidents from which fault could claimedly be found with Marshall. Singh's description of how she and Monfared gleefully lauded progress of the tacit conspiracy, coupled with Monafred's telling remark that she wished also to "look good" after the discharge was achieved, leads automatically to a holding that unlawful motivation was at work within Respondent's management circles.

Beyond this, and separately, the "routine indicia" alluded to above are vividly admitting of belief that such discrimination was practiced. It must be inferred from substantial evidence considering the record of this case as a whole that the only reason for Respondent to rid itself of Marshall was because of her near-solitary role as a main union activist. If traditional evidence of animus is not shown, it must be presumed from the awareness present here and employer action taken, coupled with Respondent's pervading desire to avoid unionization.[15]

Thus, on a second theory, I also reach the compelling inference that Respondent's claim of Marshall having opened herself to disciplinary action is a totally rebutted pretext. It is not only true that Marshall did not engage in uttering obscenities during the kickoff crocheting incident, but Respondent had heard from coworker Daughtery, as an objective spectator, that criticism of Marshall would have no foundation. Thus, aside from the dubious nature of Fukuba's adverse notations about Marshall during April and May, the first written reprimand in June was a transparent sham. This assessment applies to all other factors conjured up by Respondent, for taking only the subject of a knife on Marshall's person the evidence is ample and uncontradicted that the rumor was unfounded (Tr. 249) and that pointed objects of lethal capacity were routinely present in the TWX room with management's knowledge (Tr. 303, 2288). Beyond this, Respondent's agents blew out of all proportion the routine instances of profane crosstalk which Marshall might have uttered, and exhibited a peculiar tendency to scandalize Marshall without good cause. The reality is that jealousies and backbiting have long existed in the TWX room, a condition that Williams was well aware of, that Fukuba faced initially to his surprise, and that by all normal standards would have spotlighted Singh's outrageous behavior in June for disciplinary action long before turning in any regard to Marshall. The latter point is of much significance because Singh's past with Respondent was spotted with well-justified disciplinary actions, while Marshall was respected as to abilities and carried near-unsullied record. The entire subject of perturbing Martin is but a free-floating commentary on human nature in a clash of values, but the notion that Marshall was demonstrably at fault, recognizing certain noncondonation as the General Counsel concedes to be in order, is unsupported by the facts and a mere afterthought in terms of personnel administration. It is true, as the General Counsel most vehemently contended throughout trial and in brief, that Monfared sufficiently conceded this point in her initial testimony as a Section 611 witness. From this, and given untrustworthiness that I attach to her testimony, I expressly label the shadings she later advanced, in an effort to associate Marshallk to wrongdoing that affected coworker Martin, as tactical fabrications developed in the face of a progressively damning configuration of facts. Respondent's action here also invokes the principle of assessing disparate treatment, for its handling of the fast-breaking, emotion-laden events of June shows a reckless disregard for fairness, that can only be explained by the presence of an obsessive desire to undermine Marshall's proven value as an employee and her balanced response to the despicable mischief suddenly mounted by Singh.

Regarding the sole allegation independently premised on Section 8(a)(1), I am not persuaded that Singh's testimony is a reliable indicator of any conversational exchange with Monfared in which impermissible interrogation of an employee's "activities, sympathies and desires" with respect to the Union occurred. This matter, raised by an amendment successfully made during trial, is based exclusively on Singh's recollection that during late June

[15] In this regard, I see no real significance to the remote remark of November 25, 1981, that may have been made by Barrett.

Monfared had queried her about whether a disassociation from the Union had occurred in the recommended manner of submitting an unequivocal letter of resignation. Singh flavored this with testimony about Monfared having, in that context, expressed distrust of Singh's known deviltry.

Implicit in the credibility resolution above is my strong belief that while Singh is generally truthful as to the intrigue now revealed, her accuracy falls off sharply concerning lesser unrelated details. There are numerous examples of this, among them direct self-contradiction on making the knife/gun remark (Tr. 371, 520), recalling the Cooley message as going to Poughkeepsie, New York (Tr. 360), whereas a clear consensus of other involved persons, Marshall included, gave Tarrytown as the destination, admitted error in having said that Fukuba heard obscenities spoken by Marshall during the crocheting incident (Tr. 871), and jumbling of simple chronology (Tr. 682). Conversely, while I believe that Monfared's denial of plain conspiratorial involvement is mendacious, she reconstructed many of her experiences with a satisfactory ring.[16] This might be expected, given the administrative nature of her position, an academic background, and seeming meticulousness of approach to the churning humanisms of her assigned overview. Her version of the subject is that Singh had been present in the cafeteria during a conversation in which Fukuba inquired about how employees might appropriately respond to the Union. Monfared placed this as possibly on June 8, and testified that she "assume[d]" the prospect of employees resigning from the Union then came up. She recalled the details only "vague[ly]," but doubted that Singh had directly inquired about the process.

On balance I am not persuaded that Monfared committed unlawful interrogation as alleged. On such collateral points Singh's memory is demonstrably faulty, and I note that here her own version includes a tie-in to how she had told Serna to taunt Fessenden on the subject. I suspect that petty annoyance, as was Singh's habit, is not accompanied by accurately detailed recall and, as part of overall demeanor evaluation, reject her testimony of having been interrogated by Monfared as only a muddled, unreliable memory in this particular respect. I therefore hold that the General Counsel has not satisfactorily supported this allegation of the amended complaint, and recommend its dismissal.

Accordingly, my ultimate conclusions of law are that Respondent, by issuing a written reprimand to Marshall followed by imposition of probation and a resultant discharge from employment,[17] has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section (2), (6), and (7) of the Act, but that it has not violated the Act in any respect other than as specifically so found.

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Signetics Corporation, Sunnyvale, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or in any other manner discriminating against employees because of their activities on behalf of The United Electrical, Radio & Machine Workers of America.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[19]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rachel Marshall immediate and full reinstatement to her former position of employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered due to the discrimination against her by paying what she would have earned, less net interim earnings, plus interest, in the manner provided in *F. W. Woolworth Co.*, 90 NLRB 289, and *Florida Steel Corp*, 231 NLRB 651 (1977).[20]

(b) Expunge from its files any reference to the written warning, probation, and discharge effected on June 8, 10, and 17, 1982, respectively, and notify her in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Sunnyvale, California facility[21] copies of the attached notice marked "Appendix." Copies of the

---

[16] A renowned principle of resolving conflicts in evidence was pronounced by Judge Learned Hand as, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

[17] For purposes of remedy Marshall's backpay entitlement is to be counted from June 14. While technically she was on suspended status for 3 days, her discharge from employment effectively commenced immediately after the Cooley incident. The General Counsel has not pleaded nor argued this distinction, and there is no reason to dwell on it beyond confirming June 17 as the date of discharge from employment for an unlawful, pretextual reason. The expunction remedy to be fashioned shall expressly be deemed applicable to any personnel documents of or related to the June 14–17 time span.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] I expressly decline to categorize the unfair labor practices here presented as involving a proclivity toward violating the Act, and thus fashion only a narrow recommended Order. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[20] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)

[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the Na-

Continued

notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended complaint be dismissed in all other respects.

---

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or in any other manner discriminate against employees because of their activities on behalf of The United Electrical, Radio & Machine Workers of America.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer Rachel Marshall immediate and full reinstatement to her former position of employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to Rachel Marshall's written warning, probation, and discharge effected on June 8, 10, and 17, 1982, respectively, and notify her in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for furture personnel actions against her.

SIGNETICS CORPORATION

Jenkins Index Company *and* Southern California Printing Specialties and Paper Products Union, Local 388, affiliated with the International Printing and Graphic Communications Union. Case 21–CA–21994

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 15 February 1984 Administrative Law Judge Earldean V. S. Robbins issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

The judge found that the Respondent laid off employees Celedon Armenta and Michael Negrete in violation of Section 8(a)(3) and (1) of the Act. We agree. The judge further found, however, that the General Counsel did not make a prima facie case in regard to the layoff of employee Ambrosio Contreras. We find merit to the General Counsel's exception and find that the Respondent acted unlawfully when it laid off Contreras.

According to the credited testimony, employees met with a union representative to discuss organizing on 29 January at Negrete's house. A few days prior to the meeting Contreras telephoned the Respondent's supervisor Jose Curiel to inquire if Curiel were attending the meeting. Curiel was unaware of the meeting and asked Contreras a series of questions, including the time and location of the meeting and whether Contreras had joined the Union or signed a union authorization card. In response to Contreras' affirmative answers to these final questions, Curiel said, "You're making a big mistake because if in the office they find you signing a card, they will fire you." Immediately following Contreras' layoff with eight other employees on 10 February, Curiel telephoned Contreras and told him, "I told you they'd [sic] get fire if you signed."

We find that the General Counsel has established a prima facie case of unlawful discrimination. We agree with the judge's analysis which imputes to the Respondent its supervisor's knowledge of Contreras' union activity and sentiments. While this knowledge is combined with the timing of the layoff so close to the organizing campaign and the Respondent's animus expressed by Curiel to Contreras, including a threat of discharge for signing a union authorization card, the General Counsel has met its burden.

We find that the Respondent has not established that it would have laid off Contreras in the absence of his union activity. The Respondent asserted that Contreras was selected for layoff because he operated only a vertical press, which it did not use very frequently, and because he had an absenteeism and tardiness problem. Both Contreras and his supervisor testified, however, that Contreras also operated two other presses. While the Respondent's vice president testified that Contreras had an attendance problem, the Respondent introduced only two written warnings, marked as "first offense," received by Contreras on 17 August 1981 and on 19 October 1982. The judge found that the Respondent did not contend that such a record was sufficient to justify discharge but rather was one factor in the decision. As it appears to be the only factor, we do not find that it rebuts the prima facie case made so directly by the General Counsel. In this regard we note that, although the Respondent's vice president Anderson testified that the Respondent obtained input from department heads on employees to be selected for layoff, Contreras' department head, Kamoto, testified he had no input into the layoffs and no one informed him beforehand of the layoffs. Accordingly, we find that the Respondent laid off employee Contreras in violation of Section 8(a)(3) and (1) of the Act and we shall modify the judge's order and notice to conform with our finding.

ORDER

The National Labor Relations Board adopts the recommended Order of the adminstrative law

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that the Respondent violated Sec. 8(a)(1) of the Act by interrogating, threatening, and creating the impression of surveillance of its employees. The Respondent has failed to state any grounds for an exception to these findings. Although citing in a numbered list to the page and line of the judge's conclusions of law on this issue, the Respondent makes no argument in its brief that the judge erred. Rather, the Respondent's brief focuses exclusively on the judge's findings concerning layoffs of employees. The Respondent concludes its brief by requesting only that the judge's decision be amended to dismiss the findings of an unlawful layoff. It thus appears that the Respondent has limited its exceptions to the 8(a)(3) issue. Accordingly, without passing on the analysis or cited authorities, we shall adopt the judge's findings that the Respondent violated Sec. 8(a)(1). Member Hunter adopts the judge's finding that the Respondent violated Sec. 8(a)(1) under all the circumstances but does not rely on those cases cited by the judge.

judge as modified below and orders that the Respondent, Jenkins Index Company, Montebello, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Offer to employees Celedon Armenta, Ambrosio Contreras, and Michael Negrete immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

"(b) Remove from its files any reference to the layoff of Celedon Armenta, Ambrosio Contreras, and Michael Negrete on 10 February 1983 and notify each of them in writing that this has been done and that evidence of their unlawful discharges will not be used against them in any way."

2. Substitute the attached notice for that of the adminsitrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT lay off or otherwise discriminate against any employees for supporting Southern California Printing Specialties and Paper Products Union, Local 388, affiliated with the International Printing and Graphic Communications Union, AFL–CIO or any other union.

WE WILL NOT coercively interrogate employees as to their union activities and support and the union activities and support of fellow employees.

WE WILL NOT create the impression that the union activities of employees are under surveillance.

WE WILL NOT threaten employees with discharge, plant closure, or other reprisals if they engage in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to employees Celedon Armenta, Ambrosio Contreras, and Michael Negrete immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the layoffs of Celedon Armenta, Ambrosio Contreras, and Michael Negrete on 10 February 1983, and notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

JENKINS INDEX COMPANY

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge. This matter was heard before me in Los Angeles, California, on October 27 and 28, 1983. The charge was filed by Southern California Printing Specialties and Paper Products Union, Local 388, affiliated with the International Printing and Graphic Communications Union, AFL–CIO (the Union) on February 17, 1983, and a copy thereof was served on Jenkins Index Company, Respondent, on February 18, 1983. The complaint which issued on July 26, 1983, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act. The basic issues are whether Respondent discharged or laid off employee Celedon Armenta, Michael Negrete, and Ambrosio Contreras because they engaged in union or other protected concerted activities, and whether Respondent unlawfully interrogated and threatened employees and created the impression that the union activities of their employees were under surveillance.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

[1] The General Counsel's unopposed motion to correct the official transcript of the proceedings is granted.

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent, a California corporation, with a facility located in Montebello, California, has been engaged in the manufacture of paper folders and binders. Respondent, in the course and conduct of said business operation, annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California.

The complaint alleges, Respondent admits, and I find that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent is a job shop engaged in the production of paper folders and binders. In February 1983, it had 40 to 50 production employees and about 9 production department heads, including Jose Curiel, an admitted supervisor, who is head of the cutting and tabbing department, and Kenneth Kamoto, head of the printing department. Jerry Biggins was vice president and general manager, Gene Nicool was vice president of administration, James A. Anderson was vice president of operations, Marvin Berman was plant foreman, Virginia Califano was personnel manager, and Bob Frantz did purchasing and preparation of samples for the production and sales department.

In October 1982, Respondent laid off about five employees. According to Anderson, these layoffs were for financial reasons and were not by seniority. Rather, Respondent basically laid off higher paid employees.

In November certain of Respondent's employees discussed the desirability of obtaining union representation and Armenta contacted the Union in this regard. Thereafter, in November, union representatives Dennis Hayden and Jeff (last name unknown) visited Armenta in his home, gave him union authorization cards to be distributed to employees for their signatures, and cautioned him that signatures on the card should be solicited only during nonworking time. From November until February, but principally from the latter part of December to mid-January, Armenta and Negrete distributed between 20 and 25 union authorization cards to fellow employees. Insofar as they know, no supervisor observed them doing this. By mid-January more than 50 percent of the approximately 45 production employees had signed union authorization cards. Armenta signed a card on January 10, 1983,[2] and Contreras and Negrete signed cards on January 18. Armenta then called Hayden and arranged for Hayden to meet with some of the employees at Mike Negrete's home on January 29.

Contreras testified that he and Curiel are friends and that in the third week of January he telephoned Curiel and inquired if he was going to the meeting. Curiel asked, "What meeting?" When Contreras explained that he was referring to the union meeting, Curiel said, "I don't know anything about it." Contreras said, "I made a mistake." Curiel asked why, and Contreras explained that he thought Curiel knew about it. Curiel said, "I don't know," and asked where the meeting would be. When Contreras said it would be at Mike Negrete's house, Curiel asked when. Contreras said, "Next Saturday." Curiel then asked, "Are you in the Union?" Contreras said, "Yes." Curiel then said, "Oh, you're making a big mistake because the office, they don't want anything to do with the Union." Curiel then asked, "Did you sign already that card for the Union?" Contreras said, "Yes." Curiel said, "You're making a big mistake because if in the office they find you signing the card, they will fire you because they don't want anything with the Union. The Union is not good because they take only 20,000 a year as employees. And if somebody comes from the Union to Jenkins, they will close the door. They don't want anything. And if they come, they will close down all the plant. They will send out the jobs to Universal."[3] Contreras asked who told Curiel this; and Curiel said, "Bob Frantz explained everything to me about what they are going to do if the Union comes. They don't want anything to do with the Union. They were going to close the plant and send the jobs out to another company and if they find you signing already that card from the Union, you are going to get fired." Curiel then said, "This is a secret between you and me. Bob Frantz told me."

The meeting was held as scheduled on Saturday, January 29, at Negrete's home. From 10 to 12 employees attended including Armenta and Negrete. Hayden and another union representative were also present. Contreras did not attend.

Armenta testified that around 6:15 on Monday morning, January 31, shortly after he reported to work, Curiel asked him, "How was the meeting Saturday?" When Armenta did not reply, Curiel said, "Sal, I know all about it. You guys had that meeting down at Mike Negrete's house. For having those kind of meetings you can get into a lot of trouble." Armenta said, "Those meetings are not secret, the next time we have one you are welcome to attend." Curiel said, "Well, by the way how many employees showed up to that meeting." When Armenta made no reply, Curiel laughed and returned to his work area.

On January 31, Biggins had a meeting of employees at which he announced a freeze on wages. He further said that they did not know how long it would continue but the freeze would stop any further layoffs. That evening, Negrete and his girl friend had a social engagement with

[2] Unless otherwise indicated, all dates herein will be in 1983.

[3] Universal Paper Products and Respondent are both owned by Office Products Corporation, a holding company.

Curiel and his wife. According to Negrete, during the course of the evening he mentioned the adverse effect the wage freeze would have on him and said what the employees needed was a union. Curiel responded, "I know what you guys are up to. You guys are making a big mistake," and further said that all unions were "fucked up." Negrete said that a union was as good as "you make it." Curiel said that employees had previously tried to get a union in and the Company had said then that they were going to close down the plant. Curiel further said they would do it again, that before they would go union, they would close the plant. Negrete said there had been a meeting with union representatives and employees at his house and it was illegal for the Company to close the plant when the employees were trying to unionize it.

Negrete further testified that he said Universal had tried to get a union and, from what he understood, the union lost there by only a couple of percentage points, and that the employees had to stick together. Curiel said the employees were just making a big mistake by doing that. Curiel also said he knew who was behind this. Negrete asked who and Curiel replied, "Sal Armenta." Negrete then said, "I'm one of the main people involved too, because I believe I am going to benefit the most of it." Curiel asked if Lupe Rubio and Esther Barrios had signed a card for the Union.[4] Negrete said he did not know. Curiel said he had told Rubio she should not go for the Union, that she was just asking for trouble if she did. Negrete asked why Curiel did not want a union. Curiel said the Company would change a lot of things if the employees were represented by a union. He said his job was good and, if he lost it, it would be difficult for him to find another job that paid as well. Curiel further said if Negrete wanted the Union that was his business, but he did not want anything to do with it. Curiel then concluded the discussion by saying that they were friends and the conversation would end right there and nothing else would be said about it.

Employee Carlos Ortado testified that on February 10 Curiel approached him at his work station, told him to turn off his machine and go to the warehouse. When Curiel and Ortado were in the warehouse, Curiel told Ortado that the guys who were going to start up the Union, Sal and Mike, would be fired that day. Ortado asked how he knew and Curiel said that Bob Frantz had told him. Ortado said he felt this was going to happen. Curiel said he felt bad about it.

On that same day, eight or nine employees were laid off, including Armenta, Negrete, and Contreras. Negrete testified that he first learned of his layoff about 5 minutes before the end of his shift when he opened his paycheck and found a notice headed, "Employee Termination Record," which indicated that he was laid off. The reason checked was "lack of work—indefinite." According to Negrete, he immediately asked Kamoto if he knew about his layoff. Kamoto said yes, he had just found out about it and he was surprised that Negrete was one of those laid off. Kamoto further said that he had just talked to Berman because he had some questions about Negrete being laid off and that Berman told him that it was management's doing, that they were the ones that selected Negrete for layoff and that even he did not have any say about it.

On the following day, when Negrete returned to the plant to pick up his belongings, he asked Berman if he had prior knowledge of Negrete's layoff. Berman said that he had just found out the day of the layoff, that he did not have anything to do with it and it was all management's doing. Berman further said he could not sleep that night because of all of the people who had been laid off, that Respondent expected him to get production out, but they were getting rid of his employees. Berman said he was going to try to get Negrete's job back for him. Negrete said the only way he was going to get his job back was through the agency because Jenkins did all its hiring through a temporary agency. Negrete then asked why he was laid off for lack of work when everything was picking up. Berman said he brought that up to management and they said it was dollars and cents, that Negrete was making too much money from the Company.

Contreras testified that Califano also gave him his paycheck on February 10, and that it contained a termination notice that he was laid off for "lack of work—indefinite." He showed the notice to Kamoto and said he did not understand. Kamoto said, "Today is the last day." Contreras asked why. Kamoto said, "I just knew about this a few minutes ago and I'm sorry." Contreras said he had more experience and more seniority than other employees. Kamoto said he did not know anything about it.

Contreras further testified that Curiel telephoned him about 2 hours later at his home and said, "I told you they'd get fired if you signed," and asked what Contreras was going to do. Contreras said he was going to collect from unemployment.

Armenta's paycheck, which he did not open until after he got home, also contained an unexpected termination notice stating that he was laid off indefinitely. According to Armenta, he immediately telephoned Berman, told him he had just seen the termination notice, and asked why he had not been told that he was being laid off. Berman said he did not know anything about it. Armenta asked why he was being terminated. Berman said he did not know anything about it, that there was nothing he could do. On the following day when Armenta returned to the plant to pick up his tools, he asked Berman, who was at the compressor, if the compressor was broken. Berman said no, he was teaching Ted Dazies how to maintain the compressors. He further said he was so upset he couldn't sleep last night because of what management had done by terminating his best employees." Berman said he had a meeting with management that morning and he was going to try to get Armenta's job back.

Armenta further testified that, on the following Monday when he returned to the plant to get reimbursement for a mileage claim, Berman said he was glad Armenta had come in, that he was having a lot of trouble in maintenance with all of the requisitions, that he did not know where they stood and that Ted did not know

[4] According to Negrete, Curiel, Rubio, and Barrios are good friends.

anything about it, and asked Armenta if he would help him. Armenta did help him to sort out what parts had been ordered and what parts to pick up. Berman then told him he had the meeting with management and tried to get Armenta his job back, but that management was "real mad and upset." Berman said he told management that Armenta was the best mechanic and that his production was going to drop because of letting his best people go. Berman said management told him they knew what they were doing, that they were running the plant, not Berman. Berman said, "My best people are gone, my best mechanic is gone, what am I supposed to do," and he said management was real mad and upset but did not say why they were. Berman said he was told by management that they were running the plant and knew what they were doing, and that he was further told if he needed any help to get Rudy from Universal Paper to repair the machines.[5]

B. *Respondent's Defense*

Respondent adduced no testimony in contradiction of the testimony of employee witnesses as to statements made by Curiel. However, Respondent did adduce testimony with regard to the layoffs. James Anderson, Respondent's vice president of operations, testified that the February 10 layoffs, as well as the earlier layoffs in October, were financially motivated. In both instances, the layoffs were not by seniority. Rather, according to Anderson, they laid off the higher paid employees. For the fiscal year ending June 30, Respondent had a loss of a quarter of a million dollars and, as of the time of the hearing herein, had lost $112,000 for the current fiscal year. As part of Respondent's economic retrenchment, within the 6 weeks prior to the hearing, Respondent terminated its vice president and general manager, its vice president of administration, its personnel manager, and its plant foreman. At the time of the hearing, their various functions were being performed either by other management personnel at Jenkins or by management personnel from Universal and OPC, who continued on the payroll of Universal and OPC while working for Jenkins. Anderson further testified that the selection of persons to be laid off on February 10 was made by him and Biggins. Virginia Califano was also present at the meeting where the decisions were made. According to Anderson, they had input from department heads. However, he does not recall whether the department heads actually attended the meeting or whether they were contacted individually at the plant.

1. Celedon Armenta

Armenta commenced working for Respondent in April 1980. As a maintenance mechanic, his duties were to repair and maintain all of Respondent's machinery. There was only one other maintenance mechanic in Respondent's employ, Ted Dazies, who had been employed about a year and had been trained by Armenta. The only other person who worked in maintenance was a trainee who had been in Respondent's employ about 6 months. Of the three, Armenta was the highest paid employee and was the only one who worked throughout the plant on all the machinery.

Anderson testified that during the meeting when he and Biggins were making the determination as to whom to lay off, they discussed the maintenance department. At that time they had three people in maintenance and Armenta was receiving the highest wages of the three, so the determination was made to lay him off. Since Armento left Respondent's employ, Respondent has used an outside contractor and employees from Universal Paper to do the work previously performed by him. Anderson testified that since Armenta left, Respondent's maintenance cost has decreased. However, he also testified that work previously performed by Armenta was done by an outside contractor and an employee from Universal. This employee is paid at time and a half the rate he is paid at Universal. The outside contractor is paid in the range of $30 an hour.

Anderson testified that the rationale for the selection of Armenta was his wage rate and the fact that he could be replaced by the other two employees in maintenance and, if required, help could be received on a part-time basis from Universal. However, no documentation was introduced into evidence to corroborate Anderson's testimony that maintenance cost in fact decreased after Armenta left. Armenta testified that no one asked him if he would take a cut in pay in order to keep his job.

2. Michael Negrete

Michael Negrete, whose employment commenced in November 1978, worked in the printing department which is staffed by about 12 employees and is divided into the letterpress and the offset areas. Except for a short period of time, he has worked principally in letterpress. At the time of his layoff, he was assistant printing department head with responsibilities in the letterpress department. As such, if other pressmen needed assistance, he would assist them if he could and would check the quality of some of the work coming off the press.

Negrete testified, without contradiction, that at the time he was made assistant department head, Berman told him the printing department was going to grow and they were going to start thinking about a printing night shift which would start in January 1983. He told Negrete that being night shift supervisor would be more money for him but would also mean more responsibility, he asked if he wanted the position and who he thought should be on the night shift. Negrete named some employees he would like to have on the night shift. Both Berman and Kamoto told Negrete they wanted the night shift to be a strong shift. However, about the last week in December, Berman told Negrete that he did not think they were going to start the night shift in the beginning of January as planned, but that they were going to have a night shift and would just have to take it day by day and maybe towards the end of January the night shift could be started. Berman said Respondent had enough work at the moment but in order to start a new night

[5] According to Armenta, Universal Paper does similar work to that done by Jenkins; sometimes Rudy would help him repair some of the Jenkins machines and sometime Armenta would go over to Universal and help Rudy repair some of the Universal machines.

shift they would have to have about six to eight more people and there was not enough work to start a whole new shift. Annette Williamson, Berman's secretary, was present during this conversation. However, neither Williamson nor Berman testified.

Anderson testified that, in making the selection of employees to be laid off, Negrete was discussed. Specifically, they discussed that when Negrete was running the department when Kamoto was absent one day, they had a couple of problems. Also they tried him on the Solna, a large two-color offset press which is the most difficult press to operate at Respondent's facility, but Negrete could not operate the Solna, so they had to move him back to the press that he had been running. Negrete was unhappy about that and Biggins and Anderson felt that he was not going to be happy being moved back so they decided to let him go.

However, Kamoto testified that about a year prior to Negrete's layoff they had started to train him on the Solna press and that he worked full time on the Solna for about a month. Negrete testified that he started operating the Solna in November 1982 and ran it every time there was a job for the Solna, which was about half of the time. According to Kamoto, Negrete was removed from the Solna because they thought they had mechanical problems with the press and needed someone with more experience.[6] Later, prior to Negrete's layoff, they discovered that the poor quality they were experiencing in the product was caused by a chemical problem with the ink and the solution.

In February, Respondent placed an ad in the paper for a Solna operator and, as a result of that ad, hired James Hill after Negrete's layoff. Kamoto testified that he considered Negrete as a good worker in the letterpress department and that he was not working on the Solna at the time of his layoff.

Anderson testified that Negrete was not selected for layoff because he could not operate the Solna but because it was felt his attitude would be bad as a result of his demotion. When asked specifically what he observed about Negrete's attitude after he was taken off the Solna, Anderson testified as to an incident when he entered the production area and heard Negrete tell one of the other pressmen something to the effect that if he did not receive a raise that day he was going to tell them what to do with it. Negrete then turned around, saw Anderson, appeared to be embarrassed and that was the end of it.

Anderson testified that offset presses were becoming more important to Respondent and he and Biggins just felt that since Negrete could not run the Solna, he could not be the assistant department head and thus had no opportunities for advancement. He was young and bright and they just felt he would be frustrated. Anderson admits, however, that Negrete was only assistant department head in the letterpress area and that he does not recall whether he was removed from that position. According to Anderson, when Negrete was reassigned to the letterpress, he did not have the same dedication. He was wandering around more and had more conversations with employees in other departments when he should have been tending the press.

Kamoto testified that Negrete was a trainee on the Solna and his production was slow on that press, but admits that he never gave Negrete a warning for his production on the Solna or for his attitude and that after Negrete was removed from the Solna machine he did not notice any negative change in his attitude at work. Further, Negrete was never removed from his position as Kamoto's assistant.

At the time of his layoff, Negrete was making $8.10 an hour and was the highest paid person in the department, other than Kamoto. Negrete was receiving training in printing at Los Angeles Trade Technical School at night. His superiors at Respondent were aware of this and encouraged him to continue. Negrete testified that, on February 10, the work load was increasing and they were working a full 40-hour, 4-day week. In addition to running the letterpress machines, Negrete also ran the Harris offset machine on occasion which in terms of difficulty is the second or third most difficult machine in the department.

Negrete testified that prior to his layoff he did hear from some supervisor, a member of management, that the Company was going to hire a Solna operator. He also testified, without contradiction, that he was not actually told he was being transferred from the Solna press. Rather, he was told they wanted him to watch employee Earl Luevano closer because he was having a lot of problems at the time and he, Negrete, was not going to be spending that much time on the Solna. This was within a couple of weeks prior to February 10. Negrete further testified that he continued to work on the Solna off and on up to the time of his layoff. He does not recall whether he worked on that press on his last day of work, but he testified, again without contradiction, that he did work on the Solna within his last week of employment. He denies ever stating in the production area that if Respondent did not give him a raise he would quit or take some action against the Company, or making a statement in the production area indicating hostility for some management action; nor did anyone in management ever tell him that his attitude was improper.

3. Ambrosio Contreras

Contreras began work for Respondent in October 1980 as a pressman in the letterpress area of the printing department. At the time of his layoff he was paid $7.20 an hour.

Anderson testified that in reaching a determination as to who should be laid off, they considered Contreras' absenteeism and tardiness and the fact that he ran the vertical press, which was not used all the time; and decided they could do without him because it was not one of the presses that ran continually. They also discussed another person in the printing department, Earl Luevano. The reason Contreras was selected instead of Luevano was probably because Luevano ran the big presses and Contreras ran the vertical, a small press which was not used that much. The other operators in the printing depart-

[6] The General Counsel does not contend that the transfer of Negrete from the Solna press back to the letterpress was unlawful.

ment, according to Anderson, were offset pressmen, all of whom were busy and had good production.

Kamoto testified that Contreras operated the vertical press and also two other presses. He further testified that he had no input into the layoffs, that no one told him beforehand that layoffs were going to take place and he was not asked whom he would select to be laid off. He also testified that the same was true as to the October and November layoffs. Kamoto further testified that Contreras had an attendance problem and that, although he does not recall issuing a warning to Contreras for his absences or tardiness, he does recall bringing it to his attention. He admits that some of Contreras' absences were excused. He also testified that he does not recall if other employees in the department also had attendance problems although other employees admittedly had absences. According to him, absenteeism was not a consistent problem for most of the employees in the department.

C. *Conclusions*

1. The alleged unlawful statements and interrogations

All the alleged statements and interrogations were by Curiel, an admitted supervisor.[7] I credit Contreras, Armenta, Negrete, and Ortado as to these undenied statements.[8] They impressed me as honest, reliable witnesses who were endeavoring to tell the truth. Further, their testimony tends to be mutually corroborative. Thus, although they testified as to separate conversations, their accounts of their conversations with Curiel contain a similar thread of warning by Curiel that there would be reprisals from Respondent because of their union activities.

I find unlawful Curiel's interrogation of Contreras as to where the union meeting would be, whether Contreras was in the Union and whether he had signed a union authorization card; his interrogation of Armenta as to how many employees attended the union meeting; and his interrogation of Negrete as to whether Rubio and Barrios had signed union authorization cards. Interrogation of this nature is inherently coercive and is therefore violative of Section 8(a)(1) of the Act. *Quartrol Corp.*, 266 NLRB 120 (1983); *Fruehauf Corp.*, 237 NLRB 399 (1978); *General Electric Co.*, 264 NLRB 953 (1982); *Knogo Corp.*, 262 NLRB 1346 (1982); *Washington Beef Producers*, 264 NLRB 1163 (1982); *Airborne Freight Corp.*, 263 NLRB 1376 (1982); *United Sanitation Services*, 262 NLRB 1369 (1982); *Marion Rohr Corp.*, 261 NLRB 971 (1982); *Metropolitan Life Insurance Co.*, 256 NLRB 626, 629 (1981). It is immaterial that Curiel is a friend of Contreras and Negrete and that the interrogation of Negrete occurred in a social setting. *Quemetco, Inc.*, 223 NLRB 470 (1976).

I further find violative of Section 8(a)(1) of the Act Curiel's threat to Contreras that he would be fired if the office learned he had signed a union authorization card and that Respondent would close its plant if the employees were represented by a union; to Armenta and Negrete that employees could get into a lot of trouble for attending union meetings and otherwise supporting the Union; and to Negrete that the employees were making a big mistake by seeking to obtain union representation. Such statements constitute clear threats of reprisal for engaging in union activities. *Marion Rohr Corp.*, supra; *Donnelly Mfg. Co.*, 265 NLRB 1711 (1982); *Cumberland Farms Dairy*, 258 NLRB 900, 905 (1981); *Han-Dee Pak, Inc.*, 249 NLRB 725, 727, 729 (1980). It is immaterial that Curiel is a friend of Negrete and Contreras. The Board has held that the "impact of such statements, coming from a 'friend' who is part of management, is probably greater in view of the authenticity and credibility of the source." *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977); *Stewart-Warner Corp.*, 253 NLRB 136 (1980).

I also find that Curiel's statement to Armenta that he knew all about the meeting, and to Negrete that he was aware of what the employees were up to and knew who was behind the union organizing, created the impression of surveillance of the employees' union activities and is violative of Section 8(a)(1) of the Act. *Dutch Boy, Inc.*, 262 NLRB 4 (1982); *Ace Machine Co.*, 249 NLRB 623, 629 (1980).

I further find that Respondent violated Section 8(a)(1) of the Act by Curiel's statement to Ortado that the employees involved in the union organizing—Negrete and Armenta—were going to be fired. Such a statement conveys the impression that they were being discharged because they engaged in union activities. I also find, in view of his earlier statements to Contreras, that Curiel's statement shortly after the layoff reminding Contreras that he had told him "they'd get fired if you signed," conveyed the same impression and is also violative of Section 8(a)(1) of the Act. *Sumco Mfg. Co.*, 251 NLRB 427, 434 (1980).

2. The layoff

The General Counsel argues that the layoffs of Armenta, Negrete, and Contreras were unlawful in view of (1) the extensive union activities engaged in by Armenta, Negrete, and to a lesser degree Contreras; (2) considerable animosity on the part of Respondent toward union activities engaged in by Armenta, Negrete, and to a lesser degree Contreras; (3) considerable animosity on the part of Respondent toward union activities as exemplified by Curiel's conduct; (4) lack of any valid reason for the selection of these employees for layoff,; and (5) the layoffs of these particular employees in circumstances which show the purported reasons for their selection to be spurious. Respondent argues that it had no knowledge that these employees were engaged in union activities and asserts that it had legitimate business justification both for the decision to lay off employees on February 10 and for the selection of Armenta, Negrete, and Contreras.

[7] In its answer, Respondent did not specifically deny the complaint allegation that Curiel is a supervisor within the meaning of the Act. Accordingly, under Sec. 102.20 of the Board's Rules and Regulations, that allegation is deemed to be admitted. Further, the record establishes that Curiel possesses and exercises indicia of supervisory authority.

[8] Although Curiel testified on Respondent's behalf, he was not questioned in this regard.

The record is clear that Curiel had knowledge both of the union activity in general and of Armenta's and Negrete's leadership roles therein. Although he denies telling anyone in management that Negrete and Contreras signed union authorization cards, he does not make the same denial as to Armenta or the union organizational campaign in general, nor does he deny making statements to Contreras and Ortado which indicated that he felt the Union was a threat to his own job security and that he had discussed the union activities with Frantz. Further, Respondent's facility is a small plant with about 45 production employees and Armenta and Negrete distributed union authorization cards at Respondent's facility during the lunch break. In the circumstances, I find that knowledge of the union activities and the leadership role of Negrete and Armenta therein can be imputed to Respondent.

Anderson testified that Respondent had been losing money and the layoffs were economically motivated in an attempt to cut costs. Although arguing that this economic defense is suspect, the General Counsel's case essentially rests on the contention that the selection of Negrete, Armenta, and Contreras was unlawfully discriminatory. I conclude that the record supports this contention as to Armenta and Negrete.

Respondent had announced on January 31 that the wage freeze put into effect on that day would obviate the necessity for further layoffs. At the very least, this would seem to indicate that Respondent planned to avoid a layoff, if possible. Further, the work load was beginning to increase; yet, within 10 days it laid off two of its key employees. Armenta was Respondent's only mechanic skilled enough to work on machinery throughout the plant. Negrete was assistant department head and was being groomed for a position as supervisor.

The justification for their selection is not persuasive. Anderson testified that maintenance costs decreased after Armenta was laid off. However, no documentary evidence was introduced to corroborate this testimony. Further, the record indicates that the spread between Armenta's wage rate and that of the other mechanic was less than $2 an hour, that the other mechanic was not skilled enough to replace Armenta, and that the employee brought in from Universal received premium pay for his work for Respondent and the outside contractor utilized for some of the work previously done by Armenta was paid more than triple Armenta's wage rate. These circumstances raise questions as to the accuracy of Anderson's testimony regarding the cost savings involved and I find that Respondent's failure to offer supporting documentary evidence gives rise to an inference that Respondent's records would not support this assertion.

Further, the claim that Armenta was selected because of his relatively high wage rate is belied by Respondent's other selections. Thus, except for Negrete, Armenta, and Contreras, the employees laid off on February 10 had little seniority and were paid in the range of $3.80 to $4.10 an hour. Their selection is inconsistent with the position that Respondent was trying to rid itself of employees who had achieved relatively high wage rates.

As to Negrete, Anderson testified that he was selected for layoff because there were "a couple of problems" when he substituted for Kamoto 1 day as acting department head; he could not be assistant department head because he could not operate the Solna press and thus had no opportunity for advancement—potential for frustration—and his attitude deteriorated after he was removed from the Solna. However, the record establishes that Negrete's responsibilities as assistant department head were confined to the letterpress area and Kamoto testified that he was competent in that area, had not been removed from his position as assistant department head, and had not exhibited any negative change in attitude.

Upon a consideration of the evidence set forth above, I find that the reasons asserted by Anderson for the selection of Armenta and Negrete for layoff are pretextual. In all the circumstances, including Armenta's and Negrete's roles as leaders in the union organizational campaign, the timing of the layoffs, the animus expressed by Curiel, Curiel's statement to Ortado that the union leaders, Sal and Mike, would be fired that day, Berman's statement that he could not get Armenta reinstated because management was "real mad and upset," and the pretextual nature of the reasons asserted by Respondent for their selection, I find that the General Counsel has established a prima facie case that Armenta and Negrete were selected for layoff because of their activities on behalf of the Union, and that Respondent has failed to demonstrate that they would have been laid off even in the absence of such protected activity. Accordingly, I find that they were laid off in violation of Section 8(a)(3) and (1) of the Act.

As to Contreras, the record does not establish that he engaged in any union activities different in kind from those of a number of other employees. The General Counsel argues, however, that this is immaterial since he was told by Curiel that his discharge stemmed from engaging in union activities. I do not agree. In this regard, I note that, while perhaps suspicious, the record fails to establish that Respondent did not have a legitimate motivation for a layoff of some size on February 10. Thus, the only issue as to Contreras is whether his selection for layoff was unlawfully motivated.

It is undisputed that Contreras received a written warning for excessive tardiness on October 19. Respondent does not contend that this was sufficient for a discharge for cause but, rather, that it was a factor which influenced his selection. Thus the fact that he was not laid off, or terminated, earlier or that this was merely a first warning in a progressive warning system is not indicia of unlawful motivation. Nor does the record establish that his selection was so unreasonable as to support an inference of unlawful motivation.

I therefore cannot conclude that Curiel's statement is sufficient to establish unlawful motivation. In this regard, I note that Curiel did not participate in the layoff decision nor was he Contreras' supervisor. Thus it cannot be inferred that he would have had knowledge of the absence of legitimate reasons for Contreras' selection, an inference which would lend credence to his assertion of unlawful reasons. I also note that when he told Ortado that the layoffs would take place, he specifically identified Armenta and Negrete as the union leaders who

would be laid off and made no mention of Contreras. I therefore conclude that the record does not establish that his statement represented anything more than conjecture on his part.

In these circumstances, I find that the General Counsel has failed to establish that Respondent was motivated by unlawful considerations when it laid off Contreras. Accordingly, I find that, by such conduct, Respondent did not violate Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully laying off employees Celedon Armenta and Michael Negrete because they engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection, Respondent has committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. By coercively interrogating employees concerning their union membership, activities, and sympathy, and the union membership, activities, and sympathies of fellow employees, by creating the impression that the union activities of employees were under surveillance by Respondent, by threatening employees with plant closure and other reprisals because of their union activities, and by threatening employees with discharge in order to discourage employees from engaging in union or other protected concerted activities, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated Section 8(a)(1) and (3) of the Act by laying off Ambrosio Contreras.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

Having found that Respondent unlawfully laid off Celedon Armenta and Michael Negrete, I shall recommend that Respondent be ordered to offer each of them immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss of earnings suffered by reason of the discrimination against him, plus interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[9]

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Jenkins Index Company, Montebello, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against employees because of their union and other protected concerted activity.

(b) Coercively interrogating employees as to their union activities and sympathies and the union activities and sympathies of fellow employees.

(c) Creating the impression that the union activities of employees are under surveillance.

(d) Threatening employees with discharge, plant closure, or other reprisals if they engage in union or other protected concerted activity.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employee Celedon Armenta and Michael Negrete immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss of earnings he may have suffered by reason of the discrimination against him, plus interest.

(b) Remove from its files any reference to the layoff of Celedon Armenta and Michael Negrete on February 10, 1983, and notify each of them in writing that this has been done and that evidence of their unlawful discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Montebello, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges that the layoff of Ambrosio Contreras was violative of Section 8(a)(1) and (3) of the Act.

Waco, Inc. *and* United Steelworkers of America, AFL–CIO–CLC *and* David L. White. Cases 5–CA–12951 and 5–CA–3122

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 21 December 1981 and 20 December 1982 Administrative Law Judge William A. Gershuny issued the attached decision and supplemental decision, respectively. The General Counsel filed exceptions and supporting briefs to both the decision and the supplemental decision, and the Respondent filed briefs in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge dismissed the General Counsel's complaint in its entirety. While we affirm certain of those dismissals, we reverse others and, in one instance, we affirm the dismissal on grounds different from those set out by the judge.

1. The judge found, and we agree, that the Respondent lawfully discharged employee David White when he returned from an extended absence and failed to provide the doctor's excuse required by the Respondent's rules. We also agree that the Respondent did not violate the Act when it earlier photographed White wearing a large cardboard prounion sign on his person while working at his machine, since the dangerous nature of White's conduct rendered it unprotected and the Respondent was entitled to document the event. Additionally, we agree, based on the judge's credibility resolutions, that the Respondent did not promulgate an unlawful no-solicitation/no-distribution rule, or threaten employees with discharge for participating in union activities.

2. The judge further found that the Respondent did not violate Section 8(a)(1) of the Act when it discharged nine employees who refused to begin work on the morning of 9 January 1981.[2] For the reasons set forth below, we agree that this conduct of the Respondent was lawful.

As more fully set forth by the judge, the nine employees in question arrived at work shortly before 7 a.m. on 9 January and found that certain other employees (not involved in this proceeding) had either been discharged or had quit under purportedly unjust circumstances. The nine employees gathered in the lunchroom and demanded that Faris, the manager of the fabrication department in which they worked, meet there with them as a group. The employees never stated a specific grievance or formulated any demands other than to have Faris meet with them in the lunchroom.

As the judge found, although the Respondent was aware that the employees' concerns were probably work-related, Faris refused their demand for a mass meeting in the lunchroom. Faris came to the lunchroom about 7:45 a.m. and told the employees that he would meet with any of them individually in his office but would not participate in a mass meeting. None of the protesters agreed to this agreement. Instead, they remained in the lunchroom until they were presented with their paychecks and were discharged between 10:30 and 11 a.m. when they refused to work or leave the premises.

In dismissing the allegation that the discharge of these employees violated the Act, we note that, although employees who are unrepresented and are working without an established grievance procedure have a right to engage in spontaneous concerted protests concerning their working conditions, the precise contours within which such activity is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed. In the instant case, the employees remained in the lunchroom for a period of at least 3-1/2 hours, most of which came after Faris had told them that he would not meet with them as a group and that they must choose either to get up and go back to work, in which case he would meet with them individually, or to punch out and leave the premises. In our view, by the time these employees were discharged, late in the morning, they had overstepped the boundary of a protected, spontaneous work stoppage, and were occupying the facility in a manner which was unprotected. The Respondent's decision to terminate them was not made precipitously, and the employees had had ample time to consider the Respondent's demand that they choose between working and carrying on their protest off the Respondent's

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates herein are in 1981 unless otherwise noted.

premises. The employees gave no indication that they intended to accept either alternative, and, in fact, the employees' testimony indicates that they had no plan to give up their occupation of the Respondent's lunchroom. Neither did they communicate to the Respondent the particulars of their grievances so as to facilitate a discussion or possible resolution of their concerns. In these circumstances, we find that the discharge of these nine employees was not unlawful.[3]

3. Five days after the lunchroom protest, picketing at or near the entrance to the Respondent's premises commenced. Between 14 and 16 January, picketers carried signs listing a litany of grievances against the Respondent. The picketers consisted of five of the lunchroom protesters and two former employees previously terminated for reasons unknown. On the second day of the picketing, Fabrication Department Manager Faris took an unknown number of photographs of the picketers. The Respondent's asserted justification for the photographing is that it wanted "to find out what was on the signs and take pictures of them."

The Respondent does not contend that these pickets either engaged in, or gave the appearance that they might engage in, any form of picket line misconduct, or that their presence interfered with ingress or egress at the plant entrance or that they caused any traffic disturbance. Yet, besides photographing, the Respondent had police observe the picketing. The pickets were never asked to move, although Faris asked them if they were represented, and, if so, by whom.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Faris photographed this picketing activity. The judge dismissed the allegation on the grounds that the Respondent's conduct was "noncoercive, nonthreatening, and unaccompanied by other unlawful activity" on the Respondent's part. The judge offered no explanations why this conduct was "noncoercive and nonthreatening." We disagree with his dismissal of this allegation.

It has long been held that "[i]n the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate."[4] Photographing lawful, peaceful picketing tends to implant fear of future reprisals.[5]

In the particular circumstances of this case, we are convinced that the Respondent's conduct reasonably tended to restrain the employees from engaging in what was undisputedly protected concerted activity. The Respondent had no reasonable basis for anticipating picket line misconduct, since, both on the day of the lunchroom protesters' discharge and at all times during this picketing, the employees were orderly and peaceful. Such photographing by their former supervisor reasonably tended to coerce and restrain the picketers by "creating a fear among them that the record of their concerted activities might be used for some future reprisals,"[6] e.g., a refusal to consider them for rehire or a possible "blackball" of them with other employers. Unlike the situation in *U.S. Steel*,[7] the picketers did not seek their own media coverage nor did the Respondent have a history of photographing picketing unaccompanied by employee reprisals. Photographing the picketing employees could reasonably tend to coerce them not to take further protected concerted action to voice their grievances concerning events at the Respondent's plant. Accordingly, we find that, by photographing the picketers,[8] the Respondent violated Section 8(a)(1) of the Act.

4. The complaint also alleges that the Respondent violated Section 8(a)(1) by admonishing employees not to discuss their wages among themselves. The judge noted that it was undisputed that Faris and other supervisors engaged in such conduct, but he found, on the basis of his credibility resolutions, that the Respondent had made no threats to discharge or discipline employees for

[3] Cases relied on by the General Counsel are distinguishable. In *GF Business Equipment*, 215 NLRB 872 (1974), enfd. 529 F.2d 201 (8th Cir. 1975), the employees, during their first work stoppage, made known to the company, prior to stopping work, the specific complaints which gave rise to their protest. While the company gave the employees the choice of returning to work or punching out, they were also told that, if they punched out, they might be subject to discipline. We note the work stoppage there lasted no more than 1 hour. During the second work stoppage, the employees were again told to work or punch out but, if they punched out, they were again told they might be subject to discipline. Also, the second stoppage lasted only 15 minutes before a number of employees were discharged. In *Pepsi-Cola Bottling Co. of Miami*, 186 NLRB 477 (1970), enfd. 449 F.2d 814 (5th Cir. 1971), cert. denied 407 U.S. 910 (1972), there was no showing, as here, that the employer agreed to meet with the employees, and the employees were discharged only shortly after their work stoppage began.

Member Hunter does not agree with the rationale of these cases and accordingly finds it unnecessary to distinguish them here.

[4] *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). See also *Flambeau Plastics Corp.*, 167 NLRB 735 (1967), enfd. 401 F.2d 128 (7th Cir. 1968).

[5] See *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir. 1976); *Captain Nemo's*, 258 NLRB 537 (1981); Cutting, Inc., 255 NLRB 534 (1981).

[6] *NLRB v. Colonial Haven Nursing Home*, supra.

[7] *U.S. Steel Corp. v. NLRB*, 682 F.2d 98 (6th Cir. 1982)

[8] The fact that these employees were no longer employed by the Respondent does not strip them of their Sec. 7 rights. It is well settled that employees are not protected merely for activity within the scope of their employment relationship, but may engage in other activities for mutual aid or protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The Act provides in Sec. 2(3) that "The term 'employee' shall include any employee, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . ." Thus, we have held that a discharged employee remains a statutory employee entitled to the full protection of the Act. *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), and cases cited therein.

violating this instruction. The judge particularly noted that no employee testified that this instruction inhibited him from engaging in protected activity. The judge concluded, without discussion of precedent, that the instruction was lawful. We disagree.

In some circumstances, it may be lawful for an employer to bar its employees from discussing certain information concerning wages. For example, in *International Business Machines Corp. (IBM)*, 265 NLRB 638 (1982), we held that, although employee rights were adversely affected by the company's policy prohibiting employees from distributing wage data, which it had compiled and classified as confidential, that policy was not unlawful. The issue was whether the Company had substantial and legitimate business interests which supported its policy and which outweighed the employees' interests in making use of the data compiled by the company. In that case, we noted that employees were not precluded by the company from discussing their own wages *with each other*, but only from having access to or distributing the information which the company had compiled for its own internal use. We concluded that the company's business justification outweighed the employees' interest in having free access to the disputed wage data.

In the instant case, however, unlike *IBM*, supra, the Respondent forbade its employees to discuss their own wages among themselves. Further, it did so without establishing a substantial and legitimate business justification for its policy; indeed, the Respondent offers no argument whatsoever that justification exists, relying instead, as did the judge, on the lack of showing that any employee felt inhibited by the Respondent's rule.

In assessing the lawfulness of the Respondent's rule, we are not concerned with the subjective impact of the rule on particular employees.[9] Instead, we must determine whether the rule reasonably tended to coerce employees in the exercise of their Section 7 rights, and, if so, whether the employees' Section 7 rights are outweighed by any legitimate and substantial business justification for the rule.[10]

There can be little question that the Respondent's rule prohibiting employees from discussing their wages constitutes a clear restraint on employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment.[11] Since the Respondent has failed to establish any business justification for this restraint, it follows that its rule is unlawful.

5. In his supplemental decision, the judge found that the Respondent had not violated Section 8(a)(1) of the Act when Faris required that employee White remove a union sign he had posted on the wall outside the plant lunchroom. The sign invited employees to talk with White if they were interested in forming a union. The judge found that the Respondent had permitted other employee notices to be posted on the wall, and that the Respondent's treatment of White's posting was disparate. The judge further found, however, that, under all the circumstances at this facility, "including the fact that 700 of its 750 employees are organized"; the fact that the incident was isolated and not communicated to or known by other employees; and that the Respondent's action was free of union animus, the Respondent's conduct constitutes a de minimis violation and need not be remedied by the posting of a Board notice. Again, we disagree.

Initially, we note that, contrary to the judge, the Respondent employs only about 50 employees at this facility and that they are not organized. The Respondent does have approximately 700 employees who are represented by a union, but those employees work at other jobsites, not at the fabrication plant involved here. As the Respondent itself states in its brief, "Waco's employees who work at the Newport News facility are not members of any bargaining unit."

Secondly, the legal standard applied by the judge in dismissing this allegation was erroneous. Union animus is an element in 8(a)(3) cases, but generally is not an element in 8(a)(1) cases. "It is too well settled to brook dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act."[12] Accordingly, the absence of union animus on the part of the Respondent, assuming this to be shown by the record, would be irrelevant to the issue of whether the Respondent violated Section 8(a)(1), and it was error for the judge to rely on this factor.

Finally, we do not agree with the judge's finding that the incident was so isolated as to vitiate the need for a Board notice. As noted above, the plant employed far fewer employees than the judge

[9] *Daniel Construction Co.*, 264 NLRB 569 (1982)

[10] *IBM*, supra.

[11] *Jeannette Corp.*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976); *Triana Industries*, 245 NLRB 1258 (1979).

[12] *Daniel Construction Co.*, supra.

found. Further, the sign which White was told to remove invited employees to begin discussions concerning the possibility of forming a union. Its removal had the effect of interfering not only with White, but also with other employees in the department whom White was lawfully attempting to reach with his message. Moreover, we have found that the Respondent violated Section 8(a)(1) in at least two other respects, and, in all these circumstances, we reject the judge's characterization of this misconduct as "isolated."[13] Accordingly, we shall order that this unfair labor practice be remedied by the posting of an appropriate notice.[14]

THE REMEDY

Having found that the Respondent unlawfully interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, we shall order it to cease and desist therefrom, and to post an appropriate notice.

CONCLUSIONS OF LAW

1. Waco, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By photographing employees as they lawfully and peacefully picketed outside the Respondent's Newport News, Virginia facility; by requiring the removal of an employee's poster relating to the formation of a union from the wall outside the lunchroom at the facility, contrary to its past practice of permitting employees to post material at the location; and by telling employees that they were not to discuss their wages with each other, the Respondent has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[13] In his initial decision the judge found this issue was also untimely raised. We disagree. While the General Counsel did not raise the issue as a separate violation until his posthearing brief, it was clearly raised as an element of White's alleged unlawful discharge; it was fully litigated; and it sufficiently relates to other timely raised allegations under consideration. It could thus be considered by the judge.

[14] In his discussion of this issue, as elsewhere, the judge improperly relied on courts of appeals decisions instead of initially considering relevant Board decisions on the issues presented. And, on one issue, the judge relied on the dissent of a single Board member rather than on the Board majority in that decision. We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). It is for the Board, not the judge, to determine whether that precedent should be varied.

ORDER

The National Labor Relations Board orders that the Respondent, Waco, Inc., Newport News, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance by photographing employees as they lawfully and peacefully picket outside the Respondent's facility.

(b) Telling employees not to discuss their wages with one another.

(c) Requiring employees to remove posters relating to the formation of a union or other protected concerted activity from areas in which employees are permitted to post other types of notices.

(d) In any like or related manner interfereing with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Newport News, Virginia, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DENNIS, concurring in result.

I agree that the Respondent lawfully discharged the nine employees who engaged in the lunchroom sit-in, but I do not rely on my colleagues' rationale. The judge found that the employees in question gathered in the plant lunchroom instead of reporting to their work stations and demanded that Fabrication Department Manager Faris meet with them. Faris declined to meet with the group and, most significantly, gave the employees the option of returning to work or clocking out and leaving the premises. The employees chose neither alternative and continued to occupy the lunchroom until they were discharged.

[15] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Although this case lacks the violence that marked the sitdown strike in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), the principle the Supreme Court established in *Fansteel* is equally applicable here: the Act does not protect employee refusals to yield possession of an employer's property. Once the employees were informed that they must work or leave the premises, they could no longer continue their lunchroom sit-in with immunity from employer discipline. On this basis, I concur in the dismissal of the complaint allegation that the nine employees were unlawfully discharged.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in surveillance of employees by photographing them as they lawfully and peacefully picket outside our plant.

WE WILL NOT tell employees that they cannot discuss their wages with each other.

WE WILL NOT require employees to remove signs or posters concerning the formation of a union from the wall outside the lunchroom or any other area where employees are permitted to post notices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WACO, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was held on October 19–20, 1981, in Newport News, Virginia, on complaints issued March 23 and April 27, 1981, alleging violations of Section 8(a)(1) and (3) of the Act.

At issue principally is whether Respondent unlawfully discharged nine employees on January 9 and one employee on March 17, 1981.

On the entire record, including my observation of the witness' demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent, engaged in the manufacture of insulation materials with annual shipments of goods interstate in excess of $50,000, is an employer engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION INVOLVED

The United Steelworkers of America, which through its Local Union 15051 represents 700 of Respondent's employees some of whom are assigned to Respondent's Newport News facility, but which represents none of the employees involved in these cases, is a labor organization within the meaning of Section 2(5) of the Act.

III UNFAIR LABOR PRACTICES

A. *The January 9, 1981 Discharge of Nine Employees*

Respondent is engaged in the manufacture and installation of insulation materials. Its 700 employees, some of whom are assigned to Respondent's Newport News facility, are represented by the United Steelworkers. It employs approximately 50 unrepresented production and clerical employees at its Newport News facility. Involved in this case are nine of the 12–14 employees of the fabrication department at that plant.

At the time, the plant was engaged in the production of material for the Government under a contract which had a penalty clause for late delivery. Interruption of fabrication would affect the operation of the rest of the plant.

On January 9, 1981, between 10:30 and 11 a.m., nine fabrication department employees were discharged for refusing to work or leave the plant. The events preceding the discharges are brief, occurring between 7 and 11 a.m., and essentially are not in dispute.

When several of the employees reported to work that morning for the 7 a.m. shift, they became aware that one coemployee had been discharged for failure to have a medical slip and two others apparently had quit. There is no allegation or contention in this case that these terminations were violative of the Act. More than nine fabrication department employees gathered in the plant lunchroom to discuss their dissatisfaction with management. Some of the employees were called away from their work stations by others who went directly to the lunchroom after clocking in. The credible evidence is that all fabrication department employees were to report to their last work station at the beginning of each shift to await any new assignment by their supervisor. They were not to await the assignment in the lunchroom, as testified to by one or two of the employees.

The employees told Dimowski, their immediate supervisor, they wanted to meet with Faris, manager of the fabrication department. At 7:10 a.m., Faris was informed at home of the sit-in, came immediately to the plant, looked into the lunchroom, and went to his office. About 7:45 a.m., when Faris returned to the lunchroom the employees told him they wanted to meet with him in "our

office," the lunchroom. He declined to meet with the group, but, according to his testimony which I credit, offered to meet with them in his office one-on-one or with one or more spokespersons "to discuss whatever problems that they might have" (Tr. 261), adding that "they had a choice of to get up and go to work or punch out and go home, leave the premises. And, if they went back to work, that my door was open and I would be happy to meet with them one-on-one" (Tr. 260, 299–300). I find, based on my observation of the witnesses, the manner in which their testimony was given, and their words used and my reading of the transcript, that at all times the employees were aware they were being given the option of returning to work with an opportunity then to meet with Faris or clocking out and leaving the plant. Faris then returned to his office and shortly thereafter one or two of the employees approached him again with a request for a meeting with the group in the lunchroom, but were told that his earlier offer stood.

Nine of the employees continued to occupy the lunchroom, their intent was best described by one of their spokespersons, Peggy King: "We were just going to sit there and thought Mr. Faris would change his mind and come to listen to what we had to say" (Tr. 349). She testified that, even after the employees had been sitting there for several hours and Faris continued in his refusal to meet with them en masse in the lunchroom, they gave no thought to what they would do next.

At approximately 10:30 a.m., when Faris and General Sales Manager Robbins found the employees still occupying the lunchroom, the employees were discharged, were given their regular payroll checks which had been received from company headquarters in Richmond for distribution at the plant later that day, and were told to leave the premises. They did so peacefully.

After requesting and obtaining the name and address of the Company president, they drove to Richmond and met as a group with President Walker at approximately 3 p.m. He inquired whether they would return to work with the "right attitude" and, when he received an affirmative answer, called the Newport News plant only to be informed that Faris, who had full authority, had indeed discharged the employees and already had replaced them by transferring employees from other shifts. Walker immediately arranged for checks to be issued to the nine employees for the current payroll period and they left peacefully.

The lunchroom is a small room set aside in the plant for all salaried and hourly employees of the clerical, fabrication, and warehouse departments. It contains food vending machines, a large table, and 12 chairs. Employees regularly use the room during rest and lunch breaks. While the fabrication department employees occupied the lunchroom on the morning of January 9, no other employees attempted to use it.

I credit the testimony of Faris and Robbins that employees in the lunchroom were sitting on the table, were laughing, joking, and talking at the same time, appeared to be disorganized and without a spokesperson, and never specifically identified their problem because of their inability to reach agreement with Faris on ground rules for a meeting. Admittedly, however, Faris and Robbins were aware that their concern related generally to their employment.

Finally, there is no evidence that the employees otherwise interfered with the Employer's ability to obtain replacements or to transfer other employees to operate the fabrication department machinery. Nor is there evidence of the existence of a written grievance procedure for fabrication department employees. No work areas other than the lunchroom were occupied and no other plant employees were asked or encouraged to join in the sit-in.

There is, of course, no question whatever that the fabrication department employees on the morning of January 9 were engaged in concerted activities within the meaning of Section 7 of the Act and that Respondent knew that the employees had a work-related grievance or grievances. The real issue is whether those activities were protected.

It is, of course, elemental labor law that a "concerted work stoppage and walkout by unrepresented employees for their mutual aid and protection is protected by Section 7 of the Act" and that "the employees had a right to protest the discharge of their fellow employee by appropriate means, including a strike." *United M & M v. NLRB*, 554 F.2d 1276 (4th Cir. 1977). Similarly, it is fundamental Board law, "dissatisfied employees cannot strike and maintain their pay status at the same time." Morris, *The Developing Labor Law* (1971).

Cone Mills Corp. v. NLRB, 413 F.2d 453 (4th Cir. 1969), is wholly dispositive of the issue here. In *Cone*, as here, certain employees were protesting an unrelated discharge of a fellow employee. In *Cone*, as here, the employees declined to use the established procedure for communicating their grievances. That the grievance procedure in *Cone* preexisted the work stoppage, while the one here was announced at the onset of the work stoppage, has no relevance. In *Cone*, as here, the employees gave no indication whatever when their work stoppage would terminate or when they would vacate the plant. Indeed, the employees here had no plans but to continue with their sit-in. In this respect, the employees maintained a defiant and rebellious attitude, seeking to establish for themselves the terms and conditions of employment. And, finally, in *Cone*, as here, a number of the protesting employees returned to their machines when requested to do so and were not discharged or otherwise disciplined for participating in the protest.

On the particular facts of this case, the views of Chairman Miller in dissent in *Pepsi-Cola Bottling Co.*, 186 NLRB 477 (1970), are especially applicable: "[U]nder our Act, an employer is [not] precluded from ordering employees to leave the plant if they wish to protest rather than to work and from disciplining employees who, after warning, refuse to comply."

Accordingly, I conclude that, in discharging the nine employees of the fabrication department, Respondent did not violate the Act.

B. *The March 17, 1981 Discharge of David White*

On March 17, 1981, fabrication department employee White was terminated for excessive absenteeism. The General Counsel contends that the discharge was be-

cause of White's efforts to build employee interest in a union.

Published company policy concerning absenteeism, in relevant part, requires an employee to call his supervisor before working hours if "you have a need to be absent or late for any reason" and to have a "doctor's excuse" if "out sick for more than 1 full day." Company rules warn that "excessive absenteeism or tardiness may be reason for dismissal" and "THE PENALTY FOR BREAKING ANY OF THE ABOVE RULES CAN BE IMMEDIATE DISMISSAL OR HAVING A REPRIMAND SHEET PUT INTO YOUR RECORD. THREE OF THESE SHEETS COULD BE CAUSE FOR DISMISSAL." (G.C. Exh. 2).

On Tuesday, March 3, 1981, White, with permission of his supervisor, left work early due to illness. He was treated at a hospital emergency room on Thursday, March 5, and received a doctor's slip indicating he could return to work on Monday, March 9. On that day, however, he telephoned his supervisor saying that he "wouldn't be in" (Tr. 220); on Tuesday, he again told his supervisor he "still wouldn't be in" (Tr. 220); on Wednesday, March 11, he was treated at the emergency room and so informed the Company; on Thursday, March 12, he did not feel well and told his supervisor he was going to consult with his family doctor; on Friday, March 13, he called in to the plant and went to his family doctor who gave him an appointment for Monday, March 16; on that day, after calling in to the plant, he kept his medical appointment, but, according to his testimony, was refused treatment due to nonpayment of prior bills; and on Tuesday, March 17, when he reported to work, he was discharged by Fabrication Department Manager Faris for "excessive absenteeism." At this point, there is a conflict in the testimony. White testified that he told Faris he had doctor's slips with him and that Faris said there was no need for them. Faris, on the other hand, testified that White said he had such slips in his hand, but would not show them. This conflict need not be resolved, however, for the reason that, admittedly, the only slips White had were two: One, dated March 5, with a March 9 return-to-work date; the other, dated March 11, indicating treatment on that date, but nothing as to a return-to-work date. White had no doctor's slip accounting for his absences from work on Thursday, March 12; Friday, March 13; and Monday, March 16.

Faris testified that White missed more time than he worked and that White received more than one warning concerning his attendance. His personnel file, however, contained no written warnings, but, on the other hand, there was no evidence to indicate that written warnings were a part of the Company's regular procedures. White denied receiving any warnings, written or oral. In the fall of 1980, Faris had discharged White for refusal to perform an assigned job, but immediately rescinded the action when, at his urging, White reconsidered and performed the work. White did not dispute this incident.

In an attempt to show disparate treatment of White, the General Counsel introduced evidence that another employee, Claud, received only a written warning for lost time "because of illness." However, this proffer does not indicate the relevant circumstances or whether Claud violated the company rule requiring a doctor's excuse for medical absences. On the other hand, the General Counsel, in connection with the evidence relating to the January 9, 1981 sit-in, offered evidence that another employee, Crismon, had been discharged for failure to provide a doctor's excuse.

On March 3, the day White left early due to illness, he engaged in activity claimed to be protected concerted activity. More precisely, he had put up on the wall outside the lunchroom one or two hand-printed cardboard signs requesting coemployees to talk with him during the lunchbreak if they were interested in joining a union. There is a conflict in the testimony as to the number of signs that White had posted. White's account of two is not borne out by the photograph (G.C. Exh. 7) which shows only one. However, it is not important, for purposes of this case, to resolve that conflict. Later, during a meeting with Faris, which White requested to discuss a pay raise, Faris asked whether he or White was going to remove the sign from the wall. White stated that he would do so and, thereafter, the sign was removed and kept near White's work station. After lunch, White taped the sign to his chest. About 3 p.m., Robbins and Faris photographed White and the sign and ordered him to remove it from his person. Faris took the sign and left.

White's activities were undertaken entirely on his own. He had not contacted any particular union and there is no evidence whatever that he consulted with any other employee concerning the posting of his sign or that he discussed a union with any employee either before or after the sign was posted. Respondent took no disciplinary action against White expressly based on the posting or wearing of the sign.

Other material, unrelated in subject matter, was put up on the same wall by other employees: A picture of a frog, by a supervisor; a notice of a lost wallet; and farewell notes to outgoing employees. There were no company rules proscribing the posting of notices on the wall and such postings did not interfere with the operation of the plant. The evidence clearly indicates, and I find, that White's *wearing* of a cardboard sign on his chest while at his work station, interfered with the performance of his work and constituted a clear safety hazard. As the photograph indicates (G.C. Exh. 7), the cardboard sign is a rigid one, extending from midchest to groin. White's job entails bending to unpack cartons of material and feeding the material into moving equipment where it is consolidated and heat-treated. Had the cardboard sign become entangled in the machine, personal injury and property damage could have resulted. Company rules require employees on this operation to wear fitted clothing and the photograph indicates White was wearing a long-sleeved shirt with sleeves pushed up to his elbows.

Assuming without deciding that White's activities on March 3 constituted concerted activity within the meaning of Section 7 of the Act, I nevertheless conclude that such activities were not to any degree a motivating factor in the March 17 decision to discharge White. I conclude that the sole and exclusive reason for the discharge was White's admitted violation of the company rule concerning absenteeism.

A number of factors compel this conclusion. First, White was discharged immediately upon his return from an extended absence with no medical excuse. Second, although the Employer had ample time to do so during the period of March 3 to 17, it made no effort to discharge or otherwise discipline White as a result of the incident of March 3. Third, there is absolutely no evidence of any disparate treatment of employees. And, finally, there is absolutely no evidence of any antiunion sentiment on the part of the Employer. Indeed, as already pointed out, this Employer has a long bargaining history with a union which represents more than 93 percent of its employees.

Accordingly, I conclude that the March 17, 1981 discharge of David White did not violate the Act.

C. *Photographing Pickets*

On January 14 through 16, 1981, 5 days after they were discharged, some of the nine discharged employees picketed at or near the entrance to the Newport News plant. They were joined by at least two nonemployees. The evidence as to this alleged violation is undisputed.

The picketing was peaceful at all times and the pickets carried signs relating generally to employment grievances. Fabrication Department Manager Faris spoke with the pickets, asking them if they were represented and, if so, by whom. He also called the police, which thereafter observed the pickets, but did not interfere with their activities. On one occasion, Faris photographed the pickets. At no time were the pickets asked to move. Nor were they threatened, arrested, or otherwise interfered with. After 3 days, the pickets ceased their activities of their own accord.

The photographing of pickets by an employer does not constitute a per se violation of the Act. Where, as here, the photographing was noncoercive, nonthreatening, and unaccompanied by other unlawful activity on the part of the Employer, no violation is established.

In this respect, it is significant that the complaint does not allege and the General Counsel does not contend that Faris' questioning of the pickets or his calling for the presence of police is violative of the Act. The only assumption to be drawn is that such conduct, like that of photographing, was noncoercive under the circumstances.

D. *Warnings not to Discuss Wages*

The complaint alleges and the undisputed evidence establishes that, on a number of occasions in the fall of 1980, long before the January 9, 1981 discharge of the nine employees and the March 17, 1981 discharge of White, Fabrication Department Manager Faris and other supervisors told employees not to discuss their individual wages with one another. The reason for the instruction: The earnings of each fabrication department employee were different, due to differences in seniority and the Company's policy of considering pay raises on an individual basis. I find that Respondent made no threats to discharge or otherwise discipline employees for a violation of this instruction and, in this connection, I cannot credit King's testimony to the contrary, as it is unreliable and unsupported by the testimony of any other employee who gave testimony on this subject.

Under the circumstances here, such instructions are not violative of the Act. No employee testified that the instruction inhibited them in the exercise of protected activity. Indeed, they had no such inhibitions on January 9, 1981, when they engaged in a sit-in at the plant. Apart from the instructions, the record is free of any antiunion sentiment on the part of the employer, as noted above.

E. *Posthearing Motion to Amend*

In a footnote to his posthearing brief filed more than 4 weeks after the close of the record in this case, the General Counsel seeks to amend the complaint to allege a violation of Section 8(a)(1) of the Act based on Respondent's admitted instruction to David White to remove a sign he posted on the wall outside the lunchroom and further seeks that a violation be found by me. Admittedly, the complaint alleges no such violation, despite the General Counsel's full knowledge of the facts at all relevant times.

Neither I nor Respondent was aware that the General Counsel offered evidence relating to the sign in support of an independent violation of the Act. On the contrary, it was obvious that the evidence was offered to establish the "real" motive for White's discharge. Of course, Respondent did not brief the issue of an independent violation. Under the circumstances of this case, where there is a total absence of antiunion sentiment on the part of the Employer and where the violation, if found, would be a technical, isolated one at best, the requests will be denied.

F. *Photographing White with Sign*

The General Counsel contends that the photographing of White while wearing the rigid, cardboard sign on his chest while at his work station constituted a violation of Section 8(a)(1) of the Act, likening this case, remarkably, to one involving the wearing of a union insignia. Bearing in mind always that the protection of concerted activities in the workplace enjoys equal—but not paramount—status with the goals of industrial safety, this allegation must be dismissed for the reason that White's taping a cardboard sign to his chest, under the circumstances, constituted a clear hazard both to his personal safety and to the Respondent's equipment.

[Recommended Order for dismissal omitted from publication.]

ORDER

IT IS ORDERED that the complaint be dismissed.

SUPPLEMENTAL DECISION

WILLIAM A. GERSHUNY, Administrative Law Judge. By Order of December 3, 1982, the Board directed that the findings set forth in my decision of December 21, 1981, be supplemented in the two following respects.

1. *Paragraph 4(b) of the complaint in Case 5–CA–13122*: The relevant credible facts surrounding these allegations

are set forth at pages 6 (LL. 30, et seq.) and 7 (LL. 1–10) and will not be repeated here.

Throughout, in my decision of December 21, 1981, and here, I have credited the testimony of Faris over that of the employees. Based on my observations of the demeanor of all the witnesses during the course of this 2-day hearing, as reflected in trial notes contemporaneously made, I was of the opinion that Faris, whose testimony was clear and convincing, reported the events most accurately. On the other hand, White and other employees left with me the clear impression that their recall of events was, to a large extent, tailored to meet the litigation. I was neither impressed with their testimony, nor convinced that it portrayed the events accurately. Thus, I am unable to find that Faris said anything more of substance than "who would take down the signs, you or me." More specifically, I find that there was no discussion between Faris and White concerning the distribution of literature, the conduct of meetings or discussions with other employees during lunch break. Moreover, I find that there was no threat of discharge or discipline. That leaves only the Faris request that White remove the signs from the wall, while permitting, on a limited number of occasions, other employee notices of a personal or humorous nature. Board precedent is clear that such disparate treatment is violative of the Act. *Midwest Stock Exchange*, 244 NLRB 1108, 1116 (1979); *Stanley Furniture Co.*, 244 NLRB 589 (1979).

However, considering the circumstances at this plant as a whole, including the fact that 700 of its 750 employees are organized—and even taking into account dissimilar violations which occurred 6 years earlier on another unrelated jobsite, *NLRB v. Waco Insulation*, 567 F.2d 596 (4th Cir. 1977)—I find the March 3 incident relating to the posting of the signs to be an isolated and minimal one, not communicated to, or known by, other plant employees and free of union animus. In my opinion, effectuation of the purposes of the Act, under the circumstances here, does not require the posting of a notice. Cf. *NLRB v. Brooks Cameras*, 691 F.2d 912 (9th Cir. 1982).

2. *The conflicting testimony of Faris and White concerning medical excuses*: The relevant credible facts are set forth on page 6 (LL. 1–5), but the conflict was not resolved there.

For reasons set forth in paragraph 1, above, I credit the testimony of Faris that White refused to show him the medical slips which White said he had in his hand. There is yet another reason why I am compelled to reject his testimony in this regard: it is highly unlikely that White would have produced the excuses since he knew (a) they did not in fact account for his absences on the 3 workdays immediately preceding his return to work and (b) he was in violation of the Respondent's absentee policy and subject to immediate discharge thereunder.[1]

[1] As indicated in the Board's Order of December 3, 1982, Sec. 102.48 of the Board's Rules and Regulations shall be applicable following service of this Supplemental Decision.

Shin Nihon Kosan, Inc. d/b/a Shogun Restaurant *and* Kathy Masaoka. Case 31-CA-12304

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 14 September 1983 Administrative Law Judge Earldean V. S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

Our dissenting colleague contends that the judge erred in relying on statements allegedly made by the Respondent's president Kanenobu in his prehearing affidavit, finding them more reliable than his contrary and inconsistent testimony at the hearing. The record demonstrates, however, that the judge is correct.

Kanenobu used an interpreter at the hearing, but he testified that he spoke English when he gave his affidavit to the Board agent. He also testified that after the Board agent had finished taking his statement, Kanenobu initialed each of the pages, attested that he had read and understood its contents, and "certified that it was true and correct to the best of [his] knowledge." In addition, he requested and received a copy of the affidavit, but did not then or later notify the Board agent that it contained any errors. At the hearing Kanenobu read a portion of the affidavit aloud, finding difficulty only with the words which the judge found were illegible. In short, Kanenobu can speak and read English, and had ample time and opportunity to correct or clarify those portions of the affidavit which allegedly contained errors. Accordingly, we find no grounds for impugning the authenticity of the affidavit.

Our dissenting colleague contends that the judge erred in crediting Takee's testimony without making specific findings concerning employee Yuka's testimony that Takee offered her a bribe to give testimony at the hearing. Takee denied having made this offer. In footnote 19 of her decision the judge rejected the Respondent's argument that Takee's testimony was not credible and based on her observation of the demeanor of the witnesses and the entire record, the judge discredited the Respondent's witnesses' testimony and credited Takee's testimony where they conflicted. Thus, as Yuka's testimony is part of the entire record, the judge implicitly discredited Yuka's testimony with respect to the alleged bribe. See, e.g., *Kimball Tire Co.*, 240 NLRB 343, 344 fn. 5 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Shin Nihon Kosan, Inc. d/b/a Shogun Restaurant, Pasadena, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HUNTER, dissenting.

The findings in this case rest largely on the credibility of alleged discriminatee Voravan Takee. The Respondent's witness Hyon-ChaCha (Yuka) testified that Takee attempted to bribe her to give testimony, the clear implication being that such testimony was to be favorable to Takee's interests. Takee denied this, but the administrative law judge made no attempt to resolve the credibility of this serious allegation. In the absence of such resolution, the propriety of the judge's overall crediting of Takee over other witnesses is necessarily cast in doubt. On such an important matter, which needs a specific resolution, I would not rely as my colleagues do on the judge's summary credibility comment at footnote 19 of her decision. Moreover, the comment at footnote 19, read in proper context, appears to be a resolution of credibility between the Respondent's witness Kajino and four employees, including Takee, as to whether Kajino told the employees that Takee was fired for her participation in a walkout. That resolution has nothing to do with the issue of whether Takee bribed Yuka. Takee's attempted bribery of a witness impliedly to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note the following minor errors in the administrative law judge's decision: (1) It is not "undisputed" that Takee became head waitress in March 1982; the record indicates that she most likely became head waitress in February 1982; (2) Kanenobu, the Respondent's president, stated in his prehearing affidavit that one of the reasons he considered Takee to be a bad waitress was that she changed schedules without permission, not with permission; (3) employee Kondo testified that Takee was told about her discharge by the Respondent's manager Kajino, not by assistant manager Chijiwa; and (4) Takee's health card shows that she had family coverage in November 1981, not December. We find that these errors do not affect the validity of the judge's conclusions.

[2] In her conclusions the judge inadvertently found that the Respondent's discharge of Takee on 1 June 1982 violated Sec. 8(a)(3) as well as Sec. 8(a)(1).

fabricate testimony would cast such a deep shadow over her own credibility as a witness that the judge's failure to rule on whether or not it occurred is fatal to any reliance on her testimony.

In addition, the judge erred in relying on statements allegedly made by the Respondent's president Kanenobu in an affidavit as being "more reliable" than his contrary testimony at the hearing. Kanenobu testified through an interpreter. Describing the affidavit, which was given in English, Kanenobu said that he did not read it before he signed it; that he was told to sign it so he did; and that he did not understand what was written. When asked whether he had sworn to its veracity, he responded that he did not understand that well. When asked to read a position of his affidavit in English, he did not read it verbatim. The General Counsel himself described Kanenobu's reading as simply the "essence" of what the affidavit stated. Kanenobu was unable to read two phrases of the affidavit but the judge concluded that this resulted from the illegibility of the handwriting and not from any inability to read English. However, Kanenobu was never asked if this was the reason for his difficulty. In these circumstances, I am not satisfied that the affidavit was properly relied on.[1]

Because the judge's error in failing to resolve the question of Takee's bribery attempt has a major impact on her general crediting of Takee, and as her error concerning Kanenobu's affidavit reflects to some extent on her overall credibility findings, I would remand the case to the judge for the making and reviewing of such credibility findings as may be necessary consistent with the foregoing.

[1] My colleagues indicate that Kanenobu testified that at the time the affidavit was taken he had attested that he understood its contents. While Kanenobu signed the affidavit with its attestation clause, he testified that he had not read that clause before he signed the affidavit. Further, in view of the above, it is unclear whether he understood the clause.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge. This matter was heard before me in Los Angeles, California, on various dates in April and June 1983. The charge was filed by Kathy Masaoka, an individual, on July 7, 1982, and a copy thereof was served on Shin Nihon Kosan, Inc. d/b/a Shogun Restaurant (Respondent), on July 12, 1982. The complaint, which issued on April 5, 1983, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act). The basic issue herein is whether Voravan Takee is a supervisor within the meaning of Section 2(11) of the Act and, if not, whether she was discharged for participating in a protected concerted walkout of employees.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a California corporation with an office and principal place of business in Pasadena, California, has been engaged in the business of operating a restaurant. Respondent, in the course and conduct of its business operation, annually derives gross revenue in excess of $500,000 and annually purchases and receives goods or services valued in excess of $10,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly outside the State of California.

The complaint alleges, Respondent admits, and I find that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE SUPERVISORY STATUS OF VORAVAN TAKEE

A. *Facts*

At the times material herein Respondent's employee complement consisted of 6 cooks and 2 dishwashers who worked under the supervision of Head Takayoshi Nakagawa; 12 waitresses and 6 busboys whose supervision is in dispute; the hostess, the host, the bartender, the barboy, 2 cocktail waitresses, 2 cashiers and 2 sushi chefs who worked under the supervision of Assistant Manager Morihito Chijiwa.

Takee began work for Respondent as a waitress in February 1981. In June 1981 she left Respondent's employ. According to her, she quit. According to Respondent's president Sadaki Kanenobu, he discharged her because she did not have sufficient experience. Thereafter, Respondent rehired Takee. According to Kanenobu, she was rehired because Respondent needed a waitress and because he had heard that in the interim she had been working at Horikawa's Restaurant and that Horikawa was very strict in its training. Consequently, he thought that by this time Takee should be a good waitress. Takee testified that she was away from Respondent's employ for only a week. Kanenobu testified it was about 3 months. The parties later stipulated that Takee's break in service was no more than 2 weeks.[1]

It is undisputed that Takee became head waitress in March 1982,[2] that Respondent announced such to the other waitresses, and that her name was posted, along with those of the two office employees, the manager, the assistant manager, and the head chef, as one who was permitted access to the office. However, the testimony is in conflict as to her duties and authority as head waitress.

[1] Kanenobu and Takee testified in this regard prior to a 3-week recess in the hearing herein. The stipulation was entered into after the recess.

[2] All dates hereinafter will be in 1982 unless otherwise indicated.

As evidence of Takee's supervisory status, Respondent introduced into evidence minutes of a January 9, 1982 meeting attended by Respondent's president, manager, assistant manager, and maitre d'. Kanenobu, Respondent's president, testified that the chart depicts the organizational structure of the restaurant as discussed at this meeting which he describes as the annual front meeting.[3] According to him, this was the management structure implemented when the restaurant opened and thereafter reconfirmed the first of each year. The chart shows three department heads reporting directly to the manager—the head chef, the assistant manager, and the head waitress. Reporting to the head chef are the cooks and dishwashers. Reporting to the assistant manager are the cashiers, the bar personnel, and the front personnel. Reporting to the head waitress are the busboys and waitresses.

Kanenobu testified that the head chef and the assistant manager had the authority to hire and fire employees only in their respective departments, the head waitress had the authority to recommend the hiring and firing of busboys and waitresses, and that he thinks Takee recommended that Pepe Castillon, the head busboy, be terminated. He then testified that Takee actually terminated Pepe for thievery without any prior investigation by him or Manager Kajino. Kanenobu also testified that Kajino had the authority to hire and fire all employees without first consulting with Kanenobu. However, his prehearing affidavit states that Kajino had such authority only with regard to part-time employees, that he can hire and fire full-time employees only in an emergency.

Kanenobu testified that the duties of the head chef were to administer and instruct his subordinates, to order food, and that he had the authority to discipline kitchen employees and to make their schedules. The duties of the assistant manager were to substitute for the manager in his absence, and to administer and supervise the cashiers, the bar personnel, the front personnel, and the sushi chefs. The duties of the head waitress were to supervise her 18 subordinates. Specifically, he testified, one of her important responsibilities was the training of new waitresses; and she had the authority to discipline waitresses and busboys and to change their schedules. Kanenobu also testified that the bar manager was responsible for training the barboy and the cocktail waitresses and the head busboy was responsible for training the busboys.

According to Kanenobu, the wages and salaries of restaurant personnel were: manager—$1800 a month; assistant manager—$1600 a month; head chef—$1200 a month; maitre d'—$900 a month; cashier $3.35 to $4 an hour; head waitress— $3.60 an hour plus tips; cooks—$750 to $900 a month; hostess—$3.75 an hour; bar manager—$5.75 to $6 an hour; head busboy—$3.60 an hour; bartender—$5.25 or $5.50 an hour plus tips; barboy—$3.35 an hour plus a portion of the bartender's tips; sushi chefs—$1100 a month; and waitresses—$3.35 an hour, plus tips.

Kanenobu testified that the maitre d', the cashiers, the cooks, and the waitresses who worked a minimum of 30 hours a week and had completed the 3 months' probationary period are entitled to receive health insurance covering the employee and his or her spouse. He later testified that waitresses were entitled to health insurance after 6 months. Further, according to Kanenobu, only the manager, assistant manager, head chef, and head waitress are entitled to health insurance covering their children as well as their spouses and that no other employees receive such additional coverage. On direct examination, Kanenobu testified, in regard to when Takee began receiving this additional insurance, "I think we began to cover her entire family after she became the head waitress." On cross-examination, he testified that she received the additional coverage in January before she became head waitress. According to him, at that point he had decided to make her head waitress. He did not explain why, if the decision was made in January and the former head waitress quit in January, Takee did not become head waitress until March.

Takee testified that she has had coverage for her spouse and children since November 1981, and in support thereof the General Counsel offered into evidence her health plan card indicating family coverage as of November 1981.

Kanenobu admits that, although she receives a slightly higher rate of pay than the other waitresses, Takee received this raise in pay in December 1981 at the same time that the former head waitress received a raise. Takee testified she received the wage increase in either December 1981 or in January 1982. According to her undenied testimony, Kajino called her and Noriko, another waitress, into the cocktail lounge and told them, "Both of you going to get increase. Just please help to train the new waitress."[4]

Kajino testified that when Takee was promoted to head waitress toward the end of February he explained to her what her duties and responsibilities would be. According to him, he told her she was to train the new waitresses, make the weekly schedules for the waitresses, make the daily assignments as to tables each waitress would service, and relay directions or requests from the kitchen to the waitresses. He further testified he told her if she was dissatisfied with the performance of any new waitresses as she was training, she could terminate them. He posted a written announcement near the timecards of the date she would become head waitress. Also, at the monthly waitress meeting held on the first Saturday in February, he announced to the waitresses that Takee had been promoted to head waitress and that when she directed them to do something they were to listen to her and follow her instructions.

Kajino admits that 90 percent of the time Takee worked the same number of stations, referred to as "teppans," as did the other waitesses. However, according to Kajino, he told Takee that from time to time she should not work any teppans so she could observe what the other waitresses were doing and instruct them as to what needed to be done. He also testified that Takee was permitted to use the office, whereas the other waitresses could not do so. Further, according to him, she disci-

[3] The front employees are the maitre d' or host and the hostess.

[4] There is no evidence as to whether Noriko, in fact, received a wage increase at that time.

plined waitresses. However, the only instance of discipline that he related was one occasion when he asked waitress Hyon-ChaCha, also known as Yuka, why she was crying, and Yuka said she had been scolded by Takee.

As to the termination of head busboy Pepe, Kajino testified, "she [Takee] said to me, 'I saw Pepe taking tips from the table, so I'm going to have him terminated.' I just nodded and said, yes . . . . On that same day she came to me and said she had fired him." When asked what exactly she said, he first testified she said, "I had Pepe quit." Then he testified she said, "I fired Pepe." Kajino further testified that he did not speak to Pepe before he was fired nor did he investigate prior to the termination to determine if Pepe had in fact been stealing tips.

Takee testified that her sole additional responsibility as head waitress was to relay to the waitresses orders and requests from management and the kitchen. According to her undenied testimony this type of liaison was necessary because the waitresses worked different shifts and it was easier for management or the chefs to give instructions and requests to one waitress who could ensure that each waitress received the information. Further, she testified, without contradiction, that the cooks had been complaining prior to her becoming head waitress that there was no one to perform this function.[5] She denies that any member of management ever specifically explained to her what her duties and responsibilities would be as head waitress and testified that she first learned she was the new head waitress at the monthly waitress meeting. At that time, Assistant Manager Morihito Chijiwa announced that from then on Takee would be head waitress.[6]

Takee denies that she was in charge of the busboys or that she told anyone she saw Pepe, the head busboy, stealing tips or that she discharged Pepe. She also denies that she made out the schedule or made assignments of, or changes as to previously assigned, work stations. According to her, the schedules were prepared by Kajino or Chijiwa, as were station assignments. She admits that she trained new waitresses, but testified that she did this both before and after she became head waitress and denies that either Kajino or Chijiwa ever asked her to report on the performance of any waitress she trained. Also, she had access to the office both before and after she became head waitess for the sole purpose of obtaining uniforms for the waitresses she was training. Kajino admits that Takee trained new waitresses before she became head waitress. She denies that she had authority to grant time off or that she relayed requests for time off to management. According to her, the waitresses went directly to Kajino or Chijiwa to request time off.

Employee Diane Yoa[7] testified that when she wanted time off she requested it from Kajino or Chijiwa. Also, she contacted them directly if she was going to be late or absent. However, Yuka testified that about June she asked Takee if she could leave about 30 minutes early, and Takee immediately gave her permission to do so. Takee was not questioned in this regard. Yuka also testified that on one occasion, when she wished to change her day off, she asked Takee to change her schedule and Takee did do.

Further, according to Yuka, Takee changed her work station on one occasion. However, in this regard, she testified that Takee came to her and asked if they could change work stations because she could not tolerate the customer's perfume. As to the change in her day off, Yuka does not recall whether Takee simply exchanged days off with her. She did not ask Takee to exchange. She simply requested that she be allowed to change her day off that week and Takee said she could. Yuka further testified that, when one of the waitresses who was to work with Takee on the late shift did not come in, Takee "asked me if I could stay late with her or not. And I answered, okay, I'll stay late."

Of the three waitresses who testified, Kondo did not testify with regard to Takee's supervisory status, Yuka testified that Takee was her supervisor, and Yoa testified that she did not consider Takee as her immediate superior, but rather so considered Kajino. However, in Yoa's prehearing affidavit, she stated, "My immediate supervisor was the head waitess, Rose Takee."

Yuka testified that Takee has disciplined her and that she has observed Takee disciplining other employees. When asked what she observed, she testified that when one of the new waitresses was putting garnishes on a cocktail glass, Takee shouted at her, "That's the wrong garnish." She also testified that she observed Takee disciplining Pepe by telling him to pick up various things from, or place things on, tables. She admits that she, Yuka, and other waitresses also told busboys to clean tables. However, according to her, when she did so, she was requesting; when Takee did it, Takee did not say "please," but was ordering. Yuka further testified that Takee disciplined her, that she scolded her frequently. The only specific incident to which she testified was once in the locker room when Takee scolded her and told the other three waitresses present that Yuka was a bad waitress.

When Yuka was asked what she meant when she testified that Takee disciplined waitresses, she testified, "[S]he let the new waitresses carry everything. And she just was watching behind the new waitress." When asked if she considered that discipline, she answered, "Yes." She admits that Takee did the same thing when she trained new waitresses prior to becoming head waitress. She also testified that, after Takee became head waitress, other waitresses assisted in the training of new waitresses.

B. *Conclusions*

For reasons set forth more fully below, I do not credit Kanenobu and Kajino as to their conversations with Takee regarding her supervisory status or as to her supervisory authority or as to statements at the May 29

[5] The request relayed between the cooks and waitresses had to do with things such as use of proper abbreviations when writing an order.

[6] Yuka testified that Kajino announced at the meeting that Takee would be head waitress and would be in charge of all the waitresses and busboys.

[7] Yoa left Respondent's employ on June 13 or 15.

meeting regarding her authority to discharge employees, nor does other evidence establish such authority. Contrary to Respondent's argument, I do not find the document, containing the organizational chart which is alleged as minutes of the annual front meeting, to be a reliable indication that Takee was considered to be one of Respondent's three department heads on an organizational level with the assistant manager and the head chef.

I do not credit Kanenobu's and Kajino's characterization of that meeting as an annual meeting of front employees. In that regard, I note that the minutes indicate nothing identifiable as "front" problems or concerns. Further, neither Kanenobu nor Kajino explained why Respondent's organizational structure would be reaffirmed in a meeting with one "front" employee and was not stated to other employees. In the circumstances, I conclude that the document is not what it purports to be, and cannot be relied on to establish Takee's placement in the management and supervisory hierarchy.

Also, I find that Takee's wage rate belies the assertions that she was on the same level as the head chef and the assistant manager, whose supervisory authority is undisputed. Thus, the 25-cent-an-hour differential between her rate of pay and that of other waitresses is more comparable to the differential of 25 cents an hour and 50 cents an hour received by the head busboy and bar manager, respectively, who are not department heads and whose sole responsibility with regard to other employees appears to be training, than it is to the more than $500- and more than $300-a-month differential received by the assistant manager and head chef, respectively.

The only other evidence supporting Respondent's contention that Takee was a supervisor is the testimony of Yuka that Takee disciplined waitresses, directed waitresses and busboys in the performance of their duties, changed work assignments, and changed scheduled days off. Yuka's testimony clearly does not encompass any conduct which could be considered as either discipline or responsible direction. Thus, her instructions to busboys were admittedly no different than the instructions that Yuka herself gave to busboys. That Takee may not have been particularly polite is not an indicia of supervisory authority. Similarly, the instructions or observations as to errors made to other waitresses is consistent with her role as trainer. The one occasion involving a change of work station appears to have been a favor between two waitresses.

Also, I conclude that the change in Yuka's day off and the request that she remain with Takee for 30 additional minutes, on an occasion when the second late shift waitress was absent, was nothing more than an informal accommodation between two waitresses or, at most, an isolated overstepping of her authority. In this regard I note that, despite his testimony, which was denied by Takee, that Takee prepared the schedules, in his prehearing affidavit Kanenobu stated that one of the reasons he considered Takee to be a bad head waitress was that she changed schedules without permission.

I further note the testimony of Takee, Yoa, and Kondo that waitress dissatisfaction with scheduling was one of the complaints made at the May 29 meeting and Takee's testimony, which I credit, that Kanenobu promised that preparation of the schedule would be transferred from Chijiwa to Kajino. If Takee, in fact, prepared the schedule, there would have been no reason for Takee and the other waitresses to include this complaint in a list of grievances which were clearly directed, in large part, toward Chijiwa. Further, if Takee actually had the supervisory authority claimed by Respondent and if Chijiwa supervised only the front, bar, and sushi employees, there would have been no reason for waitresses to complain about Chijiwa.

In all of the circumstances, I credit Takee's denial that she possessed and/or exercised the various indicia of supervisory authority as contended by Kanenobu and Kajino or that she was ever told that she possessed such. I further find that her duties and responsibilities in training other waitresses and in being an information conduit from management and kitchen personnel to the waitresses do not establish that she possessed supervisory authority, *Poor Richard's Pub*, 220 NLRB 1363 (1975).[8]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

During the period of March, April, and May, the waitresses became upset over working conditions and began to discuss their dissatisfactions among themselves. During the latter part of May, after they were informed that Respondent would no longer furnish cream and sugar for their coffee, the waitresses began considering taking some action to improve their working conditions. On Friday, May 28, they discussed their various dissatisfactions with working conditions and what they should do about it. They first decided they should walk out that evening. They then decided that they should wait until after their regular monthly meeting with management which was scheduled for the following day.

On Saturday, May 29, about 1 to 2 hours before the regularly scheduled meeting with management, about eight of the waitresses, including Takee, met at a nearby restaurant. They made up a list of their complaints and decided that waitress Jennifer Lee would be their spokesperson in presenting these complaints to management. They further decided, if management did not like it or disagreed or would not respond, they would walk out. Among the complaints they listed were the posting by management of notices, considered by the waitresses to be derogatory, on the door to, and inside of, the waitresses' changing room regarding their personal grooming habits; the new requirement that they schedule a week in advance the meals they planned to eat in the restaurant; and the new requirement that they be tested as to their knowledge of cocktails.

Also included in their list of complaints was the change in the tip system from one where all tips were deposited into one box to be divided among the waitresses and other employees[9] to a system which retained the

[8] In reaching this conclusion, I have fully considered the cases cited by Respondent and find them to be distinguishable.

[9] Tips are shared with management and front personnel, sushi chefs, bar personnel, kitchen personnel, and busboys.

pooling feature but which would have each waitress deposit her tips in a separate box, the amount of which would be considered by management as a factor in determining the quality of a waitress' job performance; the changes in work schedules which had resulted in a cut in hours for some employees; the requirement that waitresses make up any deficit if they undercharged a customer whereas Respondent would retain any overage; and the requirement that waitresses clean the soup and hot water urns.

About 3:35 or 3:40 p.m. that day, Kajino, Chijiwa, and the head chef, Nakagawa, met with the waitresses. There is no dispute about much of what was said at the meeting.[10] Kajino commenced the meeting by chiding the waitresses for arriving late. Lee said they were late because they wanted to have a special meeting and they wanted Kanenobu to be present. Kajino said it was not necessary for Kanenobu to be present and he might not be present. Lee said they needed Kanenobu there. At that point, Kanenobu walked in.

Kajino then distributed a tip chart showing the amount of tips each waitress had received and explained that tips indicate whether a waitress was giving good service and that this was a means of helping an individual waitress recognize whether her service was good, or whether she needed to improve. The reaction of the waitresses to this was generally hostile. Takee, in particular, was rather vocal. Kanenobu then asked each of the waitresses her opinion of the tip charts. After they all responded negatively, Kanenobu instructed Kajino to stop preparing the tip charts.

The waitresses mentioned not being furnished cream for their coffee. Kondo, Takee, and Yoa testified that they discussed their concerns with the work schedule, complaining that Respondent was unfairly cutting the number of hours some waitresses worked, and regarding the uncertainty as to when they would be working. Kajino testified that he does not think any scheduling problems were discussed, but he does not recall. Kanenobu does not specifically deny that scheduling problems were discussed; however, his account of the meeting does not include any mention of scheduling.

The principal difference in the various accounts of this meeting is the testimony of Kanenobu and Kajino regarding an interchange between Kajino and Takee, which none of the employee witnesses included in their accounts. Kanenobu testified that during Kajino's explanation as to the purpose of the tip charts, Kajino mentioned how bad the service had become and said the responsibility was with the head waitress. Takee denied this and said the responsibility was that of the waitresses, that they were not well trained. Kajino said that was because Takee's training was bad. Takee said there were so many new waitresses that it was difficult to train them all at one time. Takee then became excited and said,"Well then, is it all right for me to fire the employees." Kajino said, "Well, naturally, of course."

It was at this point that Kanenobu interrupted and said he would poll each waitress as to whether she wanted the tip system changed. Kajino testified in general corroboration of Kanenobu as to the interchange between him and Takee. According to him, when he insisted that she was responsible for the recurring mistakes of the new waitresses, Takee said, "Well, if that is my responsibility, then is it all right to fire the waitress who makes the same mistakes." Kajino said, "Of course, you could do that."

About 4:30 p.m., the time for the early shift to prepare to commence work, Kanenobu said it was time to go to work. The waitresses said they had a number of things to discuss. Takee suggested that she, Lee, and Yoa remain to continue the discussion and that the other waitresses begin work, which they did. Kanenobu suggested that they continue the discussion in the office. The three waitresses went to the office but neither Kanenobu, Kajino, nor Chijiwa came in.

Shortly thereafter Takee and Lee reported to the other waitresses that Kanenobu did not come in to talk to them. They decided to walk out immediately and had commenced doing so when one of the chefs advised that they should first change out of their uniforms. They then went to the changing room. Both Kajino and Morihito came to the changing room door and attempted to persuade them to return to work. A commitment was made to continue the discussions. All of the waitresses except Lee and Takee returned to work.[11]

Lee and Takee then went to the office. Kanenobu said he would meet with the waitresses regarding their complaints, but he wanted to speak to Kajino first. They agreed to meet in a nearby restaurant that evening after work, which they did. Present at the meeting were all of the waitresses who had worked that day, Kanenobu, and Nakagawa.[12] Much of what occurred at this meeting is undisputed. Kanenobu apologized, saying he was busy with another restaurant and had not realized the situation. He had Kondo, who speaks both English and Japanese fluently, read a letter of apology he had written. Kondo testified that the letter requested that Chijiwa be given another chance, stating that Chijiwa did not understand a lot of American ways but he was willing to learn and further stated that the schedules would be redone.

Yoa testified in general agreement except her account includes no mention of redoing the schedule. Takee testified in generalities that the letter explained how Kanenobu was feeling, that he understood them and requested that they understand him, and that they forgive management's attitude toward them. As to the schedule, Takee testified that Kanenobu said in the future Kajino would prepare the schedule instead of Chijiwa. Takee also testified that someone asked if any of them would be discharged because of the situation; to which Kanenobu replied, "Why should I? Just go back to work, and I promise you will be happy."

[10] Except as otherwise indicated, this account of the meeting is a composite of the testimony of all the witnesses which I find more accurately reflects what occurred.

[11] They were away from work about 20 minutes.

[12] According to Nakagawa, Kanenobu asked him why he was present and Nakagawa replied that the waitresses had requested that he attend the meeting.

Both Nakagawa and Yoa testified that Kanenobu said they had discovered the person who was stealing tips[13] and that person was no longer in Respondent's employ. According to Nakagawa, this was in response to a question. However, Kondo and Takee testified that nothing was said at this particular meeting regarding the stealing of tips. Further, in the account of this meeting given in Yoa's prehearing affidavit dated July 29, there is no mention of any remarks regarding tip stealing.

Kanenobu testified that in the letter Kondo read, he stated that Chijiwa had only recently come from Japan and was not very proficient in English but he wanted to improve the business and perhaps some of the employees had taken it the wrong way. Kanenobu further stated in this letter that what Chijiwa was saying was not wrong, and Kanenobu hoped they would try to understand Chijiwa's English and give him an opportunity to improve his language so he could communicate better.

Takee did not work on the following day, May 30. She did work on June 1. According to her, at the end of her shift Kajino told her he was sorry, he would have to fire her because of the walkout on Saturday. He said as head waitress, Takee had responsibility for that, so he would have to fire her. Takee said, "but I asked the waitresses to go back to work." Kajino replied, "Yes, but you should not have let it happen at all." Kajino then said that, personally, he liked Takee a lot but he had to discharge her because of the walkout.

Kondo testified that later that same evening when she went into the changing room, she saw Takee kneeling down. She asked her what was the matter? Takee said Chijiwa fired her. Kondo asked why. Takee said Chijiwa felt that she was responsible for the walkout and she was fired for that reason. On the following day according to Kondo, she telephoned Kajino and told him she could no longer work in an environment where Takee could not be present. Kajino said the only reason Takee was discharged was because she was the head waitress and she was responsible for the walkout. He said even if someone else had been the head waitress that person would have been discharged.

Yoa testified that on June 2 she and another waitress asked Kajino why Takee was discharged. Kajino replied that she was discharged because she was head waitress and was responsible for the walkout. He said when someone was hired into management Respondent wanted that person to help Respondent, not go against Respondent in any way, and if anything was wrong to let management know first so it could figure out some way to solve the problem. He said it was for that reason only, that personally Takee was a very nice person and very honest, but they had to let her go because of the walkout.

Nakagawa testified that he was discharged on June 13. Kajino told him he was discharged because most of the chefs at the restaurant did not want to work with him. During the course of their conversation, which lasted more than an hour, Nakagawa asked why Takee was discharged. According to him, Kajino replied that the reason he had to fire Takee was because, as head waitress, they wanted her to take the responsibility for the walkout, for damaging Respondent's image. Kajino further said that Nakagawa had also participated, that he had been seen talking to the waitresses, agitating them to engage in the walkout.[14]

Kanenobu testified that Takee was discharged for two reasons: one, service had deteriorated, which meant that Takee was unable to lead or guide the other waitresses; and, two, Takee had been stealing tips. According to him, on May 30, he met with chefs Okhawa and Hiroyuki Matsuura.[15] Matsuura said if present conditions continued, he and Okhawa did not wish to remain in Respondent's employ. Kanenobu asked what the situation was. Matsuura said, "You have a terrible head waitress and a terrible head chef. Kanenobu asked what he meant. Matsuura said the head chef tried to avoid work as much as possible and gave some examples.

As to Takee, Kanenobu testified, Matsuura said she was not guiding the waitresses, that she was telling the new waitresses the wrong thing, that the cooks would report this to the head chef, but that he never relayed these complaints to the head waitress or to the others so that the same mistakes were repeated over and over again. Matsuura said the head waitress should be a model for the other waitresses but Takee would bring cakes from outside and eat them while she was working. He said neither Takee nor Nakagawa had the qualifications to be "heads."

According to Kanenobu, Matsuura further said that Takee was stealing tips, that she would tell the other waitresses that she would do the counting so they did not need to come near to where she was doing the work, and so they had to stay a distance away. He further said they all thought this was rather odd, and that while this was happening he saw Takee stealing some of the tip money. Matsuura and Okhawa said that, if Kanenobu did not discharge Nakagawa and Takee, they would quit. Kanenobu further testified that prior to this Kajino had complained once or twice that the head waitress' training was not going well.

Matsuura testified in general corroboration of Kanenobu as to what he said regarding the head chef. In addition, he testified that he said Nakagawa did not train the new chef and he was "picking on" food at another department, the sushi bar. As to Takee, Matsuura testified he told Kanenobu that Takee was treating very well the waitresses she liked, but did not treat well those she did not like, that she drank coffee in the dining room and used the sugar that was there for the customers. He agreed that he said he saw Takee stealing tips. According to him, on two occasions in April he observed Takee counting tips. No one else was present. On one occasion, he saw her put money in an envelope without a name on

[13] Yoa testified that he said they compared the work schedule with all the times that money was stolen in order to single out the one person who was working on each of these occasions.

[14] In his account of this conversation in his prehearing affidavit dated July 26, there is no mention of a reason for Takee's discharge. However, that affidavit as given in support of the claim that Nakagawa was unlawfully discharged and was not concerning Takee's discharge.

[15] At the time of the hearing herein, Matsuura was head chef and apparently had been since sometime in June.

it,[16] take the envelope, and leave. On a second occasion, he saw her put tip money in her obi, which was unusual.

Takee testified that all of the late shift waitresses sit at a table and count the tips. Matsuura admits that is the way tips are supposed to be counted but testified that on a number of occasions only one person counts the tips. Takee testified that she cannot recall any occasion when she counted tips with no other waitress watching what she was doing.

Kanenobu testified that on May 31 he related to Kajino what Matsuura and Okhawa told him and asked him to check what the amount of tips was. Later that day, Kajino reported to him that there was a total of about $1000 in tips missing per month since Takee became head waitress.[17] Kanenobu said he had to think that this decrease was because the head chef and the head waitress were not good and that the tips were being stolen. He then told Kajino to discharge Takee and to tell her that service was bad, business was very bad, and they no longer needed a head waitress so they were discharging her. He further specifically instructed Kajino not to mention the stealing of tips to Takee.

When questioned as to the reason for this latter instruction, Kanenobu testified, "We did not tell Pepe at that time, when he was thought to have stolen, and also we do not mention these personal matters." In further justification of these instructions, he testified:

> A. . . . if that were said then we would have to say who saw it. Because we didn't want to create any bad feelings there and she was going to leave and we wanted things to be left in a peaceful manner.
>
> Also, in our Oriental society, which is a very small society, it would not be good to bring up people's names in such a way.
>
> And so we tried to keep the problem as small as possible.
>
> . . . .
>
> JUDGE ROBBINS: Are you saying that in the Oriental society it is never mentioned if someone sees someone else stealing?
>
> A. No, it's just that one does not throw rocks at a departing person. But, however, if the person is coming towards me like a fire squad then I would have to do something about it.

However, in his statement of position submitted to the Board's Regional Office in response to the charge herein, he stated:

> On June 1, 1982 our head waitress, Voravan Takee was terminated. She was dismissed, due to the fact that business slowed down considerably and there was no improvement on the service to our customers, so we saw no advantage of maintaining a head waitress system.

Further, in his prehearing affidavit he states that the two chefs told him they would not remain in Respondent's employ if Nakagawa remained. There is no mention of any ultimatum with regard to Takee. Nor did he state in his affidavit that a reason for discharging Takee was that she was stealing tips.

According to Kanenobu, he did not mention the stealing of tips in his affidavit for the same reason he did not include it in his statement of position and also because he felt that he should only tell the Board agent the reason given by Kajino to Takee. In his prehearing affidavit, he does detail, as follows, why he considered Takee a bad head waitress:

> As a head waitress, Takee was very bad in that she would eat at the restaurant while she was working. She would bring food from the outside and eat it in the restaurant. She would drink soft drinks during work; she would change waitresses schedules without permission from the manager; she talked too much. Takee was never given any written warnings about any of the above-mentioned matters. It is the practice of the restaurant to give only oral warnings or reprimands, never in writing. I never gave Takee any oral warnings myself. That is the responsibility of Mr. Kajino and Mr. Morihito, the assistant manager.

Kajino testified in corroboration of Kanenobu as to the reasons for Takee's discharge and as to his conversations with Kanenobu with regard thereto. He denies the statements attributed to him by Takee, Yoa, Kondo, and Nakagawa that Takee was discharged because, as head waitress, she was involved in the walkout. He admits that Yoa did ask him why Takee was discharged; to which he replied that Takee was not suitable as a head waitress. According to him, he felt it was not necessary to mention the stealing of tips.

B. *Conclusions*

I do not credit Kanenobu and Kajino as to the reasons for Takee's discharge. I find them to be unreliable witnesses who attempted to tailor their testimony in the manner deemed to be most advantageous to Respondent. In this regard, I note the inconsistencies in Kanenobu's testimony as to whether Takee discharged the head busboy or only recommended that he be discharged; his testimony that he discharged Takee in 1981 because she was inexperienced and rehired her after a break in service of approximately 3 months because in the interim she had worked in a restaurant that had good training of waitresses, which length of time was directly, and reason for rehire and characterization of her separation as a discharge were indirectly, contradicted by a subsequent stipulation of the parties that Takee's break in service was no more than 2 weeks; and his testimony that family health insurance coverage was restricted to management, which was contradicted by Takee's health plan card which shows she had family coverage in December 1981 before she became head waitress.

I further note the conflicts between his testimony and his prehearing affidavit set forth above, particularly the

[16] All of the envelopes normally have names on them.

[17] According to Kanenobu, this was based on 10 percent of gross sales.

statements in his affidavit that Kajino can hire and fire full-time employees only in an emergency; that one reason for dissatisfaction with Takee's performance as head waitress was her changing of schedules without Kajino's permission, whereas he testified that Takee prepared the schedules; and the failure, in his affidavit and in his statement of position, to give the stealing of tips as one of the reasons for her discharge or to relate the alleged ultimatum given by Matsuura with regard to Takee. I do not credit Kanenobu's explanation of the reasons for these conflicts. Kanenobu, who speaks English but testified through an interpreter, testified that when he gave his affidavit he spoke to the Board agent in English, but did not understand what was written in the affidavit. He denies that he read the affidavit but admits that the Board agent showed it to him and he looked at it. According to him, he signed it because the Board agent told him it would be disadvantageous to him and he would lose the case if he did not sign it right then and there.

Kanenobu admits he received a copy of the affidavit but never contacted the Board agent to tell him it was incorrect. According to him, he could not read the affidavit so he just left it that way. However, he also testified that he is a university graduate in electrical engineering and that he has been in business for 3 years. Further, he admits that he can read English and, on the witness stand, did read in English that portion of the affidavit regarding Kajino's authority to hire and fire. He was unable to read two phrases but I conclude that this resulted from the illegibility of the handwriting and not from any inability to read English. He read without difficulty or error, "he [Kajino] can hire and fire full-time employees only in an emergency." In the circumstances, I conclude that Kanenobu's affidavit is a reliable account of the statements he made at that time, and that his affidavit is more reliable than his testimony.

I do not credit Kanenobu and Kajino that during the May 29 meeting Kajino told Takee she could fire waitresses who did not perform satisfactorily. In his affidavit, Kanenobu states that even Kajino did not have such authority. Further, I find it unlikely that the waitresses who testified would not recall such a statement. Moreover, if she had, in fact, fired Pepe, as Kajino and Kanenobu contend, there would have been no reason for her to ask such a question. Nor do I credit Kanenobu and Matsuura that Matsuura and Okhawa had told Kanenobu they would guit if Takee remained or that Matsuura saw Takee stealing tips.[18] I find it unlikely, considering the concern of the waitresses as to their stolen or decreased tips, that they would have tolerated, without complaint, their exclusion from the counting of tips as allegedly described by Matsurra to Kanenobu. Further, there is no reason apparent from the record why two cooks would threaten to quit because the head waitress was treating the waitresses unfairly or because the head chef was not relaying their complaints.

[18] I do not credit Yuka as to the incident she described as tip stealing. Further, there is no evidence that Respondent had knowledge of this incident when Takee was discharged.

I also do not credit Kajino's denial that he told Takee, Yoa, Kondo, and Nakagawa that Takee was discharged because she participated in the walkout. The testimony of Takee, Yoa, Kondo, and Nakagawa, which I credit,[19] tend to be mutually corroborative and, on a consideration of the demeanor of the witnesses and the entire record, more credible than that of Kajino. In all of the circumstances, I find that the reasons asserted by Respondent for Takee's discharge are pretextual and that she was discharged because she engaged in a walkout, along with other waitresses, in protest of their working conditions.[20] Accordingly, I find that Takee was discharged on June 1, 1982, in violation of Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Voravan Takee is an employee within the meaning of Section 2(3) of the Act.

3. By unlawfully discharging Voravan Takee, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By telling employees that a fellow employee was discharged because she participated in a protected concerted walkout of employees, Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act.

5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Voravan Takee in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to offer Voravan Takee immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, plus interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[21]

[19] I have fully considered and reject Respondent's argument that their testimony is not credible.

[20] Contrary to Respondent's contentions, I find that Respondent has not established that Takee would have been discharged, even absent this protected activity. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[21] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Shin Nihon Kosan, Inc. d/b/a Shogun Restaurant, Pasadena, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise descriminating against employees because of their protected concerted activities.

(b) Telling employees a fellow employee was discharged because she participated in a protected concerted walkout of employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employee Voravan Takee immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, plus interest.

(b) Expunge from its files any reference tothe discharge of Voravan Takee on June 1, 1982, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Pasadena, California, copies of the attached notice in English and Japanese marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell our employees that fellow employees were discharged because they participated in a protected concerted walkout of employees.

WE WILL NOT discharge, and thereafter refuse to reinstate, employees because they engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer to Voravan Takee immediate and full reinstatement to her former job or, if her former job no longer exists, to a substantially equivalent position of employment without prejudice to her seniority or other rights and WE WILL make her whole for any loss of pay that she may have suffered by reason of our discrimination against her, with interest

WE WILL expunge from our files any references to the discharge of Vorvan Takee on June 1, 1982, and WE WILL notify her that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

SHIN NIHON KOSAN, INC. D/B/A SHOGUN RESTAURANT

---

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Southwest Forest Industries, Inc. *and* Local 562, United Paperworkers International Union, AFL–CIO, CLC. Case 25–CA–13189

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 16 December 1981 Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, for the reasons stated in this decision, and to adopt the recommended Order.

For the reasons fully set forth in the attached decision, the judge found that employee James Scott's strike misconduct was sufficiently serious to warrant his discharge. Accordingly, he dismissed the complaint's allegation that the Respondent violated Section 8(a)(3) and (1) by discharging Scott for engaging in union activities. While we adopt the judge's recommendation to dismiss the complaint, we do so on the basis of a different rationale.

On 29 January 1981[3] the Respondent's employees went out on strike over economic issues. The following day, strikers used a baseball bat to break the window of a truck that was attempting to cross the picket line to enter the plant, and hit the driver of the truck in the face when he attempted to walk from the truck to the plant.[4] On 31 January striker Scott, who had been drinking, spun his car across the Respondent's lawn causing it to stall crosswise on the Respondent's driveway. Upon being informed that a car was blocking the driveway, the Respondent's general manager, Wilhoite, and Plant Production manager Blaine left the plant to investigate. As Wilhoite and Blaine approached his car, Scott got out of the car and took out a child-size baseball bat which he allegedly kept there for self-protection. With the bat in his hand, Scott then cursed Blaine for several minutes. The episode was witnessed by the Union's president and several supervisors and picketers.

Blaine left, only to return approximately 10 minutes later to the site of Scott's stalled car. Scott, still holding the bat in his hand, recommenced cursing Blaine. Scott then asked Blaine if he had ever played baseball, and Blaine replied yes. Scott next stated that he would use Blaine for a baseball bat if Blaine crossed a line that a striker had drawn on the driveway earlier as a symbol separating management's side from the picketers' side.

Later in the day, Blaine, who had left the premises on business, returned to the plant. As he attempted to turn the car into the driveway, Scott placed himself in front of the car for 5 to 10 minutes and cursed fellow picketers for not helping him. After letting Blaine's car pass through the picket line, Scott stopped one of the Respondent's trucks, jumped on to its running board, and cursed the driver. On 2 February the Respondent discharged Scott for engaging in strike misconduct.

The judge found that Scott had engaged in serious misconduct which rendered him unfit for further service with the Respondent. We agree. The combination of Scott's physical and verbal acts of abuse and confrontation put him clearly beyond the protection of the Act and justified his discharge.[5] We disagree, however, with the judge's subordinate finding that "Scott never actually menaced Blaine or anyone else" with the baseball bat.

In *Clear Pine Mouldings*, the Board adopted a new objective test for determining the legality of an employer's refusal to reinstate a striker because of verbal threats by strikers directed at fellow employees or even at persons who do not enjoy the protection of Section 7 of the Act. The test is "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

Viewed apart from Scott's blockading efforts, his verbal tirades against Blaine while holding a small baseball bat in his hand reasonably tended to coerce within the meaning of the above test. With-

[1] The Respondent's request for oral argument is denied as the record and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates refer to 1981.

[4] The two strikers involved were discharged and their discharges are not contested.

[5] The judge correctly noted that the Respondent had committed no unfair labor practices against which Scott's misbehavior might be weighed. See *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1954). For reasons stated in the plurality opinion of Chairman Dotson and Member Hunter in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), Member Hunter does not agree with the *Thayer* test of balancing an employer's unfair labor practices against striker misconduct in determining whether adverse action against the striker is warranted.

out provocation, Scott repeatedly confronted Blaine while in conspicuous possession of a potential offensive weapon.[6] At one point, Scott clearly threatened to assault Blaine if he crossed the symbolic picketers' line. The presence of the bat heightened the impression of imminent physical danger imparted by the threat, even though Scott apparently never lifted the bat from his side. In the circumstances of this case, Scott's behavior reasonably tended to threaten Blaine with bodily harm. By this misconduct above, as well as by the totality of his actions described above, Scott forfeited any right to further employment by the Respondent.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[6] It is irrelevant that, as the judge found, Scott considered the bat necessary for self-defense. There is no evidence that Blaine or any other witness to Scott's behavior would reasonably have viewed the bat as limited to a defensive purpose.

DECISION

I. BACKGROUND

STEPHEN J. GROSS, Administrative Law Judge. The United Paperworkers International Union (the Paperworkers) and Paperworkers Local No. 562 represent the production and maintenance employees at the Indianapolis plant of Southwest Forest Industries (SFI).[1] On January 21, 1981,[2] the employees represented by the Paperworkers went out on strike over economic issues. Picket lines were established immediately. SFI continued to operate the plant using supervisors and nonbargaining unit employees.

On February 2 and 3 SFI fired four striking employees and suspended one. SFI's letters to those employees gave as the reasons for its action against them their participation in activities such as damaging vehicles attempting to enter the plant, hitting the driver of one of those vehicles, damaging a supervisor's vehicle, threatening nonstriking personnel, and committing "malicious mischief."

On February 18, Local 562 filed a charge against SFI contending that its discharges and suspension of the five employees violated the Act.

A complaint, dated April 9, followed, limited to SFI's actions against one of the employees, James Scott. According to the complaint, SFI discharged Scott because he

> [J]oined, supported or assisted the Union, and engaged in concerted activities for the purpose of mutual aid and/or protection, and in order to discourage employees from engaging in such activities or other [protected] activities . . . and because said employee participated in a strike called by the Union.

SFI denied any wrongdoing and the case went to hearing in Indianapolis on September 28 and 29. The General Counsel and SFI have filed briefs, and the case stands ready for decision.[3]

There is no real dispute about the general requirements of the Act pertinent to this case. Employees have the right to strike and to picket (absent circumstances not present here). Employers accordingly may not discriminate against employees for doing so. While an employee's serious acts of misconduct on the picket line place the employee outside the Act's protection, minor picket line misconduct does not.[4] And if an employer in good faith fires a striking employee on the ground that the employee was guilty of serious picket line misconduct, the employer nonetheless will be deemed to have violated Section 8(a)(1) of the Act if it can be shown that, despite the employer's honest belief to the contrary, the employee did not in fact engage in misconduct aggravated enough to remove the employee from the Act's protection.[5]

No party contends that Scott's discharge stemmed from union animus on SFI's part or was otherwise discriminatorily motivated; and there is no evidence in the record that would support such a contention if one had been made. The questions at issue are therefore limited to: (1) whether Scott actually engaged in the activity for which SFI fired him; and (2) if he did, whether those actions were sufficiently aggravated to render his conduct unprotected.

For the reasons stated below, my conclusion is that both questions must be answered affirmatively, and that SFI accordingly committed no unfair labor practice when it fired Scott.

II. SCOTT'S VERBAL ABUSE OF BLAINE

A. *Introduction*

On January 31 Scott involved himself in several angry, loud confrontations at or near the picket line. As is usual in such cases, a lot of things happened in relatively short

[1] SFI does not dispute the General Counsel's contention that it is an employer engaged in commerce for the purposes of the National Labor Relations Act (the Act). And all parties agree that Local 562 is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] On March 16 Respondent's attorney sent a 27 page letter to Region 25 in response to the charges Local 562 had filed against SFI. Several pages of the letter related to Scott. The General Counsel sought to introduce the entire letter into evidence. But I allowed into the record only those pages specifically relating to Scott: See Tr. 77–81. At p. 8, fn. 1, of her brief, the General Counsel renewed her motion to have the entire letter (or at least several additional pages) made part of the record. The renewed motion is denied. In view of the possible prejudice to Respondent by adding evidence to the record at this juncture, the General Counsel would have had to make a compelling case for her motion to have been granted. But it continues to appear that the relevance of the additional pages is marginal. And the General Counsel had the opportunity to use as much of the document in question as she chose for purposes of impeaching Respondent's witnesses (so long as she avoided asking about attorney-client communications: see Tr. 79).

[4] See *Coronet Casuals*, 207 NLRB 304 (1973).

periods of time, and the circumstances carried an emotional charge with them. In those kinds of situations witnesses to the events will inevitably misperceive some of what actually happened, and, on top of that, later misremember some of what they perceived.

None of the persons who testified in this proceeding were immune from those kinds of difficulties. But five of the witnesses did seem to attempt to testify accurately about what they remembered: The General Counsel witnesses Coffman and Haltom; and SFI witnesses Blaine, Clark, and Wilhoite. The description below of Scott's activities represents my understanding of what happened on January 31 based on an amalgamation of the testimony of those five witnesses. (The testimony of the General Counsel witnesses Scott and Siedle differed substantially from the other witnesses and at times seemed inherently improbable. Under the circumstances I am unable to credit much of the testimony of either of the two.)

B. *Scott's Confrontation with Production Manager Blaine*

Late in the morning of January 31 Scott drove his car back and forth on the street in front of the SFI plant, driving in a way that produced loud engine and tire noises and high rates of acceleration and deceleration. Ultimately that form of driving resulted in Scott's car spinning across the plant's front lawn, with the car ending stalled crosswise on the driveway at the western side of the plant.

A guard somewhere near the site radioed to say that a car was parked across the west driveway, blocking it. Bert Wilhoite is the general manager of SFI's Indianapolis plant and the Company's senior official at the plant. When Wilhoite was told about the car blocking the driveway, he went out to the site in an effort to handle the situation. A few moments later Thomas Blaine, the plant's production manager and second most senior official, also headed for the site.

Scott had consumed sufficient alcohol for his speech and coordination to be obviously affected. For reasons not to be found in the record, Scott believed that Blaine had stood in the way of management and the Union working out their differences without a strike. As Wilhoite and Blaine approached, Scott got out of his car. Scott kept a child-size baseball bat in his car "in case," as he put it, "I ever run into any trouble."[6] And he was holding the bat when he got out of the car. After exchanging a few relatively calm words with Wilhoite, Scott, referring to Blaine, told Wilhoite that "if it weren't for that skinny motherfucker we wouldn't be out on strike right now." Scott then turned to Blaine and, while striding back and forth in an area about 3 to 6 feet from Blaine, proceeded to curse at him profanely ("weasel-faced motherfucker," "cocksucker," etc.), loudly, angrily, and repetitiously. Blaine did not respond. All of this took place in the presence of several SFI supervisors, the president of Local 562 (who had earlier tried, unsuccessfully, to get Scott to leave), and a dozen or so picketers.

After a few minutes of Scott's cursing, Wilhoite, in an effort to defuse the situation, told Blaine to check things at the plant's east driveway. Blaine followed Wilhoite's orders. But 5 or 10 minutes later Blaine returned to the site of Scott's stalled car.

Scott promptly began to curse at Blaine again, and again used the most abusive, profane epithets available. Sometime earlier another of the picketers had delineated a place on the driveway that, he jokingly said, marked the boundary line between the picketers' turf and management's. Scott asked Blaine if he had ever played baseball. Blaine responded affirmatively. Scott then asked Blaine whether he had ever been used as a baseball bat and suggested that he would use Blaine in just that way if Blaine stepped across that imaginary line. As Scott said that he had his right hand pointing at Blaine. But the baseball bat was in his left hand and he continued to hold the bat down, near his leg.

At that point Wilhoite stepped between Blaine and Scott and told Blaine to leave the area. Blaine stepped backward a few steps (so that he would not have to turn his back to Scott while he was within Scott's striking range), turned, and walked away.[7]

The driveway was ordinarily wide enough for two cars to pass. But during the strike it was partially blocked by several 55 gallon drums. The combination of Scott's car and the drums completely blocked the driveway. At the Company's request, however, the pickets pushed Scott's car to the side without interference from Scott.

III. SCOTT'S SUBSEQUENT ACTIONS BLOCKING VEHICLES

About an hour after Scott's confrontation with Blaine, Blaine left the plant in his own car on company business. He returned about 1 p.m. The plant borders English Avenue. As Blaine started to turn onto the east driveway

---

[7] Blaine and Wilhoite each wrote "incident reports" covering the Scott-Blaine confrontation (see G.C. Exh. 8, Tr. 67–72 and 296). The General Counsel submitted Wilhoite's incident report into evidence (but not Blaine's) solely for "the purpose of impeachment, and not for the truth of the matters asserted in the document" (Tr. 67). The General Counsel points out that while Wilhoite testified that Scott actively menaced Blaine with the baseball bat, Wilhoite's incident report makes no mention of a bat. That discrepancy is one of the reasons that I do not believe that Scott waved the bat around in a threatening way, as Blaine and Wilhoite testified. But Wilhoite's failure to mention the bat in his incident report by no means necessarily shows that Scott did not have a bat in his hand during the incident.

The General Counsel, in a further reference to the incident reports, argues that, given their availability and their obvious relevance to the issues at hand, an adverse inference should be drawn against SFI because of its failure to introduce Wilhoite's and Blaine's reports into evidence (Br. at 5). But the material in the reports is hearsay. While , Fed.R.Evid. 803(6) permits the admission of some reports notwithstanding that consideration, the incident reports at issue here were obviously prepared with the awareness of possible litigation in mind. Under these circumstances the admissibility of the reports is far from clear: see, e.g., *Picker X-Ray Corp. v. Frerker*, 405 F.2d 916, 922–923 (8th Cir. 1969) (incident report held inadmissible); 4 Weinstein's *Evidence* at 803–177 (1979). It accordingly can be presumed that SFI assumed that any attempt by it to introduce the incident reports into evidence would be met with a vigorous and sus-

into the plant from English Avenue, Scott placed himself in front of Blaine's car. Blaine stopped the car. For the next 5 or 10 minutes Scott remained in front of Blaine's car, sometimes leaning against it, and cursed at nearby picketers for their willingness to allow vehicles to enter the plant grounds. (E.g., "None of you other son-of-a-bitches are going to help me . . . on the strike line, I'll have to do it by myself.")[8] In the meantime the other picketers began demanding that Scott let Blaine's car pass. At no time during this incident did Scott address any remarks to Blaine.

Scott ultimately did, of his own accord, let Blaine's car go through. But Scott forthwith placed himself in front of an SFI truck that was immediately behind Blaine.

Scott and the picketers continued their argument for a while—with Scott remaining in front of the truck—and then Scott jumped on the running board of the truck and cursed at the driver. Scott subsequently got off the truck, and, about 5 minutes after it had first been stopped by Scott, it proceeded into the plant.[9]

IV. SFI'S ACTION AGAINST SCOTT

In a letter dated February 2, 1981, but actually signed on February 3, SFI advised Scott as follows:

> You are discharged from employment effective February 2, 1981, for engaging in picket line misconduct consisting of making threats of bodily harm directed towards another employee and for trespass and malicious mischief at the picket line established at our plant, 6400 English Avenue, Indianapolis, Indiana on Saturday, January 31, 1981.

V. CONCLUSION

Scott never actually menaced Blaine or anyone else. While Scott's actions certainly must have seemed threatening to Blaine and Wilhoite, Blaine—who was the object of Scott's attention—recognized that Scott's baseball bat "threat" was contingent on Blaine stepping onto Scott's side of that imaginary line. As for Scott taking the bat out of his car, the impression I got was that, as Scott saw things, he needed the bat for his own protection, not as an offensive weapon. Finally, as far as this record discloses, Scott's misbehavior during the strike was limited to the January 31 incidents, and those were at least in part a product of Scott's consumption of alcohol.[10]

But Scott's verbal abuse of Blaine was sufficiently far out of line for his actions to lose the protection of the Act. A short burst of profanity is not cause for discharge—even, probably, if a member of management is the object of that profanity.[11] But here that abuse, apart from being very ugly, lasted for several minutes (a long time for that kind of incident), and then was repeated (when Blaine returned from checking the east driveway). Beyond that: (1) Blaine was a high-ranking official of the plant at which Scott worked; (2) the ugliness of the incident was heightened by Scott's drunkenness and the presence of a bat in his hand; and (3) numerous employees and several supervisors witnessed the incident.

By any standard Scott's behavior under these circumstances rendered him unfit for further service with SFI. The Company accordingly did not act improperly in firing Scott, particularly since SFI had committed no unfair labor practices against which Scott's misbehavior might be weighed.[12]

As for Scott's action in stopping Blaine's car and the company truck, we need not resolve here whether that would be enough, standing alone, to remove Scott's strike activities from the Act's protection. But in view of the fact that Scott stopped both vehicles for considerable periods—not just momentarily—and did his best to get the other picketers to prevent vehicles from entering, Scott's stopping the two vehicles adds to the strength of SFI's case.

CONCLUSIONS OF LAW

1. Employee James Scott engaged in acts of picket line misconduct sufficiently aggravated to lose the protection otherwise accorded by the National Labor Relations Act.

2. Respondent Southwest Forest Industries discharged Scott for that aggravated misconduct.

3. Respondent's discharge of Scott accordingly did not violate the Act in any respect.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed in its entirety.

---

[8] Tr. 275 (witness Coffman).

[9] The truck was stopped a total of 10 minutes or so. First because Scott had stopped the car in front of it (Blaine's). And then because of Scott's actions directed at the truck. With the truck unable to exit off English Avenue into the plant, a traffic jam developed on English Avenue.

[10] See *Juniata Packing Co.*, 182 NLRB 934, 936 (1970).

[11] See *Moore Business Forms*, 224 NLRB 393, 405 (1976); *Rangaire Corp.*, 157 NLRB 682, 711 (1966); *Mosher Steel Co.*, 226 NLRB 1163, 1166 (1976).

[12] See *NLRB v. Thayer Co.*, 213 F.2d 748, 755 (1st Cir. 1954), cert. denied 348 U.S. 883 (1954). Compare *Moore Business Forms*, supra; *Rangaire Corp.*, supra; *Juniata Packing Co.*, supra; *Mosher Steel*, supra.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Noel Produce, Inc. *and* General Teamsters Local No. 174, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 19–CA–15720(E)

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 3 May 1984, Administrative Law Judge William J. Pannier III issued the attached decision. The Applicant, Noel Produce, Inc., filed exceptions and a supporting brief and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge correctly found that the Applicant is ineligible for an award of attorney fees under the Equal Access to Justice Act (EAJA) because the aggregate net worth of the Applicant and its parent company concededly exceeds $5 million.[1] Applicant contends that we have exceeded our administrative authority by adopting Section 102.143(g) of the Board's Rules and Regulations, which requires that the net worth of an applicant be consolidated with that of its affiliates in determining eligibility. Section 102.143(g) is merely an adoption of the rule recommended by the Administrative Conference of the United States which received and considered comments on the validity of the rule. Although EAJA is silent on the matter, the requirement implements the purpose of that Act, which sought to establish "financial criteria which limit the bill's application to those persons and small businesses for whom costs may be a deterrent to vindicating their rights."[2] Parties that meet the eligibility standard only because of technicalities of legal or corporate form, while having access to a large pool of resources from affiliated companies, do not fall within this group of intended beneficiaries. Moreover, in our attempt to ensure that the rule does not eliminate deserving applicants, Section 102.143(g) provides that in limited circumstances net worth will not be consolidated where "such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act . . . in light of the actual relationship between the affiliated entities." The Respondent does not set forth any basis warranting a finding that applying the affiliation rule to it would be unjust and contrary to the purposes of the Equal Access to Justice Act.

ORDER

It is hereby ordered that the application of Noel Produce, Inc., Kent, Washington, for an award under the Equal Access to Justice Act be dismissed.

SUPPLEMENTAL DECISION

(Equal Access to Justice Act)

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. On January 20, 1984,[1] I issued a Decision in which I concluded that Applicant Noel Produce, Inc. had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. by having engaged in certain unlawful conduct prior to March 31, but had not committed certain other unlawful conduct alleged to have occurred between that date and May 5. Further, in the absence of any credible evidence of objectionable conduct between those two dates, I concluded that there was no basis for setting aside a second or rerun election conducted on May 5 and, accordingly, no basis for considering whether or not a bargaining order would be warranted under Section 8(a)(5) of the Act, as was sought in the complaint. No exceptions were filed and the Board adopted my findings and conclusions.

Thereafter, Applicant filed Respondent's "Application for Attorneys Fees, Costs and Expenses Pursuant to the Equal Access to Justice Act," based on the fact that it prevailed on that portion of the complaint that had alleged a violation of Section 8(a)(5) of the Act. That application has been referred to me by the Board for appropriate action.[2] The General Counsel has filed an answer to the application for an award and a motion for judgment on the pleadings. While the General Counsel advances several arguments in support of its motion, it suffices to dispose of this matter, in its entirety, on the basis that Applicant does not satisfy at least one criterion to be eligible to receive such an award. I also grant the motion on the basis that the General Counsel's position with respect to the 8(a)(5) allegation was reasonable in law and fact, and that there had been substantial justification for including that allegation in the complaint.

[1] In such circumstances, the Board finds it unnecessary to pass on the judge's discussion of whether the General Counsel was "substantially justified" in including an 8(a)(5) allegation in the complaint.

[2] H.R. Rep. No. 96–1418, at 15 (1980).

[1] Unless stated otherwise, all dates occurred in 1984.

[2] Referred also was a motion to withhold information from public disclosure. In light of my disposition infra, it is unnecessary to rule on that motion.

Analysis

The Board's Rules and Regulations Section 102.143(c)(5) recite that to be eligible for an award, an applicant that is a corporation, such as Applicant, must have a "net worth of not more than $5 million." Further, Section 102.143(g) of the Board's Rules and Regulations provides:

> The net worth . . . of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant . . . will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities.

In its application, Applicant states that Noel, Inc. is its parent company and, further,

> . . . because Noel, Inc., as a corporate entity having a total net worth which exceeds $5 million, does in fact control or own a majority of the voting shares or other interest of the Applicant, the aggregate "affiliated" net worth of the Applicant is caused to exceed the corporate net worth eligibility requirement established by the NLRB Rules and Regulations . . . .

Applicant sets forth no circumstances that would render application of the affiliate rule "unjust and contrary to the purposes of the Equal Access to Justice Act" within the meaning of Section 102.143 (g) of the Board's Rules and Regulations. Instead, Applicant argues that this concept of affiliated corporate net worth is one that is contrary to the provisions of the Equal Access to Justice Act, being no more than the product of "the Board's 'bunker' mentality."

Whether or not the affiliate concept embodied in Rule 102.143(g) is the product of "'bunker' mentality" is really not an issue that I am free to resolve. I am bound by Board law and certainly by the Board's Rules and Regulations. Therefore, as Applicant and its affiliate concededly have a net worth in excess of $5 million, I grant the General Counsel's motion on the ground that Applicant is not eligible, for that reason, to receive an award.

Ordinarily, that conclusion would end all further discussion. However, certain statements that have been made give rise to doubt concerning whether there is a true understanding of the legal principles that governed the proper method of analyzing the 8(a)(5) issue presented in the underlying proceeding. While I am not obliged to do so, in the interest of clarifying the situation, and in view of the assertions made in conjunction with the affiliate concept, it does seem that some benefit might be derived from an explanation of the method of analysis that would have ensued had I credited the testimony regarding statements purportedly made between March 31, when the first representation election was conducted, and May 5, when the second or rerun election was conducted.

As set forth in greater detail in my decision, on various occasions prior to March 31 Applicant's general manager had made threats of closure if the employees selected a bargaining representative and, on one occasion, unlawfully had interrogated a job applicant concerning union sympathies. Also prior to March 31, Applicant's officials had promised wage increases and, further, had announced and granted a general wage increase, all in violation of Section 8(a)(1) of the Act. Following the filing of objections to the first election, based on Applicant's preelection conduct, that election was set aside pursuant to a stipulation of the parties.

With regard to the alleged conduct between March 31 and the second or rerun election on May 5, by the time that the General Counsel and the Charging Party/Petitioner had rested there was testimony that approximately a week after the first election, Applicant's general manager had convened a meeting of employees and had warned them "that if the place went union, that Noel would never agree to a contract with the union." Moreover, there was testimony that on the day of the election, prior to its commencement, the general manager had told an employee, Keith A. Maunu, that if the employees selected representation in the election, a contract would never be reached or ratified by Applicant and, further, that all wages would be frozen until a contract was reached. I did not credit this testimony. Yet, "the General Counsel cannot himself resolve credibility issues." *Charles H. McCauley Associates*, 269 NLRB 791 (1984). Indeed, I did credit Maunu's testimony concerning an earlier conversation with the general manager and, based on the available information, there was no reason for the General Counsel to believe that Maunu's account of the later conversation was not worthy of belief.

Applicant points out, in the application, that this testimony was not corroborated. But there was no way for there to be corroboration of Maunu's testimony, short of an admission by the general manager that he had made the statements on May 5 attributed to him by Maunu. For, according to Maunu, only the two of them had been present during that conversation. True, only Gary Fisher was called to describe the general manager's purported remarks at the general meeting with employees. But, as I stated expressly in my decision, I did not credit Fisher because "I was not impressed by [his] demeanor," not because there was no corroboration for his account, although I pointed out that that was the fact. Had I believed Fisher, corroboration of his testimony would not have been necessary for me to conclude that the general manager had made the threat to the assembled employees that day. See, e.g., *C. P. & W. Printing Ink Co.*, 238 NLRB 1483 (1978). In addition, it is worth noting that this testimony by Fisher, and by Maunu as well, never was denied. Finally, in this area, the general manager had made threats to employees prior to March 31. The nature of those threats had differed from those attributed to him after March 31. Yet, his pre-March 31 willingness to resort to threats, to deter employees from selecting a

bargaining representative, tended to support the General Counsel's position that he likely would have continued making threats, even if of a different consequence, prior to the rerun election.

In sum, there is nothing either argued by Applicant or contained in the record of this proceeding that would controvert a conclusion that, by the time that the General Counsel and the Charging Party had rested, there was a substantial basis in fact for believing that Applicant had engaged in objectionable and unlawful conduct between the elections. Had Maunu and Fisher been credited, then analysis would have progressed to the issue of the effects of the general manager's statements upon the laboratory conditions for conducting a rerun election. Clearly, had Maunu and Fisher been credited, there would have been a reasonable basis in fact and law for contending that the second election should have been set aside. Fisher's testimony showed that all employees had been warned that no contract would be reached even if they did elect a bargaining representative and, inferentially, that it would be futile for them to exercise their statutory right to do so. Maunu's testimony showed that Applicant was not reluctant to repeat this threat and to reinforce it with a further threat: that employee wages would effectively be frozen until a contract was reached.

True, had he been credited, Maunu's testimony showed no more than that the general manager's threat not to increase wages had been made to but a single employee. Yet, it had been made against a background of pre-March 31 threats to several employees and, also, of pre-March 31 wage increases to all unit employees. Those wage increases served to demonstrate the "fist inside [Applicant's] velvet glove." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). And, had Maunu been credible, it had been that fist that the general manager had unsheathed on May 5 by warning that Applicant would exercise its power over wages to freeze them, perhaps permanently, if the employees chose to elect a representative. Consequently, had the general manager made the remarks described by Maunu, those comments "were likely to be rapidly disseminated around a plant during the struggle of organization." *Bausch & Lomb Optical Co. v. NLRB*, 217 F.2d 575, 576 (2d Cir. 1954).

In sum, had the testimony of the General Counsel's witnesses been credited, there was a reasonable basis for concluding that the second or rerun election would have been set aside, since Applicant had been renewing its threatening statements during the period between elections and those statements, particularly the threat described by Fisher, had been known to a substantial number of employees who were scheduled to vote in the second election. If, in fact, the second election had been set aside, analysis then would have proceeded to the question of whether a bargaining order should issue and, concomitantly, to the issue of whether it should be concluded that Applicant had violated Section 8(a)(5) of the Act by having rejected the demand for recognition that had been tendered to it.

Contrary to the implication in the application, the determination of whether to issue a bargaining order would not have been confined to unlawful conduct occurring between the two elections. Rather, all of Applicant's conduct, from the very beginning of the organizing campaign, would have been evaluated in making that determination. See, e.g., *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981); *Maxwell's Plum v. NLRB*, 481 F.2d 75, 79 fn. 3 (2d Cir. 1973). Moreover, in doing so, a number of indicia would have been considered: the seriousness or gravity of the nature of the unfair labor practices committed,[3] the swiftness or suddenness with which they were committed on learning of the existence of the organizing campaign,[4] the duration or period of time over which they were committed,[5] the number of employees affected by them,[6] the level of supervision which had committed them,[7] and the likelihood of their repetition should another rerun election be directed.[8]

Here, as set forth in greater detail in my decision, Applicant commenced committing unfair labor practices even before the representation petition had been filed. It then continued committing them over the entire course of the period prior to the first election. Had Maunu been fully credited, his testimony concerning the May 5 comments by the general manager would have shown that Applicant had continued committing unfair labor practices up to the very day of the second election. All unit employees had received wage increases and, had Fisher been credited, all of them directly had heard the threat that it would be futile to exercise their right to elect a bargaining representative as no contract with it would ever be reached by Applicant. Moreover, a number of employees had been subjected, on an individual basis, to separate unlawful remarks by Applicant.

Most of the unfair labor practices had been committed by Applicant's general manager. However, the announcement of wage increases, as well as apparently the decision to grant them, had been made by its owner. Among the unfair labor practices committed were several threats to close if the employees selected a bargaining representative. Such threats are of the type to which employees "are particularly sensitive," *NLRB v. Gissel Packing*, supra, 395 U.S. at 619, and "are not easily erased from the minds of employees." *Tri-City Paving*, 205 NLRB 174 (1973). Moreover, against a background of those types of threats and of illegally granted wage increases, threats that wage increases will no longer be granted until a contract is reached, when coupled with threats never to reach or ratify a contract if a bargaining representative is selected, are equally likely to dissipate majority support and to linger in employees' memories. Finally, had Maunu and Fisher been credited and had

[3] See, e.g., *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[4] See, e.g., *Wright Plastic Products*, 247 NLRB 635 (1980).

[5] See, e.g., *Rapid Mfg. Co.*, 239 NLRB 465, 467 (1978), enf. denied 612 F.2d 144 (3d Cir. 1979); *Warehouse Groceries Management*, 254 NLRB 252, 256 (1981).

[6] See, e.g., *NLRB v. Henry Colder Co.*, 447 F.2d 629, 631 (7th Cir. 1971); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 312 (3d Cir. 1980).

[7] See, e.g., *Midland Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir. 1980); *Wright Plastic Products*, supra.

[8] See, e.g., *Apple Tree Chevrolet*, 251 NLRB 666, 669 (1980); *Chandler Motors*, 236 NLRB 1565, 1567 (1978).

the second election been set aside, then the likelihood of conducting yet a third election with even some assurance that Applicant would not once more interfere with the laboratory conditions for conducting it becomes quite remote.

In sum, operating of necessity from the premise that his witnesses would be credited, *Charles H. McCauley Associates*, supra, and had the second election been set aside, there was ample justification for the General Counsel to assert that a bargaining order should be sought and "his position [in that regard] was reasonable in law and fact." Board's Rules and Regulations, Section 102.144(a). However, before departing this subject, one final point is worthy of note.

As I pointed out in my decision, the alleged violation of Section 8(a)(5) of the Act and the concomitant bargaining order remedy were sought on behalf of a joint representative whereas the authorization cards designated only a single labor organization. Nevertheless, as I noted in footnote 8 of my decision, while there is at least one Board decision concluding that cards authorizing a single representative will not support a bargaining order issued on behalf of a joint representative, there is also at least one other Board decision, issued within a 3-week period of the above-referred to one, that gives rise to an argument that the Board might allow single representative cards to support a bargaining order for a different entity in certain circumstances. Neither decision sets meaningful guidelines for its application, cf. *World Wide Press*, 242 NLRB 346, 365 (1979), with the result that it is not possible to conclude that the General Counsel acted without substantial basis in pressing the issue for possible clarification. Moreover, even if the Board would not have been willing to issue a bargaining order on behalf of the joint representative, a bargaining order still could have issued on behalf of the labor organization designated on the cards, notwithstanding the absence of a demand for recognition made solely on its behalf. See, e.g., *Grandee Beer Distributors*, 247 NLRB 1280 fn. 5 (1980).

Therefore, "the presence or absence of a *prima facie* case is not determinative of whether or not an applicant is entitled to an EAJA award." *Jim's Big M*, 266 NLRB 665 fn. 1 (1983). The General Counsel had a reasonable basis in fact for arguing that its witnesses should be credited. Had Fisher and Mauna been credited fully, the General Counsel had a reasonable basis in fact and law for asserting that the second or rerun election of May 5 should have been set aside in the circumstances. Had that election been set aside, the General Counsel had a reasonable basis in fact and law for contending that a bargaining order should issue.

ORDER

It is ordered that Respondent's aplication for attorneys fees, costs, and expenses pursuant to the Equal Access to Justice Act be, and it is, dismissed.

N & T Associates, Inc. d/b/a Aladdin Hotel *and* General Sales Drivers, Delivery Drivers & Helpers, Local Union #14 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 31-CA-13095 and 31-CA-13396

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 5 March 1984 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Charging Party filed an exception and the Respondent filed exceptions, a supporting brief, and an answering brief to the Charging Party's exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified herein, and to adopt the recommended Order.

The judge found that the Respondent, through Supervisor Giantonio, violated Section 8(a)(1) by asking employee Costanza "why he was so vocal on behalf of the union." Relying on *PPG Industries*,[2] and two other cases applying *PPG*,[3] the judge concluded that Giantonio's question constituted an unlawful interrogation. We disagree.[4]

In *Rossmore House*, 269 NLRB 1176 (1984), the Board overruled *PPG Industries* and announced that it would henceforth evaluate interrogations according to "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." Applying this test here, we do not find Giantonio's questioning unlawful.

Giantonio's credited testimony shows that the conversation took place on the floor of the casino while Costanza was on duty at the Big Six Wheel. Giantonio, the lowest ranking supervisor for one of the 21-games, was passing by the Big Six Wheel en route to the coffee shop when Costanza said hello to Giantonio. Giantonio stopped and asked Costanza why he was so vocal on behalf of the Union. Costanza gave three reasons in reply: security, the change in the toke or tip policy, and an alleged incident in which Director of Casino Operations Vickrey, rather than allowing a dealer to accept a $1250 toke, returned it to the customer. Giantonio responded by saying that new management would probably correct any security problem; that the originator of the change in toke policy had retired and the old toke policy would probably be reinstated; and that he did not believe that Vickrey had returned the toke because he was on duty that night monitoring the tables played by the customer and did not observe the alleged incident. That was the end of the conversation, during which no one else was present.

In our view, these facts reveal only a casual, private exchange between Costanza and Giantonio. Giantonio conveyed neither threat of reprisal nor promise of benefit during this conversation. Moreover, unlike the judge, we attach no significance to the fact that Costanza had not previously informed Giantonio of his union activities. Costanza, on occasion, had engaged in these activities on the closely monitored casino floor where such activities were blatant breaches of the Respondent's rules. It was, thus, inescapable that these activities would and did come to management's attention, not only through routine observation of activities on the floor, but also because of the widespread discussion among employees that Costanza's boldness provoked. Accordingly, we shall dismiss this allegation of the complaint.

We affirm the judge's finding that the Respondent, through its supervisor Billy Mills, violated Section 8(a)(1) when Mills asked employee La Fountain how he intended to vote in the election and suggested that he might obtain a supervisory position at another of the Respondent's casinos if he voted no.[5]

Although we agree with the judge's ultimate finding that the Respondent, through Supervisor Giantonio, violated Section 8(a)(1) by asking employee Flamm on 7 August why he was so enthusiastic about the Union, we find that the judge's reliance on *PPG*, overruled as noted above, was mis-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 251 NLRB 1146 (1980).

[3] *Host Services*, 263 NLRB 672 (1982); *Zero Corp.*, 262 NLRB 495 (1982), enfd. 705 F.2d 439 (1st Cir. 1983).

[4] Member Zimmerman dissents from the reversal of this finding of the judge. He adheres to *PPG*. See his dissent in *Rossmore House*, cited infra.

[5] Chairman Dotson agrees with his colleagues that Supervisor Mills' suggestion that employee La Fountain would be rewarded with a supervisory position if he voted against the Union was an unlawful promise of benefits and therefore violated Sec. 8(a)(1) of the Act. However, the Chairman does not consider a simple inquiry into how an employee intends to vote to be a violation of the Act under the holding in *Rossmore House*, supra, and if the inquiry here was considered separate and apart from the promise of benefit, he would not find the former to be a violation.

placed because the evidence does not support a finding that Flamm was an open union supporter.[6]

While Giantonio testified without corroboration that he was aware of "rumors"—neither the source nor nature of which were identified—that Flamm was a vocal union supporter, the record discloses only one specific union activity engaged in by Flamm: He signed a union authorization card early in the Union's petition drive.[7] On the other hand, Flamm testified that, in a conversation with Supervisor Mills on 29 July, he denied that he was even aware that an election was scheduled because "I was little bit nervous that [Mills] might think I was active within the Union." Flamm was not part of the group of employees who had contacted the Union to initiate the union organizing among the Respondent's employees. Flamm was not named in the Union's letter to the Respondent in which employee organizers were identified. Viewed accordingly, and under all the circumstances surrounding the questioning of Flamm as set forth in the judge's decision, we find that Giantonio's interrogation of Flamm about his union activities reasonably tended to restrain, coerce, and interfere with Flamm's exercise of his Section 7 rights under the Act. We conclude that the Respondent violated Section 8(a)(1) of the Act.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, N & T Associates, Inc. d/b/a Aladdin Hotel, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[6] Member Zimmerman would find the violation even if Flamm were an open union adherent. Accordingly, he finds no fault with the judge's reliance on *PPG*.

[7] Cf., e.g., *Rossmore House*, supra, 1176 (activities manifesting status as known union adherent).

[8] Chairman Dotson believes that his colleagues read the *Rossmore House* holding too narrowly. Even assuming Flamm was not an open union supporter, the Board still must assess "all of the circumstances" to determine whether "the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." He finds no hint of restraint, coercion, or interference in Giantonio's addressing this single question to Flamm on the casino floor and would, accordingly, dismiss this allegation of the complaint.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Las Vegas, Nevada, on September 27, 28, 29, and October 5, 6, and 7, 1983. The charge in Case 31–CA–13095 was filed on May 9, 1983,[1] by General Sales Drivers, Delivery Drivers & Helpers, Local Union #14 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), and a complaint and notice of hearing was issued by the Regional Director for Region 31 of the National Labor Relations Board (the Board), on June 29, 1983.

The charge in Case 31–CA–13396 was filed by the Union on August 8, 1983. Thereafter, on August 25 the Acting Regional Director for Region 31 of the Board issued an order consolidating cases, consolidated amended complaint and notice of hearing alleging a violation by N & T Associates, Inc. d/b/a Aladdin Hotel (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent's answers to the complaints, timely filed, deny the commission of any unfair labor practices.[2]

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Nevada corporation with an office and principal place of business located in Las Vegas, Nevada, where it is engaged in the operation of a hotel and casino. In the course and conduct of its business operations Respondent annually purchases and receives goods or services valued in excess of $50,000 directly from suppliers located outside the State of Nevada, and annually derives gross revenues in excess of $500,000.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are whether Respondent coercively interrogated employees, threatened them with discharge, changed their work shifts, and discharged certain employees all because of their union

[1] All dates or time periods herein are within 1983 unless otherwise specified.

[2] Certain complaint allegations pertaining to an overly broad no-solicitation/distribution rule, and disparate enforcement of Respondent's bulletin board rules were settled informally during the course of the proceeding, and have been deleted from the complaint.

activity, in violation of Section 8(a)(1) and (3) of the Act.

B. *The Facts*

1. Background

About the first part of May Respondent changed its "toke" or tip policy. Prior to that time, the tokes received by the 21-games dealers were pooled among all of the 21-games dealers and divided equally at the end of a 24-hour period. The tokes received by the craps dealers, however, were divided up at the end of each 8-hour shift by the crew operating each craps table, consisting of four individuals. Apparently to alleviate or diminish the incentive for "hustling" or the direct solicitation by craps dealers of either tokes or bets for dealers from customers at the craps tables, Respondent instituted a new toke policy, namely, that thereafter the tokes of all the 21-games dealers and craps dealers would be combined and divided equally at the end of a 24-hour period. This was particularly disturbing to the craps dealers, as it resulted in over a 50-percent reduction in their income.

Primarily as a result of the new toke policy, and apparently for other reasons not specified in the record, several employees went to the union hall on May 4 and requested that the Union commence an organizing campaign among Respondent's gaming employees. On May 4, Union President Robert Dambro sent a letter to Respondent's principal owner, Edward Torres, advising that "This letter is to officially notify you of our intent to organize your gaming employees at the Aladdin Hotel effective immediately." The letter named as "in House organizers" the following employees: Mark Erter, Bryan Mackey, Gerald Erkenswick, Paul Citelli, Jim Harshman, Danny Burrell, and Sonny Gee. The letter was received by Respondent on May 5.

2. The discharges of Tocco and Citelli; threats, promises, and interrogation

Edward Tocco had worked for Respondent since January 1978 as a craps dealer. He worked the swing shift—4 p.m. to midnight. On May 4, Paul Citelli and Bryan Mackey, who had been to the union hall earlier that day, as noted above, gave Tocco a union card in the dealers' room about 3:45 p.m., prior to the start of his shift. They also gave him six or eight additional cards. Tocco signed the card he was given, and during his various breaks at work that evening he spoke to approximately 25 employees in the dealers' breakroom and elsewhere, and solicited their support for the Union.

There are four craps dealers assigned to each table during the shift. On the four-man crew that night at table one were Tocco, Citelli, John Wickliffe, and Joe Martinez. Three dealers are always dealing or operating the game, while the fourth is on break. Breaks are taken according to a rotation system, each dealer working the game for 60 minutes and then taking a 20-minute break.

Tocco testified that at 5:40 p.m., as he was returning from his break, Mario Romano, swing shift pit boss, said he wanted to talk to Tocco. Romano told him not to "pioneer" on any labor union efforts and to "keep your nose clean, you can't afford to lose this job." Tocco said he had nothing to do with the Union. About 7 p.m., as he was returning from another break, Romano said, "Stay clean, now, don't say anything." Again Tocco replied that he had not said or done anything.

The shift was to end at midnight. About 11:45 p.m. Tocco was pulled off the game and was handed a termination slip by Romano, who said, "I have to let you go." The termination slip stated that Tocco was being discharged for hustling. Tocco became very upset and protested the reason for the termination. Romano said, "Well, I told you not to say anything." Tocco persisted, stating that Romano knew that he had not been discharged for hustling. According to Tocco, Romano just looked down and shrugged his shoulders. At no time was Tocco asked to provide management with an account of the alleged hustling incident.

Paul Citelli worked for Respondent since October 1979 as a craps dealer. As noted previously, he had gone to the union hall to seek union representation, at which time he signed a union card and became part of the organizing committee. On the evening of May 4, he spoke to 10 or 15 employees about the Union, and distributed several authorization cards in the dealers' room, the help's hall, and the coffee shop, the various locations where employees were permitted to take their breaks.

Citelli testified that during the shift Romano asked if he was involved in any union activities, and said if he was involved or was seen at any meetings he would be blackballed and would not be able to work and would lose his job. Romano also said that the dealers made enough money, that he could not understand why they were attempting to get a union, and that if Citelli had nothing to do with the union activity he would always have a job at the Aladdin. Citelli replied that what he did on his own time was his own business, and he would do what he believed best for himself. Despite Romano's warning, he continued to solicit for the Union during his breaks that evening.

After he and Romano had spoken, Citelli observed a conversation between the owner of Respondent, Ed Torres, Pat Kaner, a former manager, and Maurice "Moe" Miller, then casino manager, and overheard statements to the effect that "the situation had to be quashed," and that "whatever it took they had to nip it in the bud right then and there." Citelli did not testify that he heard the term "union" mentioned, however.

Citelli got off work at 11:40 that day. Romano approached him and said he had to fire him and that he was sorry, but there was nothing he could do. He explained that Miller told him that he had to fire Citelli because he was hustling. Romano said he knew that Citelli had not hustled, but there was nothing he could do about it.

Citelli testified that prior to the shift the dealers had decided not to engage in hustling thereafter because of the new toke policy, which became effective that evening. In fact, during the evening Citelli told a player who had placed a bet for the dealers that it was not necessary.

Fonley "Swede" Sorenson worked for Respondent for 5 years. His employment was terminated on June 2. He

was a floorman in the craps pit, a supervisory position. The floorman is in charge of the four dealers, the boxman, and the game in general. He is to make sure the game is run properly and to extend credit to customers at the table. Additionally, he is to ensure that there is no hustling and, if he observes that customers are being hustled, he is to report it or take care of the situation. Sorenson testified that there have been at least one or two occasions in the 6-month period prior to June 2 when customers would complain to him about being hustled. Routinely, on a complaint by a customer, he would ask what the problem was, and would then confer with the dealer in question, the boxman who also is a supervisor assigned to watch the game, and possibly Sorenson's supervisor, the pit boss. Sorenson has given dealers verbal warnings for hustling.

On May 4, he was a floorman over table one, the table on which Tocco and Citelli were alleged to have hustled. Sorenson testified he did not observe hustling by any dealers that evening, particularly Tocco or Citelli, and had never observed them hustling prior to this date. Sorenson said that during the shift on May 4 there were no customer complaints, nor did anyone from management say that a customer had complained. Further, contrary to customary procedures, Sorenson was not asked by any representative of management whether he had observed any hustling. Sorenson recalled that earlier that evening a player with a foreign accent was placing line bets for the dealers on table 1. He observed a $100 bet for the dealers and was told that the player had placed similar bets. However, Sorenson was certain that no player dressed in western clothing had placed bets of any amount for the dealers between 11 p.m. and midnight, as contended, infra, by Miller and Romano. Further, he observed that during the evening Citelli had refused a bet that a customer wanted to make for the dealers, telling the customer that it was not necessary. This was the first time that he had ever observed a dealer refuse a bet.

Sorenson testified that he became aware of the union activity early that evening when Bryan Mackey mentioned it to him. Near the end of the shift, Romano showed Sorenson the termination slips for Tocco and Citelli. Sorenson asked why they were fired, and Romano said, "For hustling." Sorenson said there had been no hustling and Romano replied, "I know." Sorenson suggested that Romano not sign the slips, and have the person responsible for the discharges sign them. Romano said that that was his job and he was required to do it. Sorenson remarked that they were getting rid of Tocco and Citelli because of the union activities. Romano said, "Yes, I know." Later, Sorenson said to Romano, "Don't use me as a witness for these terminations," and said they would have to fire him before he would be a witness to it. As noted above, Sorenson was discharged on June 2. The record contains no evidence regarding the reason for his discharge.

Bryan Mackey is a craps dealer and began working for Respondent in 1976. He was acting as a boxman on the evening shift on May 4, and apparently rotated between several tables. He was working as a boxman on table 1 30 percent of the time between the hours of 11 p.m. to midnight that night, and recalls that the table was slow at that time. The duties of a boxman are to supervise the game and make sure the losing bets are picked up, the winning bets are paid off properly, and the money is placed in the box, and to cosign any credit markers. When Mackey was boxman at table 1 he did not observe either Tocco or Citelli hustling any customers. While he did not observe any $100 line bets for the dealers that evening, he did observe Citelli refuse a bet.

Mackey testified that generally when a customer complains about hustling the customer would first go to a pit boss who, in turn, generally goes to the immediate supervisor or floorman on the game to inquire about the circumstances. Sometimes the boxman is also questioned about the matter. This procedure is for the purpose of ascertaining whether the allegation is true, as the player could have been disgruntled and perhaps misinterpreted the dealer's conduct. Mackey was never asked about any alleged hustling during the shift.

Joe Martinez began working for Respondent in 1980 and is still employed as a craps dealer. He worked on the shift with Citelli and Tocco the night they were terminated. He did not observe any hustling, and does not recall any $100 line bets for the dealers at any time during the shift.

John Wickliffe has worked for Respondent since 1980 as a craps dealer. He also worked on the shift in question with Tocco and Citelli. He did not observe any hustling that evening. He recalls that about midway through the shift a customer was making $50 and $100 line bets for the dealers. However, there were no such bets placed during the last hour of the shift. Wickliffe acknowledged that while some dealers hustle or ask for bets, the dealers were in general agreement prior to the shift that they would refrain from this practice so there would be no opportunity for Respondent to discharge them.

Miller testified that about 11:45 p.m. on May 4, he overheard a conversation between Romano and a customer dressed in western attire and with a Texas or southern accent. Miller's testimony is as follows:

> To the best of my recollection I was on the telephone and Mr. Romano just came into the pit, and a gentleman came over from the crap table and started complaining about being hustled and being begged for a bet. He had bet a hundred-dollar chip for the dealers, and they lost. Then they asked him to put up another hundred-dollar bet. And that is when he got insulted and walked over to Mr. Romano and started complaining.
>
> Mr. Romano tried to cool him off, and invited him to dinner the next night. The gentleman went to the cage, wouldn't give us his name, cashed in his chips, and walked out.

Romano testified that the incident occurred about 11 p.m., rather than 11:45 p.m. as Miller stated, and that he was distinctly able to place the time because he was called off his break and summoned to the dice pits. He stepped into the pit and, according to Romano, "a very irate customer met [him] head on." Miller was about 6 or 8 feet away on the telephone, and observed the conversation between Romano and a man with a southwestern

accent dressed in western clothes. The customer told Romano that he was playing at the casino and was "sick of being hustled and having dealers begging me for bets." Romano asked who hustled him, and the customer pointed toward craps table 1, and stated that it was "[t]he fellow with the stick [Tocco]. Romano then asked "who else hustled you," and the customer said "the fellow on the left [Citelli]." Romano said he was sorry, and offered to treat the customer to dinner or a show. The man refused to tell Romano his name and said he did not intend to return to the casino. He then walked toward the cage to cash in his chips, and Romano saw that he had about 15 $100 chips in his hand. Romano then returned to the dice pit and told Miller that, "We just lost a customer. He said that he was hustled at "Crap Number One." Miller said, "By who?" Romano stated, "He claimed Citelli and Tocco." Miller told Romano that he was going to phone G.C. Vic Vickrey, executive vice president and director of casino operations, who was at home. After speaking to Vickrey, Miller told Romano to "terminate them both."

About 11:40 a.m. Romano gave Citelli his termination notice, telling him that he was sorry but that a customer had complained that he was hustling. According to Romano, Citelli said "okay" and walked away. Nothing else was said. Romano denied that he had any conversation with Citelli that night regarding any subject, and specifically denied that there was any conversation about union activity. He testified that he was unaware of such activity.

When Romano gave Tocco his termination slip, Tocco protested and said he did not do anything. Romano did not reply. Tocco signed the slip and, according to Romano, said, "You did what you had to do. Now, I have got to do what I have to do." He had had no prior conversation with Tocco that evening.

2. Shift changes

Gerald Erkenswick has been working for Respondent as a craps dealer for about 7 years. He was involved in initiating the union campaign, and his name was among the seven employees listed as union organizers on the aforementioned letter which was sent to Respondent by the Union. He had worked the preceding 2 years on the graveyard shift. His shift was changed on about May 7 or 8 when he was placed on swing shift. His schedule was again changed about September 13 back to graveyard. When on the graveyard shift he worked about 4-1/2 days per week or about 9 days per pay period; on swing shift he worked only 6 days per pay period. Thus, the change in shift considerably lessened his income.

He spoke to Romano about this when he began his first day on swing shift. Also Robert Stevens, assistant pit boss, was present. Romano said, "Didn't think you would be back on swing shift, did you?" Erkenswick replied that he preferred the graveyard shift and asked why he had been placed on swing. Romano said, "You know why . . . you know, you shouldn't have jumped the gun." Erkenswick testified that Respondent would break up the crews periodically, every 2 or 3 months, but would not change their shifts.

Robert Stevens began working for Respondent in 1976 as a floorman, a supervisory position. His employment with Respondent terminated on June 5. He was responsible for making up the swing shift schedule each week for the craps dealers and the boxmen and floormen. Stevens testified that on May 5 or 6 he had a conversation with Romano, his immediate supervisor. Romano took out a list of six names, and he said those employees were having their shifts changed because they were listed as union organizers in the letter Respondent had recently received.[3] Stevens suggested that was a bad move on the part of Respondent, and Romano, according to Stevens, said he was told to do it by "the man." Thereafter, the schedules were changed as Romano directed.

Andrew Smith is a relief shift boss, and makes out work schedules. Smith testified that it is a policy of Respondent to break up crews every 60–90 days. This prevents them from agreeing on signals for possible hustling or collusion. According to Smith, about 20 percent of the approximately 40–50 craps dealers would stay on the same shift for a year, and the shifts of the remaining dealers would be changed. As an example, Smith testified that in October 1982 six dealers from graveyard were assigned to the day shift and vice versa.

3. The discharge of Costanza; threats

Anthony Costanza began working for Respondent on May 26, 1976, and was discharged in the early morning of August 6, while he was on the graveyard shift (7 p.m. to 3 a.m.). He primarily dealt the "Big Six" or wheel of fortune. George Maxson, casino executive, was his immediate supervisor. Costanza's testimony clearly reflected that he considered himself to be "the man" in charge of organizing the "21" dealers, and he appeared to be extremely proud of the fact that he was placed in such a prestigious position by the Union. Costanza testified that he organized a network of about eight "pretty strong" helpers and directed their activities, and that he handed them some 60 to 65 authorization cards for distribution, talked about the Union with approximately 65 of the 90 dealers, and directly solicited cards from about 27 dealers. The record reflects that no other employee was as active in the union campaign.

Costanza testified that on July 22, while he was on a break, he was approached by Romano who told him that there was an election coming up[4] and that if the Union won the election the craps and 21-games dealers would again have to pool their tokes. Romano asked him to spread the word and Costanza said all right. Romano denied that he ever had a conversation of this nature with Costanza.

Further, according to Costanza, around August 2 Joe Giantonio, a floorman and admitted supervisor, asked

[3] As noted above the May 4 letter from the Union contained seven names, however, Citelli had been previously discharged. Apparently, according to the complaint, the shifts of the following employees were changed: Mark Erter, Bryan Mackey, Gerald Erkenswick, Jim Harshman, Danny Burrell, and Sonny Gee.

[4] On June 2 a representation petition was filed in Case 31-RC-5526, and a Decision and Direction of Election issued on July 14. The representation election was scheduled for August 12 but has been postponed indefinitely pending Board review.

him how he was going to vote. Costanza readily admitted that he was the organizer for the 21-games dealers. Giantonio said it was not good to get involved with union organizing, and Costanza replied that it was unfair that the 21-games dealers only made $35 per day, and that he was upset about the way people were being fired. Several hours later Giantonio said that Vickrey would be leaving Respondent's employ and would be going to the El Rancho casino, and therefore the Union would not be necessary. Further, he said that if the Union did win the election, Torres, Respondent's owner, would cancel the hospitalization benefits.

Giantonio testified that several dealers had told him that Costanza had been standing up on the tables in the dining room chanting "Union, Union, Union." In early August, he asked Costanza why he was so vocal about the Union, and told him that management thought highly of him and that he was doing a good job. Costanza explained his reasons for supporting the Union, and mentioned three points: the tokes of the 21-games dealers being combined with those of the craps dealers; an incident concerning Vickrey and employee Robert La Fountain wherein Vickrey is alleged to have precluded La Fountain from receiving a $1250 tip from a customer; and the lack of job security in the casino industry in general. Giantonio told Costanza that the instigator of the toke policy, Miller, had retired and the original toke policy had been reinstated; that the $1250 toke incident was said to have happened on a game he was observing and as he did not see the incident it was very unlikely that it had occurred; and regarding job security, Giantonio anticipated that new management would probably be appointed at the casino, and that everything would be all right. Giantonio testified that he did not ask Costanza how he intended to vote, or tell him that he should not be involved with union organizing activities. Nor did he state that Vickrey was going to the El Rancho, and that therefore the Union was not necessary. Moreover, according to Giantonio, there was no discussion of hospitalization benefits.

On August 2 or 3 Costanza's schedule on the graveyard shift was changed from Tuesday through Saturday to Tuesday through Friday. It is alleged that this shift change, discussed infra, was discriminatorily motivated.

On the August 5 graveyard shift Costanza observed Maxson, his supervisor, who was seated at the bar, staring at him for a prolonged period of time. Later that night Maxson came over to the Big Six Wheel and asked what Costanza was going to do when he came back tomorrow and the Big Six was gone. Costanza said he could also deal 21-games. Maxson then told him that he was not going to be able to get another job because he was involved in union activity. Shortly thereafter, while Costanza was on a break, Maxson continued the conversation at the unoccupied 21-games tables. Maxson told Costanza that he was finished in this town, and that Torres, Respondent's owner, would see to it that Costanza would not be able to get another job because he was involved in union organizing activity. Costanza reiterated his reasons for favoring the Union. Maxson stated that the Teamsters were crooks, and Costanza replied that paying dealers $35 per shift was like stealing from them. Maxson said, "I could fire you right now and you wouldn't even get to vote." He further stated that Costanza would not be able to get another job and would lose his home, and that "you, your wife and your baby would have to leave town." He ended the conversation by threatening that, "Mr. Torres knows how to deal with people like you, if you know what I mean." Costanza could smell liquor on Maxson's breath, and testified that immediately prior to this confrontation he had observed Maxson drinking at the bar.

Later, at 2:30 a.m. on August 6, Costanza was given a termination slip by Frank Garcia, backup shift boss, who merely stated that he had been told to deliver the slip. Costanza testified that at no point that night did he refuse to follow instructions from any member of management, or use any expletives during a conversation with Maxson. Nor had he been told by Maxson to stop talking to employees while he was operating the Big Six. Costanza further testified that while dealing the Big Six he was allowed to talk to anybody he wanted to, so long as there were no customers present; that he was never given any written or verbal reprimands for excessive talking or failing to properly perform his duties; and that he never distributed authorization cards to employees while at the Big Six.

Elton Ebarb is a 21-games dealer. Ebarb testified that during his first night on the graveyard shift, about the first week in May, Costanza called him over to the Big Six wheel, reached into his sock, and removed an authorization card which he handed to Ebarb. Costanza said, according to Ebarb, "I know you're on our side," and asked him to fill out the card and send it in or return it to him. Costanza added, "I got to do this fast because George Maxson has warned me before about talking on the wheel." Ebarb testified that he was very surprised and disturbed about being confronted in such a manner, because in the gaming business it is unacceptable and against policy to go to your sock or pocket, and he did not want to be under suspicion. Two days later Costanza asked whether Ebarb had sent the card in, and Ebarb said no. Ebarb testified that he mentioned the incident to Bill Peccole, his 21-games boss on days.

Costanza, on rebuttal, denied that this conversation occurred. Rather, according to Costanza, after the petition for an election was filed, he gave Ebarb an authorization card, which he obtained from his sock, in the coffee shop. Further, Costanza recalled that at this time Ebarb said he had a relative or somebody who was involved with the Teamsters and would probably become a shop steward.

Jeffrey Kaufman is a 21-games dealer. About 2 weeks prior to the union election, Costanza motioned for him to approach the Big Six Wheel. Costanza told him that if the Union was voted in, the people who were part of the Union would be secure and would not be in jeopardy of losing their jobs should there be new management. According to Kaufman, there were three or four customers on the game at the time, and the conversation lasted 30 seconds. Kaufman testified that he was surprised that Costanza was engaging him in such a conversation during a live game.

Costanza, on rebuttal, testified that he never talked to Kaufman about the Union at the Big Six Wheel, but did have a conversation with him in the coffee shop.

Gene Dessel is a 21-games dealer on the day shift. He has been in Respondent's employ 4 months. In mid-July, on his way to the dealers' breakroom, Costanza, who was operating the Big Six, stopped him and said "We have this election won, the majority of dealers are with us and people respect you and they like you on this shift." He told Dessel to keep talking to the people and "We'll win the election." The conversation lasted 15–20 seconds. Prior to this occasion Dessel was not acquainted with Costanza, and had never had any conversation with him about the Union, or about anything else. According to Dessel, there were about six customers at the wheel during the conversation, and Costanza had stepped from behind the table into the aisle, and had his back to the wheel. Dessel felt that Costanza's conduct was unusual and that Costanza was not properly performing his job. Costanza engaged him in about two other conversations of a similar nature, although Dessel does not recall if there were any customers at the wheel during these subsequent conversations.

Costanza, on rebuttal, testified that although he had relieved Dessel at the Big Six on several occasions, he was not acquainted with him in July, and had no conversation with him at any time or place about the Union.

Al Gundlack is a graveyard 21-games shift manager. His immediate supervisor is Maxson. About mid-July, he observed a conversation at the Big Six Wheel between Costanza and, he believes, La Fountain, another 21-games dealer. No customers were at the wheel. As Gundlack approached, La Fountain walked away. Gundlack asked Costanza what was going on, and Costanza said they were discussing tokes. Gundlack told him to stop engaging in such conversations, and that he could talk about tokes elsewhere.

About a week later, Gundlack again observed him talking to another 21-games dealer whom he believes was Natale. They were talking for 2 or 3 minutes, and although there were no customers at the wheel, the wheel is to be kept spinning at all times in order to attract customers. On this occasion the wheel was not spinning. As Gundlack approached, Natale walked away. Gundlack told Costanza to stop the conversation and to keep the wheel spinning. Constanza said okay. A few days later, about the end of July or the first of August, Gundlack observed Costanza talking to another dealer. As he began to approach the wheel, the employees looked up and the other dealer walked away. Gundlack motioned for Costanza to keep the wheel spinning.

Prior to the above occasions, according to Gundlack, Costanza's conversations with employees would be of 2 or 3 seconds duration and were "walking conversations." However, the aforementioned incidents were of 2 to 4 minutes duration, and therefore were excessive. Moreover, at times during the foregoing conversations, Costanza would have his back to the "rack" or stacks of chips, an unacceptable practice. Gundlack never told Costanza his job was in jeopardy if he continued that conduct.

Frank Garcia has a supervisory position on the graveyard shift. He reports to Gundlack. In early July, Miller directed his attention to the Big Six. He saw Costanza and La Fountain talking to each other. La Fountain was seated by the slot machines, near the Big Six. Garcia told Miller he would talk to them. While he was approaching, Costanza looked at him and Garcia motioned for him to discontinue the conversation. He also apparently told the two employees to stop the talking. Several weeks later, he saw Costanza talking to Natale. When Costanza looked up, Garcia motioned for him to stop. Each of the conversations he observed lasted a minute or two. About a week prior to the election, Gundlack told Garcia that he was sick and tired of asking Costanza not to talk to other dealers, and directed Garcia to again ask Costanza to discontinue such conduct. Garcia did this, and advised Costanza that it was against the rules to talk to other dealers while he was dealing the Big Six. Prior to July, Garcia had observed similar conversations between Costanza and the dealers.

George Maxson is casino executive for Respondent and is in charge of all casino operations when Vickrey is not present. He is also specifically in charge of the "21-games tables on all three shifts. He testified that he did not know Costanza was specifically involved in union activity.

Maxson testified that he was aware that about 2 weeks prior to the night of August 5, the graveyard shift boss, Al Gundlack, and his assistant, Frank Garcia, had told Costanza that he was involved in too much conversation while there were players on the game. Gundlack told Maxson that he had talked to Costanza about this on several occasions, and had also directed Garcia to talk to him. Maxson had several conversations concerning Costanza with Gundlack, and one with Garcia in the presence of Gundlack. Garcia said that he had informed Constanza to continue dealing the game, and not to talk to employees while he was on the game. Maxson told them to monitor the situation, and to advise him if Costanza continued to engage in such conduct.

At 1:15 a.m. on August 6, Maxson observed Costanza, who was operating the Big Six, talking to a dealer while there were two customers present at the wheel. The customers had money down on the table, and Costanza had his back to them. Maxson approached Costanza and told him not to talk and to continue dealing the game. Maxson began to walk away and when he had walked only a short distance he again observed Costanza talking with another dealer. The same customers were present, and Costanza had not yet spun the wheel. He walked back to Costanza and said he wanted to see him on his break. At this time, by coincidence, a dealer came to relieve Costanza who was due for his break, and Costanza and Maxson walked to the 21-games pit. Both were standing. Maxson told him he had to stop the talking, and that stopping the action on the game and talking to the dealers in this way jeopardized his family, his home, and everything. He further said that Costanza could be terminated if this conduct continued. Costanza began talking about the $1250 toke that management had "stolen" from La Fountain. Maxson said he did not want

to talk about that, but wanted to discuss Costanza's lack of attention to his job. Maxson repeated, "[Y]ou just jeopardize your family, your home and everything by continuing to do this, and to stop it." Costanza replied, according to Maxson, that he did not have to worry about a job as he had a family that would always get him a job, and to "fuck off and leave me alone." Costanza was gesticulating vigorously during the conversation and stuck his finger very close to Maxson's face. Then Costanza turned around and walked away with his hands covering his ears.

Maxson testified that he was momentarily stunned as Costanza's behavior was unanticipated and clearly out of character. Several minutes later Gundlack came over, and Maxson told him to terminate Costanza for insubordination, telling him briefly what Costanza had said.

Maxson testified that during the aforementioned conversation with Costanza he did not mention the Union or say Costanza would be finished in the town or ask him what would happen when he came to work tomorrow and there is no Big Six wheel. Nor did he say anything to the effect that Torres would see to it Costanza never worked again if he continued to be involved in the union situation; that the Teamsters are crooks; or that Torres knows how to deal with people like Costanza. Further, Maxson testified that he did not go to the bar that evening and have several drinks. Rather, he had one beer about 2 a.m. after work, and had no other alcohol that evening. He very seldom sits at the bar, and very seldom drinks hard liquor. Maxon said he never talked to Costanza or any other dealer about the upcoming election.

Gundlack corroborated Maxson's testimony. On August 6, Gundlack saw Constanza talking to Maxson at the Big Six about 1:15 a.m. About 5 minutes later, he asked Maxson what was wrong with Costanza. Maxson said Costanza was talking to a dealer while there were customers at the table, and that he intended to talk to Costanza on his break. About 15 minutes later he observed Maxson and Costanza talking in the 21-games pit. At first they appeared to be engaged in a polite conversation. However, a few minutes later, Gundlack saw Costanza's hands gesticulating in an animated fashion and then saw him point a finger waving it towards Maxson's face while they were only a few feet apart. Then he saw Costanza leave. Maxson looked surprised, and Gundlack walked over to him and asked what was wrong. Maxson said he wanted Gundlack to terminate Costanza, because he just told Maxson to "fuck myself." Gundlack wrote up a termination slip and told Frank Garcia to give it to Costanza when the Big Six was closed down for the night.

Costanza, on rebuttal, testified that Garcia never told him to discontinue any conversation with La Fountain or Natale; and neither Garcia nor Maxson ever gestured to him to stop talking at the wheel, or told him to stop talking to dealers. Costanza testified that he never had his back to the game; never told Maxson his family would insure that he would always have a job; never told Maxson to "Fuck off and leave me alone"; and has never been told by Gundlack to stop talking to dealers, or anything similar to that.

4. The change in Costanza's schedule

As stated above, Costanza's schedule on the graveyard shift had been changed on August 2 or 3 from Tuesday through Saturday to Tuesday through Friday, thus reducing his workweek. Moreover, the record shows that Saturday night is the busiest night of the week at the casino, and that Costanza, because of his ability to attract customers to the Big Six as a result of his demonstrative personality, was considered to be the premier Big Six dealer in Respondent's employ.

Maxson testified that during the first week in August he was informed by Vickrey that thereafter the second 21-games pit, denominated "B pit," would not be operating on swing shift during weekends because business did not warrant the additional personnel. Also, for the same reason, baccarat was reduced to one shift during the weekend and a craps game was discontinued on swing shift. As a result, Maxson changed the schedule of the dealers which had previously been posted. The new schedule reflected that, not only was Costanza given Saturday off, but also that eight other employees who had originally been scheduled to work on Friday or Saturday were given those respective days off. Maxson testified that he attempted to reschedule them so that they would have 3, rather than 2, successive days off every other weekend. Although on Friday and Saturday, August 5 and 6, it became necessary to expand a few games over into B pit, that pit has been closed on the weekends since that time.

5. Additional threats and interrogation

Ronald Flamm, a current employee, testified that Billy Mills, a supervisor, approached him in late July, and wanted to know if Flamm was aware of the scheduled election. Mills, according to Flamm, asked him which way he was going to vote, and said that management would appreciate it if he would vote no. As a result of this testimony, the General Counsel moved to amend the complaint, and the motion was granted. On cross-examination Flamm initially was very sure about the conversation and reiterated that he was "absolutely" and "exactly" sure that Mills "directly" asked him how he was going to vote. However, on being provided with a copy of his affidavit, Flamm agreed that Mills merely said he would appreciate it if he would vote with management, and did not ask him how he was going to vote. As a result of Flamm's testimony on cross-examination, this amendment to the complaint was withdrawn.

Flamm further testified that in early August, Supervisor Giantonio wanted to know what Flamm was going to do after he lost his job. Flamm asked what he meant, and Giantonio replied that the employees were hurting themselves by voting for a union, and that Flamm would probably be losing his job. Giantonio also told him that the hotel was about to be sold and the new owners would probably get rid of all the dealers because of their union activities. About a week later, sometime prior to the election, Giantonio repeated essentially the same things to Flamm, and told him that "we'd be going out the door anyway—Union or not."

Giantonio testified that he heard from other dealers that Flamm was vocal on behalf of the Union. He asked Flamm why he was so enthusiastic about the Union when he knew that new management was coming in and that things would probably change for the better. Flamm then proceeded to engage in a tirade about his disregard for management in general and stated that casino management all over town "were all pieces of shit." He then began discussing his inability to get a job at a different casino. Giantonio specifically denied making the other statements attributed to him by Flamm.

Robert La Fountain is currently employed as a 21-games dealer. La Fountain testified that about a week before the election, Billy Mills, a floorman and admitted supervisor, asked him how he was going to vote. Further, Mills said that if he would vote no he would be taken care of by Mills and Maxson, explaining that, according to La Fountain, "being the best dealer on the shift, I would have no problem getting a floor job over at the El Rancho."

Billy Mills testified that Maxson asked him if he would mind talking to the dealers about the Union. He spoke to approximately 13 dealers, and told them all the same thing, namely, that the employees should consider the pros and cons and should cast their vote, but that he did not want to know how they intended to vote. Although he sometimes supervises La Fountain, Mills never had a conversation with him about the Union, never asked how he was going to vote in the election, and never told La Fountain that if he voted no, he could expect to be given a floorman's position at the El Rancho. Prior to February 1983 Mills was a floorman at the Riviera Casino, and had previously worked there under the supervision of Maxson who assisted him in obtaining employment with Respondent.

C. *Analysis and Conclusions*

1. The discharge of Tocco and Citelli; threats, promises, and interrogation

The record is clear that hustling by employees is considered to be a serious infraction of Respondent's rules and that various forms of discipline have been imposed for hustling, from verbal warnings to dismissal. The nature of the discipline, as reflected by the record evidence, apparently depends on the seriousness of the incident, as determined on a case-by-case basis. Nevertheless, it appears that hustling is sometimes difficult to detect at the craps table where the noise, action, and number of excited customers create a rather hectic atmosphere, and that hustling does occur, on a not infrequent basis, despite the fact that the dealers are reminded from time to time that hustling is strictly prohibited.

Had Tocco and Citelli been hustling in the manner alleged by Miller and Romano, it is clear that their discharge would have been in conformity with Respondent's established business practice. However, the abundant and credible record evidence, discussed below, clearly satisfies me that the scenario described by Romano and Miller simply did not occur.

Tocco and Citelli are alleged to have "begged" bets for the dealers on table 1, from a customer dressed in western attire, sometime between 11 and 11:45 p.m. on May 4. There were four dealers at that particular table, who were observed by a supervisor and a boxman. All of these individuals favorably impressed me as being credible witnesses, and appeared to have an accurate recollection of the evening in question. Each testified that there was no hustling by Tocco and Citelli or anyone else, nor was there a "high roller" at the table that evening fitting the description given by Romano and Miller.

Moreover, it is admitted by Romano and Miller that they reacted to the stranger's alleged contention that he had been begged for bets by, after phoning Vickrey, immediately discharging Tocco and Citelli without even inquiring into the matter. Such a reaction is totally implausible, given the fact that Tocco and Citelli were considered to be good employees, that they had been in Respondent's employ for approximately 5 years, that they had not been previously reprimanded for hustling, and above all that Respondent had a supervisor, Sorenson, stationed at the table the entire evening for the very purpose of, among other duties, insuring that no hustling was occurring. While Respondent contends that hustling is sometimes difficult to detect because of the frenzied nature of the game, this does not provide a legitimate and believable excuse for Miller or Romano to simply assume, without inquiry, that Sorenson would know nothing about the alleged incident. The fact that no investigation was instigated by management, either prior or subsequent to the discharges, is conclusive evidence that management was quite aware that, in fact, there were no hustlers and there was no irate western-attired high roller who cashed in his chips and walked out into the night, never to darken Respondent's casino again. Finally, it would be difficult to have more probative evidence than the testimony of Supervisor Sorenson. As noted previously, he was a highly credible witness, and Respondent has not proffered any evidence tending to show that Sorenson would have a reason for fabricating his testimony. Thus, I find that Romano admitted to Sorenson that the discharges of Tocco and Citelli were a direct consequence of their union activities. By such conduct Respondent violated Section 8(a)(1) and (3) of the Act.

I credit Tocco and find that after he had engaged in extensive union activity on the evening of May 4, Romano told him not to "pioneer" in any union efforts and to keep his nose clean and not to say anything about the union because he could not afford to lose his job. Later that night, when Romano discharged Tocco, he reiterated that he had previously warned Tocco not to say anything. By such conduct, Respondent unlawfully created the impression of surveillance of Tocco's union activity, attempted to unlawfully dissuade him from engaging in such activity, and threatened him with discharge, in violation of Section 8(a)(1) of the Act.

Similarly, I find that Romano, in violation of Section 8(a)(1) of the Act, interrogated Citelli about his union activity, threatened him with discharge and with being blackballed by Respondent from other jobs, and promised him a permanent job with Respondent in the event

he refrained from such union activity. I also find that, as Citelli credibly testified, Romano admitted to Citelli that his discharge for hustling was a mere pretext.

2. Shift changes

Supervisor Stevens appeared to be a credible witness. He forthrightly testified that about May 5 or 6 Romano told him to change the shift of six employees because they had been named in the Union's letter as "in house organizers" for the Union. The record evidence shows that the change in shift had a detrimental effect on the income of employee Erkenswick who testified that as a result of the shift change he worked approximately 3 days less per pay period. It would appear that the remaining five employees suffered similar reductions in income. Further, I credit Erkenswick and find that when he asked Romano why he had been placed on the swing shift, Romano told him that he "shouldn't have jumped the gun." Obviously, this was a reference to his union activity.

While Respondent maintains that it was not unusual for employees' shifts to be changed from time to time, the record is crystal clear that on the instant occasion shifts were changed not for permissible and customary business reasons, but as a direct and immediate result of the employees' union activity. Moreover, the record does not show that the shifts of the named employees would have been changed at that time even absent any union activity.

By the foregoing conduct, I find that Respondent discriminatorily changed the work shifts of employees Mark Erter, Bryan Mackey, Gerald Erkenswick, Jim Harshman, Danny Burrell, and Sonny Gee, to their detriment, and thereby has violated Section 8(a)(1) and (3) of the Act, as alleged.[8] Further, Romano's statement to Erkenswick implying in no uncertain terms that the shift change was due to his union activity is clearly coercive and is violative of Section 8(a)(1) of the Act.

3. The discharge of Costanza; threats

Although Costanza appeared to be a very convincing witness, his testimony was inherently suspect. Thus, while he categorically denied that he had any conversations with dealers at the Big Six involving union solicitation, his involvement with the Union, according to a reasonable interpretation of his testimony, appeared to be obsessive. Given his vocal and demonstrative character traits, utilized to the fullest extent by Respondent as a vehicle for attracting customers to the Big Six, I find it implausible that Costanza possessed sufficient self-control, under the circumstances, to limit his union-related conversations to his breaks or off-duty hours, as he testified.

Moreover, extensive and seemingly credible testimonial evidence proffered by Respondent further tends to undermine Costanza's apparent credibility. It is unnecessary to reiterate the foregoing testimony of various employees, all of whom appeared to be candid and forthright, regarding their conversations with Costanza at the Big Six. A reasonable summary of their testimony demonstrates that Costanza engaged employees in union-related conversations at the Big Six on numerous occasions, sometimes when customers were present, and that the employees considered Costanza's conduct to be quite irregular and contrary to Respondent's established policy. Further, Costanza admitted to employee Elton Ebarb that he had been warned about such conduct by George Maxson.

I was likewise favorably impressed with the testimony of Supervisors Gundlack, Garcia, and Maxson all of whom testified that on numerous occasions they had warned Costanza about excessive talking and inattention to his duties, and that Costanza's failure to heed their warnings and discontinue the unacceptable conduct had become a matter of some concern. In fact, it appears that, under the circumstances, Costanza's supervisors were being extremely tolerant of his conduct.

Also noteworthy is the fact that La Fountain, who appeared as a witness on behalf of the General Counsel for other purposes, was not called as a witness to corroborate Costanza's testimony that certain incidents involving La Fountain did not occur. Thus, the record testimony shows that on several occasions Costanza was observed by Supervisors Gundlack and Garcia speaking to La Fountain at the Big Six. Indeed, on one such occasion, Garcia instructed the two employees to stop the talking.

As a result of the foregoing, and despite Costanza's convincing testimonial demeanor, I am constrained to conclude that the evidence is insufficient to show that he did not, in fact, engage in the conversations attributed to him, and that he was not, in fact, frequently warned for such conduct.

Although I find it highly unlikely that Maxson was not aware of Costanza's extensive union activities, nevertheless, it is significant that, insofar as the record shows, neither Maxson, Garcia, or Gundlack, who were subjected to extensive cross-examination and appeared to be credible, had engaged in any contemporaneous unlawful activity, and that neither Romano nor Miller were involved in Costanza's discharge. Further, while Costanza testified that during the sequence of events preceding his discharge Maxson had been drinking and, although not intoxicated, was obviously affected by the amount of alcohol he had consumed, the record does not substantiate this contention. Thus, Maxson denied that he had consumed any alcohol that evening prior to Costanza's discharge, and there is no corroborative testimony regarding Maxson's sobriety on the night in question, or his general drinking habits while on the job, that would tend to support Costanza's assertions.

In summary, despite the fact that Respondent engaged in blatant violations of the Act by discharging Tocco and Citelli, and that the discharge of Costanza, the Union's most vocal and active adherent, was precipitated by an alleged isolated, out-of-character expletive, uttered during a one-on-one conversation, only a week prior to the scheduled election, I conclude from the foregoing that the record is insufficient to establish that Costanza's discharge was motivated by his union activity rather

[8] It has not been alleged or contended that the change in shifts of other individuals who replaced the aforementioned employees was likewise discriminatory.

than by his insubordinate behavior. Therefore, I shall dismiss this allegation of the complaint. For the same reasons, I conclude that the statements attributed to Maxson by Costanza, alleged as violative of Section 8(a)(1) of the Act, must be dismissed.

Moreover, I am unable to credit Costanza regarding his alleged July 22 conversation with Romano, who denied that he had told Costanza anything to the effect that tokes would again be pooled if the Union was voted in. Under the circumstances, herein, the record evidence does not sufficiently demonstrate to my satisfaction that a statement of this nature was made by Romano, who is not alleged to have engaged in any further unlawful conduct subsequent to May 4. Therefore, I shall also dismiss this allegation of the complaint.

I credit Supervisor Giantonio's account of the August 2 conversation with Costanza, and find that he did not ask Costanza how he intended to vote or advise him to discontinue his union activity or make the other statements attributed to him by Costanza. However, as admitted by Giantonio, he did ask Costanza why he was so vocal on behalf of the Union. Consistent with established Board precedent, I find that such conduct on the part of Giantonio constitutes coercive interrogation which is violative of Section 8(a)(1) of the act, particularly absent any evidence that Costanza initiated the conversation or otherwise notified Giantonio of his union sympathies. *PPG Industries*, 251 NLRB 1146 (1980); *Host Services*, 263 NLRB 672, 681 (1982); *Zero Corp.*, 262 NLRB 495, 496 (1982), enfd. 705 F.2d 439 (5th Cir. 1983).

4. The change in Costanza's schedule

The record reflects that about August 2 Costanza's schedule was changed. As a result, he was no longer scheduled to work the following Saturday, as previously scheduled. The General Counsel contends that the change was discriminatorily motivated.

It is clear that at the same time, eight employees, in addition to Costanza, were given either Friday or Saturday off by Maxson, in order to comply with Vickrey's instructions to reduce the personnel on certain games due to a decline in business. While such evidence would tend to show that Costanza was treated no differently than other employees, the General Counsel argues that because Costanza was considered to be the premier Big Six dealer, he would have been permitted to remain on the job on the following and each subsequent Saturday, the busiest night of the week, but for his union activity. However, it appears, according to Maxson's testimony, that he was attempting to treat the employees under his supervision equally during a unique situation, and intended that they be scheduled to work alternate weekends. Thus, had Costanza remained in Respondent's employ, he would have worked on alternate Saturdays. In this manner he would have been accorded the same treatment as the other employees. I therefore conclude that the record fails to establish that but for Costanza's union activity, he would have been given more favorable treatment than the other employees, by being permitted to work every weekend, rather than every other weekend, and I shall dismiss this allegation of the complaint.

5. Additional threats and interrogation

Giantonio impressed me as a forthright witness and I credit his account of the early August conversation with Flamm. Flamm did not appear to have a sufficient regard for the accuracy of his various conversations with management, as exemplified by the abrupt change in his testimony regarding his conversation with Mills, which resulted in the withdrawal of that particular allegation. Rather, it appears that Flamm's testimony was influenced by his subjective interpretation of the conversations. However, as Giantonio admitted, he did commence the conversation by asking why Flamm was so enthusiastic about the Union. Interrogation of this nature is violative of the Act, particularly as Flamm had not previously announced or identified himself to management as a union supporter. *PPG Industries*, supra.

La Fountain, a current employee, appeared to be a credible witness, and I credit his account of the early August conversation with Supervisor Mills. Thus, I find that Mills did ask him how he was going to vote, and did promise that if he would vote no he would be given a supervisor's job at the El Rancho, a hotel apparently owned by Respondent's principal owner. Such statements constitute a coercive interrogation and a promise of benefit in exchange for voting against union representation and are violative of Section 8(a)(1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging employees Edward Tocco and Paul Citelli on May 4, 1983.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by changing the shifts of employees Mark Erter, Bryan Mackey, Gerald Erkenswick, Jim Harshman, Danny Burrell, and Sonny Gee.

5. Respondent has violated Section 8(a)(1) of the Act by engaging in coercive interrogation of employees, by threatening them with discharge because of their union activity, and by promising benefits in order to induce them to refrain from such activity.

6. The record evidence is insufficient to establish that Respondent has violated the Act by discharging employee Anthony Costanza.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act, and take certain affirmative

action described herein, including the posting of an appropriate notice attached an appendix.

Having found that Respondent unlawfully discharged and thereafter failed and refused to reinstate employees Edward Tocco and Paul Citelli, it is recommended that Respondent offer them immediate and full reinstatement to their former jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Further, Respondent shall be ordered to remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way. See *Sterling Sugars*, 261 NLRB 472 (1982).

Having found that Respondent unlawfully changed the shifts of employees Mark Erter, Bryan Mackey, Gerald Erkenswick, Jim Harshman, Danny Burrell, and Sonny Gee, to their financial detriment, I recommend they be made whole, in the manner prescribed above, from any losses they have suffered.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, N & T Associates, Inc. d/b/a Aladdin Hotel, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their union activities.

(b) Changing the work shifts of employees because of their union activities.

(c) Coercively interrogating employees, threatening them with discharge because of their union activities, and promising them benefits in order to induce them to refrain from such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer Edward Tooco and Paul Citelli immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Make whole the following employees, in the manner set forth in the remedy section of this decision, for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them: Mark Erter, Bryan Mackey, Gerald Erkenswick, Jim Harshman, Danny Burrell, and Sonny Gee.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to discharge you because of your union activity.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT promise you benefits in order to induce you to refrain from engaging in union activity.

WE WILL NOT change your work shifts because of your union activity.

WE WILL NOT discharge you for engaging in union activity.

WE WILL offer Edward Tocco and Paul Citelli immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make whole, with interest, those employees whose work shifts have been changed, for any loss of earnings they may have suffered as a result of the discrimination against them.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

N & T ASSOCIATES, INC. D/B/A ALADDIN HOTEL

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Pipefitters Local Union No. 392, AFL–CIO (The Oberle-Jordre Co., Division of the Bishopric Products Co.) *and* Melvin R. Snow. Case 9–CB–5527

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 15 March 1984 Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions for the additional reasons set forth below[2] and to adopt the recommended Order as modified and set out in full.[3]

The judge found that the Respondent violated Section 8(b)(1)(A) by its efforts to cause six travelers to quit their jobs in order to provide employment for the Respondent's members and Section 8(b)(2) by attempting to cause the Employer to lay off the travelers.

The record evidence in this case reveals that the Respondent and the Employer are parties to a project agreement between the Kentucky Utilities Company and certain signatory labor organizations. The agreement contains an exclusive referral provision through which the Employer's pipefitters are hired. For some time prior to 19 November 1982[4] the Employer had about 10 pipefitters working on the project. Only the steward and an apprentice were members of the Respondent. The other pipefitters were travelers.

During the second week of November the Respondent's business agent visited the project site and spoke with the Employer's construction manager. The business agent advised the construction manager that there were about 450 local members out of work and asked the Employer to lay off the travelers and replace them with local members. The construction manager responded that he could not afford to lay off anyone but if anyone had to go he wanted to keep his welders.[5]

In the days immediately preceding 19 November the Respondent's steward Charles Murphy had one or more separate conversations with each traveler concerning his continued employment at the project site. The credited testimony shows that the conversations were substantially similar. Each traveler was advised that he should plan on making the next day his last day and further advised that anyone who was asked to leave and refused to do so would be sanctioned by the hall. To ensure that this request was not taken lightly Murphy told five of the travelers that he would not want to be a traveler and still be on the job on Monday. All of the travelers ultimately advised Murphy that they would cooperate. None of the six travelers appeared for work on Monday, 22 November, and after 3 days of unexcused absences all were terminated by the Employer.

As noted, the judge found that the Respondent violated Section 8(b)(1)(A) by the efforts of its steward whose threats caused the travelers to leave their jobs.[6] The judge ordered the Respondent to make the travelers whole for any loss of earnings suffered as a result of their compliance with the Respondent's unlawful requests.

Our dissenting colleague would reverse the judge's finding of an 8(b)(1)(A) violation as to traveler Theodore Linkous. The dissent is predicated on the view that the record does not show that the Respondent "caused" Linkous to lose his job. Although the dissent finds that Linkous did not return to work because of a back injury, he acknowledges that Linkous was discharged for absen-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent coercively requested each of the six employees to quit their employment, we particularly rely on the credited testimony that the Respondent's steward told five of the six employees that he would not want to be a traveler on the job come Monday. A sixth employee overheard a conversation wherein the Respondent's steward was relating this admonishment to a group of three employees. Accordingly, it is clear that this particular threat was effectively communicated to each of the six employees.

[3] To help assure that the Respondent's unlawful conduct is remedied, we will require the Respondent to notify the Employer, The Oberle-Jordre Co., Division of the Bishopric Products Co., that the Respondent has no objection to Oberle-Jordre's rehiring the individuals named in the remedy section. We will also require that the Respondent notify those individuals that it has no objection to their working for Oberle-Jordre or any other employer.

In *R. H. Macy & Co.*, 266 NLRB 858 (1983), the Board held the issuance of expunction remedies against unions to be necessary and appropriate in all cases where a union causes an employee to be unlawfully discharged, laid off, or otherwise discriminated against. We have accordingly incorporated an expunction remedy in the Order.

[4] All dates refer to 1982.

[5] In referring to his "welders" the construction manager was speaking of three of the six travelers.

[6] The judge relied on *Sachs Electric Co.*, 248 NLRB 669 (1980), enfd. in relevant part sub nom. *NLRB v. Electrical Workers IBEW Local 433*, 668 F.2d 991 (8th Cir. 1982).

teeism and argues that the Respondent should not be liable for any of his backpay loss. We disagree.

The facts surrounding Linkous' discharge are not in dispute. Linkous was approached by Murphy on Thursday, 18 November, and asked to make the next day his last day of work. Linkous responded that he would have to think about it and would let Murphy know the next day. On Friday, 19 November, between 8 and 8:30 a.m., Linkous told Murphy that he had decided to leave the job that day. Murphy was pleased with Linkous' decision and invited Linkous, as he had the other travelers, to join him that afternoon for drinks. Linkous explained that he would have to stay until 4 p.m. and told Murphy that he would take a raincheck. The two men had no further conversations that day.

Later that morning between 10 and 10:30 a.m. Linkous reinjured his back. He then went to the nurse and reported the injury as he had done only a few weeks before. On the previous occasion Linkous had no contact with the Employer from 12 October until 26 October when he returned to work. On this occasion Linkous was immediately terminated for absenteeism when he failed to report for work for 3 consecutive days.

Our dissenting colleague finds that, although the Respondent attempted to have Linkous quit, the intervening back injury prevented the execution of its plan. It is the dissent's position that the fact that Linkous reported his injury before leaving the project site destroyed any inference that he was quitting and joining the ranks of the other travelers who quit work that day.[7] We believe the dissent misconceives the relationships in this case. The complaint alleges a violation of Section 8(b)(1)(A). This section is concerned with the rights of individual employees in their relation with labor organizations. However, the dissent is predicated on Linkous' conduct as it relates to the Employer. The relevant relationship is that of Linkous and the Respondent.

All of the evidence in this case as it pertains to the Respondent clearly shows that like the other travelers Linkous was approached by Murphy and advised to quit his job. Like the other travelers Linkous told Murphy that he would comply with the Respondent's request that he leave the job by failing to report for work on Monday. Like the other travelers Linkous did not report for work for 3 consecutive days and was terminated the following week.

Nevertheless, the dissent asserts that there is no evidence to show that the Employer actually considered Linkous to be a part of the group of travelers simply because he was discharged for the same misconduct. Not only does this argument miss the point but ignores the facts of the case. The record establishes that the Employer knew that Linkous was a traveler. The Employer also knew that the Respondent wanted the travelers off the job to make room for its local members. The Employer observed several travelers walk off their jobs that day. Yet, the dissent would have us believe that, when the Employer terminated the travelers for absenteeism the following week, unlike the other travelers Linkous was singled out and discharged for an abuse of sick leave. The record contains no evidence that the Employer made this distinction. Indeed, the Employer not only sent Linkous the same termination letter it sent to the other five travelers but also provided to Linkous a letter stating that he had been discharged for absenteeism and not due to his back injury.

Linkous' misfortune in reinjuring his back does not alter the plain fact that the Respondent successfully sought Linkous' announced compliance with its request that he quit his job. Such conduct by the Respondent violated Section 8(b)(1)(A). Moreover, the back injury is relevant only insofar as it affects Linkous' loss of earnings for which the Respondent is liable.[8] We would accordingly affirm the judge.

In addition, our colleague expresses concern over the judge's failure to make any findings as to whether the Respondent's statement constituted unlawful threats within the meaning of Section 8(b)(1)(A). We note, however, that the judge did conclude that the Respondent violated Section 8(b)(1)(A) "[b]y its efforts to cause travelers to quit their jobs in order to provide jobs for Local 392 Members." Absent any specific findings by the judge, coupled with the absence of any exceptions by the parties themselves, we do not pass on these 8(b)(1)(A) statements.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Pipefitters Local Union No. 392, AFL–CIO, Cincinnati, Ohio, its officers, agents, and representatives, shall

[7] While the record does not show the time that Linkous actually left the project site, it is reasonable to infer that he left before the other travelers.

[8] The recommended Order of the judge provides that the extent to which Linkous' loss of earnings resulted from his coerced decision to give up his job as opposed to his being injured on the job should be determined during the compliance proceedings.

1. Cease and desist from

(a) Requesting travelers referred out of the Respondent's hiring hall to quit their jobs in order to make jobs available for members of Local 392.

(b) Attempting to cause The Oberle-Jordre Co. to terminate or in any other manner discriminate against employees who are not members of Local 392, in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Make whole Melvin R. Snow, Charles Tunny, Gary Holder, Harry J. Smith, Jerry Luttrell, and Theodore Linkous for any loss of earnings they may have suffered because of their compliance with the Respondent's unlawful requests that they quit their jobs at Oberle-Jordre's Ghent jobsite, in the manner prescribed in the section of the judge's decision entitled "The Remedy."

(b) Notify The Oberle-Jordre Co. in writing that it has no objection to its reemployment of Melvin R. Snow, Charles Tunny, Gary Holder, Harry J. Smith, Jerry Luttrell, and Theodore Linkous.

(c) Notify in writing the above-named individuals that it has no objection to their working for The Oberle-Jordre Co. or any other employer.

(d) Remove from its files any reference to the termination of the above-named individuals and notify them in writing that evidence of their termination by The Oberle-Jordre Co. shall not be used as a basis for future action against them.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its business office, hiring halls, and meeting places copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 9 for posting by The Oberle-Jordre Co. in places where notices to employees are customarily posted and ask Oberle-Jordre to remove any reference to its termination of Melvin R. Snow, Charles Tunny, Gary Holder, Harry J. Smith, Jerry Luttrell, and Theodore Linkous from its files and notify these individuals that it has asked The Oberle-Jordre Company to do this.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation of the complaint not specifically found herein is dismissed.

MEMBER HUNTER, concurring in part and dissenting in part.

I disagree with my colleagues' decision to adopt the judge's finding of an 8(b)(1)(A) violation concerning the discharge of traveler Theodore Linkous. Although I would reverse the judge as to Linkous, I would not disturb his findings as to the other five discharged travelers, in agreement with my colleagues. Unlike my colleagues, I would dismiss the complaint as to Linkous' discharge because I am persuaded that the record does not show that the Respondent *caused* Linkous to lose his job.

The record shows that all travelers were approached by the Respondent's steward to quit their employment to provide jobs for the Respondent's own members. Unlike Linkous, the other travelers walked off the job after lunch on 19 November 1982.[1] Earlier that day, Linkous had informed the steward that he would leave the job at the end of his shift. However, at work that day before his shift ended, Linkous suffered a back injury. The record shows that Linkous told the Employer that he had injured his back and was leaving the job to seek medical attention. Linkous then left the jobsite, sought medical care, and did not return to work the following week, as did the other travelers. After 3 days of unreported absences, Linkous, as well as the travelers who quit, was terminated for absenteeism. They all had violated an existing company rule requiring daily reporting of absences from work. As of the time of the underlying hear-

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] According to the judge's findings, Linkous left the project site after the other travelers. On the other hand, my colleagues in the majority find that it is reasonable to infer from the record that Linkous actually left *before* the other travelers. Regardless of which version is correct, the result is the same: Linkous did not join the other travelers.

ing, Linkous' back injury was still preventing him from returning to full duty work.

In my view, the foregoing shows that Linkous never quit his employment at the urging of the Respondent, as did the other travelers. Contrary to the judge, I do not infer "quitting" or an intention to quit simply because Linkous never grieved his discharge. At best, I would find that the steward attempted to have Linkous quit but that the intervening back injury prevented the execution of any future plans which Linkous may have had to quit. Linkous' back injury necessitated his leaving the jobsite that day, and the only information supplied to the Employer by Linkous was that he was leaving because of his back injury. This specific reason given for his leaving, in my opinion, destroyed any inference that Linkous was quitting and joining the ranks of the other travelers who quit work that day.

Under the majority's reasoning, Linkous' status as a traveler was sufficient to connect him to whatever the other travelers did that day and the following week and for whatever purpose. This contradicts Linkous' own record testimony. Linkous himself testified that he left and did not return to work after 19 November 1982 because of the reinjury to his back. Linkous' testimony further indicates that it was his intention to return to work after his recuperation from his back injury but, meanwhile, he had been discharged. Thus, I fail to see the connection with the other travelers who left and did not return because the Respondent had requested them to quit their employment.

There is also no evidence to show that the Employer actually considered Linkous to be a part of this group of travelers simply because he was discharged for the same type of misconduct. Application of the same company absentee rule is not sufficient to establish liability on the part of the Respondent on the particular facts of this case. In addition, contrary to the judge's analysis, I do not consider significant the fact that on one prior occasion with Linkous, in the case of a previous injury, the Employer was more lenient in the enforcement of its absence reporting rule. The record is insufficient to show that the Employer's alleged stricter enforcement of its work rule was prompted by the Respondent's request to terminate nonmembers. As correctly found by the judge, the Employer had flatly refused such a request. The record shows no deviation from this firm stance taken by the Employer.

Another area of my disagreement with the majority opinion lies with its failure to find certain statements by the Respondent's steward Murphy to constitute unlawful threats within the meaning of Section 8(b)(1)(A). As found by the judge, during the week preceding 19 November 1982, steward Murphy had separate conversations with travelers Snow, Tunny, Luttrell, Smith, and Holder. The judge further found that, in the course of these conversations, Murphy made the following statements. Murphy told Snow that if the travelers did not leave the job they "would never work out of 392 again" and that, if Snow wanted to be in good graces with the Respondent, he should leave the job. After Murphy requested Tunny to quit, Tunny said, "I really don't have much choice, do I?" to which Murphy replied, "[N]o, you really don't." Murphy told Luttrell that, if Luttrell did not leave, he would never work out of Local 392 again. Murphy also told Luttrell that Murphy "would not want to be a traveler on the job on Monday morning" and that the Respondent would not be responsible for what happened to Luttrell on Monday morning if he was on the job. Murphy repeated similar comments to a group of employees, including Snow, Smith, and Holder. Murphy also told Smith that the Union would not be responsible for travelers who were on the job on Monday morning. Murphy also told Holder that anyone who did not leave the job "would be sanctioned by the hall." The Respondent did not except to any of these statements. The judge did not make any findings with respect to whether these statements were violative even though encompassed by the outstanding complaint allegations of 8(b)(1)(A) threats made by the Respondent.[2] The General Counsel and the Charging Party did not except to the judge's failure to dispose of these 8(b)(1)(A) allegations. Because these matters were fully litigated and without exception to them from the Respondent, I would find all the above remarks by steward Murphy to constitute 8(b)(1)(A) threats and would correct the judge's decision to reflect this determination. I also would rely on these threats in support of the judge's conclusion that the Respondent coercively requested the travelers to quit.

[2] In substance, the complaint alleged that the Respondent threatened employees that they no longer would work out of Local 392 (the Respondent) if they did not quit their jobs and that the Respondent similarly threatened employees with unspecified physical harm. The complaint further alleged these threats to be violative of Sec. 8(b)(1)(A).

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT request travelers referred out of our hiring hall to quit their jobs in order to make jobs available for members of Local 392.

WE WILL NOT attempt to cause The Oberle-Jordre Co. to terminate or in any other manner discriminate against employees who are not members of Local 392, in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Melvin R. Snow, Charles Tunny, Gary Holder, Harry J. Smith, Jerry Luttrell, and Theodore Linkous for any loss of earnings they may have suffered because of their compliance with our unlawful requests that they quit their jobs at Oberle-Jordre's Ghent jobsite, with interest.

WE WILL notify The Oberle-Jordre Co. in writing that we have no objection to its reemployment of Melvin R. Snow, Charles Tunny, Gary Holder, Harry J. Smith, Jerry Luttrell, and Theodore Linkous.

WE WILL notify in writing the above-named individuals that we have no objection to their working for The Oberle-Jordre Co. or any other employer.

WE WILL remove from our files, and ask Oberle-Jordre to remove from its files, any reference to the termination of the above-named individuals and notify them in writing that evidence of their termination by The Oberle-Jordre Co. shall not be used as a basis for future action against them.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, PIPEFITTERS LOCAL UNION NO. 392, AFL–CIO

DECISION

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on April 4, 1983, and amended on May 3, 1983, by Melvin R. Snow, a complaint was issued on May 11, 1983, by the Regional Director for Region 9 of the National Labor Relations Board (the Board), alleging that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Pipefitters Local Union No. 392, AFL–CIO (the Union), had committed violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act). The Respondent has filed a timely answer denying that it has committed any violations of the Act.

A hearing was held on July 5 and 6, 1983, in Cincinnati, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of all parties have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

At all times material, The Oberle-Jordre Co., Division of the Bishopric Products Co. (the Employer or O. J.), was an Ohio corporation engaged in construction work, including installation of power plant equipment at a facility being constructed at Ghent, Kentucky, pursuant to a contract with Kentucky Utilities Company. During the calendar year 1982, in the course of its performance of that contract and others in Kentucky, the Employer purchased goods and materials valued at approximately $125,000, directly from suppliers located outside the Commonwealth of Kentucky. The uncontradicted testimony of the Employer's president establishes that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Employer has been working at the Ghent facility since 1977. The Respondent Union is a party to the project agreement covering the Giant project and represents and refers the pipefitters employed there. For some time prior to November 19, 1982,[1] the Employer had about 10 pipefitters working at the project. Of these, Union Steward Charles Murphy and an apprentice were the only members of Local 392, the others all being "travelers," union members working temporarily within the geographical jurisdiction of a local other than their own local unions. During the second week of November, Union Business Agent Dave Jeffers visited the Ghent site and spoke with the Employer's construction manager James Bowers. Bowers testified that Jeffers told him that because of the shutdown of construction at the Zimmer Nuclear Power Plant in Moscow, Ohio, the Union had about 450 local people out of work and he asked Bowers if he "could lay the travelers off and rehire with local

[1] Hereinafter, all dates are in 1982.

people." Bowers responded that he could not lay anyone off. He told Jeffers that he had too much of a problem getting heavy wall welders who could meet the special qualifications required for the work being done; that he had some qualified welders who had been there a long time; and that, because of the tight schedule he had to meet, he could not go through the delay or expense of getting new people qualified. They discussed the number of heavy wall welds that had to be made and Bowers gave Jeffers a list of the qualified welders who were on the job and told him that if "anybody had to go," he wanted to keep the welders he had.

Jeffers denied that he ever asked Bowers to lay off travelers. He recalled a conversation with Bowers, at about the time Bowers indicated, in which he asked Bowers if he was going to build up his crew, but said he did not ask about a layoff. Jeffers could not recall if anything was said about the Zimmer plant shutdown and said he would not have brought it up "because it just would not be something I would be talking about." I credit the testimony of Bowers over that of Jeffers[2] and find that Jeffers did request that the Employer lay off the travelers on its crew and replace them with local union members.

During the week or so preceding November 19, Union Steward Murphy had separate conversations with each of the travelers on the Ghent job concerning the fact that the Zimmer job had shut down, causing the layoff of many members of Local 392. The Charging Party, Melvin Snow, is a traveler who had worked out of Local 392 off and on for about 5 years, starting at Ghent in July. About a week before Snow left the job on November 19, he spoke with Murphy, who told him "if Zimmer shuts down we are going to have to get rid of all the travelers here at Ghent and put local hands on." On the morning of November 18, Murphy was not at work and Snow was operating a stress machine in place of Murphy. When Murphy arrived on the job after lunch, he asked Snow to step out on the roof to talk to him. Murphy told Snow that he had just come from the union hall where he had talked to Jeffers and that all the travelers at Ghent were going to have to leave to make room for local hands being laid off at Zimmer. Murphy told him that if the travelers did not leave the job they "would never work out of 392 again" and that, if Snow wanted to be in good graces with the Union, he should leave the job. Murphy also told Snow that he and Jeffers were trying to get O. J. to lay them off so that they could draw unemployment compensation and that they were still talking to O. J. about it. On Friday, November 19, Murphy told Snow that he wanted him to make it his last day and offered to buy lunch for Snow and the other travelers.

Theodore Linkous is a traveler who had worked out of Local 392 for 9 years. Linkous testified that, on November 18, Murphy came to where he was working with two other pipefitters and asked for a word with him. After they moved about 50 feet away, Murphy asked Linkous to make the next day his last on the job. When Linkous said that if he quit he would not be able to draw unemployment compensation, Murphy told him that he and Jeffers had been trying all week to get O. J. to lay them off, but that O. J. would not cooperate with them. This, Murphy said, left him "to do the dirty work" of going around asking everybody to leave. Linkous told Murphy on the following morning that he had decided to leave as requested and Murphy offered to buy him a drink.

Charles Tunny had worked as a traveler out of Local 392 for about 5 or 6 years and had been on the Ghent job since October. He had never spoken to Murphy until the afternoon of November 18 when Murphy came to him and said that he wanted the following day to be his last because Murphy had some local men he wanted to put on the job. When Tunny questioned him about unemployment benefits, Murphy told Tunny to get himself fired by not showing up or calling in on the first 3 days of the following week and he would then be able to draw unemployment compensation in 4 to 6 weeks. When Tunny said, "I really don't have much choice, do I," Murphy responded, "No, you really don't." Murphy then mumbled something which Tunny understood to be "if I were a traveler, I would not want to be here Monday morning anyhow."

Jerry Luttrell is a traveler who has worked out of Local 392 since 1977 and had been with the employer at Ghent most recently since February. Luttrell testified that, after lunch on November 18, Murphy told him that Murphy had had a meeting with the business agent and that he was going to have to ask Luttrell to "drag up" or quit the job. When Luttrell responded that he would have to give it some thought, Murphy told him that, if he did not leave, he would never work out of Local 392 again. Murphy also said that he "would not want to be a traveler on the job on Monday morning" and that the Union would not be responsible for what happened to him on Monday morning if he was on the job.

Harry Smith had worked as a traveler out of Local 392 at Ghent for 4 years. He testified that, on November 17 or 18, Murphy told him that Jeffers was trying to get O. J. to lay the travelers off, but that O. J. would not go along with it so that the travelers were going to have to "drag up." He also said that at one point Murphy "blowed his top" and, using rough and foul language, said that the Union would not be responsible for travelers who were on the job on Monday morning. When Smith mentioned the possibility of a lawsuit, Murphy replied that he had spoken to all the travelers alone without witnesses so no one could prove anything. Murphy also said that, if Smith filed a lawsuit against the Union, he would "never work out of Cincinnati again."

Gary Holder had worked out of Local 392 as a traveler off and on since 1981 and had been at Ghent most recently since June. Holder testified that, on the afternoon of November 18, Murphy told him that he had asked some people to leave and that anyone who did not leave "would be sanctioned by the hall." On the following day, Murphy told a group including Holder, Snow,

[2] I found Jeffers' testimony in almost all respects to be unworthy of belief based on his demeanor while testifying and the content of his testimony. He struck me as having absolutely no regard for the truth of the testimony he gave.

Smith, and a pipefitter named Barnes that he "wouldn't want to be a fucking traveler and be on the job come Monday." Murphy also told them that the hall had agreed to let two of the three specially qualified hot welders stay on the job and that Holder and Smith could stay. When Barnes objected that he had been on the job longer than Holder and should be permitted to stay, Murphy told them he was going to call the hall and see if he could get it worked out so that all three hot welders could stay. Earlier, when Smith asked when he and Holder were going to be asked to leave, Murphy shouted, "You'll leave when I tell you to leave." After two or three telephone calls, Murphy came back and told Holder and Smith "that there was [sic] welders on the bench that wanted to complete those welds that we were doing." That afternoon, Holder, Smith, Luttrell, Snow, and Barnes went to lunch with Murphy who paid for their lunches and told them he appreciated what they were doing for the Union and that they "would be given first consideration when work broke again, as far as sending out travelers."

Snow did not return to the job after lunch and the other travelers, with the exception of Linkous, who apparently worked until the end of the day, walked off the job during the afternoon. None of the travelers returned to the job the following week and, after 3 days of unexcused absences, all were terminated by the Employer.

Charles Murphy denied that he had ever threatened any of the travelers that, if they continued to work past November 19, the Union would not be responsible for them or that they would not be able to work out of Local 392 again. He testified that all he did was ask the travelers to leave the job. He denied having any conversations with Jeffers concerning obtaining layoffs for the travelers from the Employer and said he last saw Jeffers at the jobsite 2 or 3 weeks before November 19. The credited testimony of Bowers shows that Murphy came into his office at the end of the meeting in which Jeffers asked him to lay the travelers off and that Murphy and Jeffers left together. Murphy did admit to having been asked by the travelers if the Employer would give them layoff slips and said he "probably told them that O. J. probably wouldn't give them one." He also told them if they left the job "they could probably collect unemployment." Throughout his testimony Murphy was hesistant, vague, and evasive. I do not credit his testimony[3] insofar as it conflicts with that of Snow, Linkous, Tunny, Luttrell, Smith, and Holder, who were credible witnesses, and I find that Murphy made the statements attributed to him by those individuals.

B. *Findings and Conclusions*

The General Counsel contends that the Respondent violated Section 8(b)(1)(A) of the Act by the actions of Murphy, the union steward on the Ghent job, whose threats caused the travelers to leave the job. The Respondent contends that there was no coercion of any of the travelers by the Union and that all voluntarily chose to leave the job as a courtesy to unemployed local union members in accordance with custom or the "golden rule."

The evidence establishes that none of the travelers had any intention of quitting the Ghent job prior to their conversations with Murphy during the week preceding November 19. It also establishes that none of the travelers was approached by Murphy about leaving until after Jeffers had been unsuccessful in his attempt to get the employer to lay off the travelers. The evidence in the record does not establish the existence of the custom the Respondent relies on on or that anyone on the Ghent job was aware of it. Even Murphy, who was questioned repeatedly about this subject, could not testify to the existence of any such custom.[4]

Regardless of whether there it was a custom or merely the application of the "golden rule," the evidence is clear that Murphy was not content to rely solely on the moral persuasion of either to get the travelers off the Ghent job. While he may have phrased his remarks to the travelers in the form of requests that they leave the job, he added, among other things, that if they did not leave, they would be sanctioned by the hall, they would never work out of Local 392 again, and that the Union would not be responsible for what happened if they showed up on the job after November 19. That Murphy's requests were not simply appeals to the travelers' sense of altruism, but were directives, is evidenced by Murphy's care in talking to each traveler individually so there would be no witnesses and his angry statement to Smith that "you'll leave when I tell you to leave." As the deadline Murphy had set for the travelers came closer, he became more and more agitated and less cautious, telling a group of four of the travelers on November 19 that he "would not want to be a fucking traveler and be on the job come Monday." A short time later that day, after the travelers informed him they were leaving, Murphy treated him to lunch and expressed his appreciation for what they were doing.

The evidence also establishes that Murphy was acting as an agent of the Union in requesting that the travelers leave and that he made this clear to them. It was Jeffers, the Union's business agent, who initiated the efforts to get the travelers off the job. Jeffers met with Murphy at the jobsite immediately after his unsuccessful attempt to get the Employer to lay off the travelers. As job steward and the only local journeyman at the Ghent project, Murphy was the obvious choice for and, by his admission to Linkous, the one selected to do the "dirty work" of asking everyone to leave. Murphy told Linkous and Smith about Jeffers' failure to persuade the employer to lay them off when he asked them to leave. When Murphy came to the job on the afternoon of November 18, he told the travelers he spoke to individually that he had just come from the union hall and that they were

[3] I am convinced that Murphy carried through on a promise he made to Snow in the event that legal action was taken against the Union because of his requests that the travelers leave the job. Murphy told Snow, "I'm going to get up and lie like hell."

[4] The only evidence in the record concerning industry customs is the testimony of Harry Smith that, if a local man on a job is going to be laid off, "then a traveler will leave." But this custom had no application in the present case because, in Smith's words, "there wasn't no local man on the job, you see, to leave for."

going to have to leave. That the Union orchestrated the travelers' removal was further evident from what occurred on November 19 when Murphy told the travelers that the hall had determined that two of the travelers who were hot welders could stay on. When another traveler complained, Murphy made a series of telephone calls to the hall and announced the final decision, that there were local men who wanted the jobs, so all the travelers had to go. Also, Jeffers' failure to take any meaningful action after being informed by Bowers on November 19 that the travelers were leaving the job is further evidence that he instigated and was aware of what Murphy was doing at the jobsite.[5]

In *Sachs Electric Co.*,[6] the Board considered similar "requests" that travelers quit their jobs so that unemployed local members could take their places and found them to be coercive. As in *Sachs*, the travelers here were "undoubtedly" aware that the "requests" came from "union officials who, by virtue of their responsibilities in administering the hiring hall, control, and will continue to control, the travelers' livelihoods within the hiring hall's jurisdiction," and were likely to construe them "as more than mere solicitations for 'volunteers.'" Ibid. I find that the Respondent's efforts to cause the travelers to quit their jobs in order to provide jobs for members of Local 392 were based on impermissible considerations and violated Section 8(b)(1)(A) of the Act.

The General Counsel also contends that the Respondent violated Section 8(b)(2) of the Act by virtue of Jeffers' request to Bowers that the Employer lay off the travelers. As noted above, I credit the testimony of Bowers that Jeffers did ask him to lay off the travelers and rehire with local pipefitters prior to November 19, when the travelers left the job. There is no evidence that any threats were made or any inducements offered in order to get the Employer to lay them off or that the Employer had any intention of complying with the request.[7] Notwithstanding the fact that Jeffers made only a "bare request," which was not acceded to by the Employer, I find there was an unlawful "attempt to cause" the Employer to discriminate against the travelers in violation of Section 8(a)(3) because there was no legitimate basis for this request, which was premised solely on the Union's desire to employ its local members at the expense of the travelers. Consequently, the Respondent's action violated Section 8(b)(2) of the Act.[8]

CONCLUSIONS OF LAW

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Pipefitters Local Union No. 392, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Oberle-Jordre Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By its efforts to cause travelers to quit their jobs in order to provide jobs for Local 392 members, the Respondent violated Section 8(b)(1)(A) of the Act.

4. By attempting to cause the employer to lay off all travelers employed by it at the Ghent, Kentucky jobsite and replace them with Local 392 members in violation of Section 8(a)(3) of the Act, the Respondent violated Section 8(b)(2) of the Act.

5. The unfair labor practices found herein are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it be ordered to cease and desist from such violations and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to make whole Melvin R. Snow, Charles Tunny, Gary Holder, Harry J. Smith, Jerry Luttrell, and Theodore Linkous[9] for any loss of earnings they may have suffered because of their compliance with the Respondent's unlawful requests that they quit their jobs with the Employer at the Ghent project. Backpay shall

[5] I have previously indicated that I did not believe much of Jeffers' testimony. This is particularly true with respect to his claim that he did not direct Murphy to have the travelers leave and that, when they left the job, he figured it was a "nooner," that is, "they go to lunch and do not come back." Equally incredible was his claim that, after he learned the travelers had been discharged for absenteeism, he tried to get the Employer to rehire them, in view of the fact that he never talked to any of the travelers about their leaving and he had done nothing to get them to return to the job after Bowers had requested that he do so. Since one of his duties as business agent was to see that the Ghent job was properly manned, his complete lack of concern about the travelers' leaving the job unmanned indicated his knowledge and complicity in getting them off the job.

[6] 248 NLRB 669, 670 (1980), enfd. sub nom. *NLRB v. Electrical Workers IBEW Local 453*, 668 F.2d 991 (8th Cir. 1982).

[7] Bowers' testimony that he told Jeffers, "If anybody had to go, I'd want to keep my welders," suggests that some kind of deal may have been discussed, but the evidence is not sufficient to establish this.

[8] See *Commercial Workers Local 227 (Kroger Co.)*, 247 NLRB 195 (1980); *Electrical Workers IBEW Local 112 (Ajax Electric)*, 231 NLRB 162 (1977).

[9] Linkous credibly testified that he decided to comply with the Respondent's request that he leave the job and informed Murphy on the morning of November 19 that it was to be his last day. However, later in the day, Linkous reinjured his back on the job and, as a result, was unable to work the following week in any event. Notwithstanding the fact that Linkous reported his injury to the Employer in the same manner as he had in the case of a previous injury, he was terminated by the Employer for "absenteeism" on November 24, as were the other travelers. Consistent with his decision to give up his job, Linkous did not contest what appears to be an arguably erroneous termination. As of the date of the hearing in this matter, Linkous had not been cleared to return to work by his physician. However, it is possible that, had he not been terminated, Linkous might have been able to return to work for the Employer on "light duty status" or "working with pain," even though he might not have been able to obtain new employment, because of his physical condition. The extent to which his loss of earnings resulted from his coerced decision to give up his job rather than his injury can be determined during the compliance stage of this proceeding.

be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1980), with interest to be paid on the amounts owing in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

[Recommended Order omitted from publication.]

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Quinn Company *and* Operating Engineers, Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO. Case 32–CA–5228

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 27 October 1983 Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a supporting brief, and the Charging Party filed a brief in response to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Quinn Company, Fresno and Salinas, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Monterey, California, on June 30, July 1, and August 2, 1983. Pursuant to a charge filed against Quinn Company (Respondent) on February 7, 1983, by Operating Engineers, Local Union No. 3 of the International Union of Operating Engineers, AFL–CIO (the Union), the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing of February 28, 1983, alleging in substance that Respondent engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. Specifically, the General Counsel alleges that Respondent's supervisors interrogated employees about their union sentiments, solicited employees to circulate, and themselves circulated, decertification petitions, and impliedly promised better benefits if employees abandoned the Union. Respondent filed an answer denying the commission of any unfair labor practices and affirmatively alleged that litigation of the alleged unfair labor practices was barred by a settlement agreement approved by the Regional Director.

All parties have been afforded full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a California corporation with offices and places of business in Fresno and Salinas, California, where it is engaged in the sale and service of heavy mechanical equipment. During the 12 months prior to issuance of the complaint, Respondent purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

As mentioned earlier, Respondent is engaged in the sale and service of heavy mechanical equipment at its facilities in Fresno and Salinas. Since at least 1970, the Union has represented Respondent's employees at both the Fresno and Salinas facilities in one bargaining unit.[1] The last collective-bargaining agreement between Respondent and the Union expired on November 22, 1982. During early November 1982, certain of Respondent's employees circulated a petition seeking to oust the Union as the bargaining representative of Respondent's employees. On November 8, Respondent received petitions signed by a majority of the employees in the bargaining unit stating that they no longer wished to be represented by the Union. The following day Respondent withdrew recognition from the Union. On November 12, the Union wrote Respondent claiming that a majority of the employees had signed authorization cards on behalf of the Union and requesting that Respondent negotiate for a

[1] The parties stipulated that the following unit of Respondent's employees constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time mechanics, parts men, welders, utility men and janitors employed by Respondent at its Fresno and Salinas, California facilities; excluding all office clerical employees, confidential employees, sales employees, professional employees, guards, and supervisors as defined in the Act.

succeeding contract. That same date, the Union filed a petition in Case 32–RC–1736, requesting a representation election, and an unfair labor practice charge in Case 32–CA–5035, alleging that Respondent had committed unfair labor practices in soliciting the employee petitions. On December 15, a petition was filed in Case 32–RD–452 by Leon Brown, an employee at Respondent's Fresno facility, on behalf of Respondent's employees seeking to decertify the Union.

In January 1983, the Union and Respondent attempted to amicably settle the issues raised by the representation petitions and the unfair labor practice charge. The Union agreed to withdraw the charge in Case 32–CA–5035 and not to refile the charge (until a consent election could be held). The parties further agreed to consent to a Board-conducted election to resolve the question concerning representation. The Union stated that this settlement was contingent upon Respondent refraining from any further unfair labor practices. On January 12, 1983, the Regional Director approved the Union's withdrawal of the charge and approved a Stipulation for Consent Election calling for an election to be held on February 10, 1983. On February 7, 1983, the Union filed the instant charge alleging violations of the Act covered by the withdrawn charge and also violations of the Act allegedly occurring after the charge was withdrawn. Based on this charge, the Regional Director indefinitely postponed the scheduled election. On March 28, 1983, the Regional Director, based on the allegations of the instant complaint, dismissed the representation petitions.

Within this factual background, the General Counsel contends that Respondent committed certain unfair labor practices in soliciting employees to decertify the Union, including directly dealing with employees and promising benefits in order to induce employees to abandon union representation. Further, the General Counsel alleges that, after withdrawal of the first charge, Respondent, in campaigning for the scheduled election, continued to unlawfully promise benefits in order to induce employees to vote against union representation. As mentioned earlier, Respondent contends that its settlement of the first charge, approved by the Regional Director, bars litigation of the instant case. Further, Respondent raises a defense that the conduct of Gary Molezzo, shop foreman at Salinas, and Gene Harper, parts manager at Salinas, in support of the decertification campaign, is not imputable to Respondent because both Molezzo and Harper are bargaining unit employees and members of the Union.

B. *The Decertification Campaign*

Leon Brown, a parts man at Respondent's Fresno facility, testified that there "had always been talk among the employees about getting rid of the union" and that he and Joe Harrah, another Fresno employee, increasingly discussed the matter during the summer of 1982. Brown attributed these discussions to concerns over recent agreements between the Union and two competitors of Respondent, one in Sacramento and the other in Stockton. According to Brown, the employees at both companies received pay cuts as a result of the newly negotiated union agreements. Brown heard that Harrah was attempting to decertify the Union in September but Brown neither saw nor signed a decertification petition at that time. However, in October, Brown contacted the Board's Oakland Regional Office and, based on advice received from Board personnel, composed and circulated an employee petition. Brown used company paper and personnel to type the petition which he circulated on company time. Brown circulated the petition between November 1 and 8. There is no evidence that Respondent encouraged Brown's decertification activities or even that Respondent was aware of such activities until after Brown had obtained the signatures of several employees November 1 and 2.

Prior to his circulation of the petition, Brown discussed "getting rid of the Union" with Gary Molezzo, shop foreman, and Gene Harper, parts manager, both of whom are employed at Respondent's Salinas facility. After circulating the petition in Fresno, Brown called Harper and asked if Harper would circulate a petition in Salinas. After Harper agreed to do so, Brown dictated the wording of the petition to Harper over the telephone. Harper handwrote a petition and, with Molezzo's assistance, he circulated the petition at the Salinas facility.

C. *The Employee Meetings*

Blake Quinn, Respondent's president, credibly testified that, in late October and early November, conversations concerning the Union and decertification were keeping "a lot of work" from getting done.[2] Dan Cunningham, Respondent's vice president, informed Quinn that a decertification petition was being circulated at the Fresno facility and that the employees had been questioning their supervisors about Respondent's health plan and profit-sharing plan. Based on this information, Quinn decided to call a meeting for all bargaining unit employees. Thus, on November 5, mandatory meetings for all bargaining unit employees were conducted at both the Fresno and Salinas facilities.

At the Salinas meeting, Quinn read a prepared statement which stated in pertinent part:

> Recently there has been a lot of discussion in the shop concerning the upcoming expiration of the contract between Quinn Company and the Operating Engineers and what will happen when the contract expires.
>
> By law an employer must bargain with a union so long as that union represents a majority of the employees. Quinn Company has not received any evidence which demonstrates that the union does not enjoy majority status even though there have been rumors that some employees no longer wish to be represented by the union. Quinn Company intends to abide by the law and bargain with the union concerning entering into a new contract so long as the union represents a majority of employees.
>
> As to what to expect in upcoming negotiations, Quinn Company cannot bypass the union and nego-

[2] This testimony was corroborated by Brown.

tiate directly with employees as that would be an unfair labor practice. Therefore our proposed renegotiations of the contract will be presented to the union at the bargaining table.

If anyone has any questions concerning this matter please feel free to ask me, your union representative or any member of the NLRB. If anyone wishes to contact the NLRB in Oakland their phone number is (415) 273-7200.

Quinn then said he had heard through the "grapevine" that the employees had "some questions" and that he was there to answer three of those questions. Quinn then listed three topics: decertification, Respondent's profit-sharing plan, and Respondent's health and welfare plan. Quinn then turned the meeting over to Cunningham. Cunningham wrote the NLRB's phone number on a chalk board along with the figures 30 percent and 50 percent. Cunningham explained that if 30 percent of the employees signed a decertification petition, the NLRB would conduct an election and if 50 percent of the employees signed such a petition, Respondent would no longer have to bargain with the Union.

Cunningham emphasized that he could make no promises. He then explained "in some detail the basic wording of the profit-sharing plan." Cunningham told the employees that to be eligible for the Company's profit-sharing plan an employee had to be 25 years of age (soon to be reduced to 21 years) and have worked for the Company for at least 3 years. He then gave an example of two employees who had recently left Quinn Company after 10 and 15 years, respectively. Cunningham said that had the two employees been covered by the Company's profit-sharing plan the 10-year employee would have retired with $30,000 and the 15-year employee with $70,000. Cunningham explained that employees covered by the Union's pension plan were not eligible for the Company's profit-sharing plan.[3]

As to health and welfare, Cunningham compared Respondent's plan to the Union's plan and concluded that they were "equal to or almost equal to" each other. Cunningham added that Respondent was changing carriers so details about Respondent's new plan would not be available until some time later.

Both Quinn and Cunningham emphasized that they could make no promises in regard to the profit-sharing or health and welfare plans. Moreover, both Quinn and Cunningham refused to respond to certain questions because their answers might be construed as promises.

It is undisputed that the Company's profit-sharing plan has been in effect for nonunion employees since about 1965. The plan provides in pertinent part:

> Notwithstanding the foregoing, an employee for whom the Company is required to make or making contributions to any pension or other retirement plan (other than this plan and social security) pursuant to a collective-bargaining agreement or agreements on the date when such employee would otherwise be eligible to become a participant shall not become a participant so long as he remains subject to such condition but shall become a participant immediately thereafter if such employee ceases to be an employee for whom the Company is required to make or makes such contributions.

On November 9, Respondent called another mandatory employee meeting at the Salinas facility. Rick Gregerson, shop manager, read a prepared statement in which he announced that Respondent had been presented with a decertification petition signed by a majority of its employees. Gregerson said that based on the petition Respondent would no longer bargain with the Union. Gregerson thanked the employees for their support and said that the petition would be forwarded to the NLRB.

In anticipation of the election scheduled for February 10, 1983, Respondent held a mandatory meeting for employees in late January or early February. At this meeting, Respondent distributed to employees a seven-page document concerning Respondent's benefits.[4] The seven-page handout included one page which was personally tailored to the recipient employee and which compared the employee's estimated retirement benefits under Respondent's profit-sharing plan and the employee's estimated retirement benefits under the Union's pension plan. The personalized page for employee John Larsen estimated that if Larsen worked 35 years under the union pension plan, Respondent would contribute $67,184 on Larsen's behalf, the contribution would experience zero growth and Larsen's pension at age 65 would be $1,411 a month. Larsen would not be able to withdraw a flat sum on retirement. The document showed two alternatives under Respondent's profit-sharing plan. The first alternative, based on 35 years of work, showed a company contribution of $61,880. The contribution would grow to $701,301 and, at age 65, Larsen's monthly pension would be $9,159 per month. Instead of taking a monthly pension, Larsen could withdraw a lump sum of $763,181. Under the second alternative, which was also based on 35 years of employment, the Company would contribute $125,230 which would grow to $1,419,262. At age 65, Larsen would receive $18,536 a month or a lump sum payment of $1,544,492.

The handout also compared Respondent's health and welfare plan with that of the Union, and compared the yearend value of the profit-sharing plan with that of the Unon's pension fund. There is no contention that any of the information contained in the document was false.

[3] The evidence is not clear as to what Cunningham actually said concerning the disqualification under the plan of employees covered by a pension or retirement plan under a collective-bargaining agreement. The best I can ascertain from the vague testimony of the employee witnesses is that Cunningham made it clear that employees could not be covered by the Union's pension plan and the Company's profit-sharing plan at the same time.

[4] The handout included the following disclaimer:

> Attached is information concerning the present benefits for employees both for in the bargaining unit and for Quinn Company nonunion employees.
>
> In viewing these calculations, bear in mind that all the law permits us to do is to compare, or give you information which you can use to compare present benefits. The law expressly prohibits the employer from making any promises in this period before an election.

Based on its belief that Respondent's distribution of the handout constituted an unfair labor practice, the Union filed the instant charge on February 7, 1983, and requested that the Regional Director postpone the scheduled election.

D. *Harper's Participation*

Gene Harper is parts manager at Respondent's Salinas facility. At all times material herein, Harper has been covered under the terms of the collective-bargaining agreement and has been a member of the Union. Harper assigns, directs, reviews, and evaluates the work of the seven employees in his parts department. Harper interviews job applicants and narrows down the applicants to one or two. The remaining applicant or applicants are then interviewed by the shop manager. Harper recommends who shall be hired and his recommendations have always been followed. Further, Harper grants employees time off and authorizes overtime. Finally, Harper is responsible for written evaluations of parts department employees. Accordingly, I find that Harper is a supervisor within the meaning of the Act. As will be discussed, infra, the issue is whether, in view of Harper's inclusion in the bargaining unit, his conduct in support of the decertification petition can be imputed to Respondent.

Harper testified that he went to each of the people under his supervision and explained that, because he desired decertification, he had signed the petition. Harper further explained that it was up to each employee to decide whether to sign the petition. Harper denied talking with the store manager or the representatives of management about the petition. Jess Barba, an employee and shop steward, testified that when he refused Harper's request to sign the petition, Harper responded that Barba's refusal put Barba in a "bad light." Although Harper did not specifically address Barba's claim, he did deny making any threats or promises. Having observed Harper's demeanor and having considered the corroborative testimony of employees Larry Shepherd, Frank Shillak, and Daniel White, I credit Harper's testimony over that of Barba. Shepherd, a parts man under Harper's supervision, testified that Harper informed him that a decertification petition was "going around." According to Shepherd, Harper said he did not want to influence Shepherd's decision and that the decision to sign the petition was entirely up to Shepherd. Shepherd further testified that Harper did not make any promises or any threats. Shillak and White, two other employees supervised by Harper, similarly testified that Harper indicated a personal decision to sign the petition but that the employees could decide for themselves whether to sign the petition. Shepherd, Shillak, and White all signed the petition on November 5, 1982.

As mentioned earlier, Brown had begun circulation of an employee petition at the Fresno facility on November 1. Harper and Molezzo did not begin circulation of a petition at the Salinas facility until after the employee meeting of November 5.

E. *Molezzo's Participation*

Gary Molezzo is the shop foreman at Respondent's Salinas facility and is in charge of 12 mechanics. At all times material, Molezzo has been included in the bargaining unit and a member of the Union. Molezzo does little, if any, mechanical work, and spends most of his time directing and assigning mechanics' work. Molezzo prepares evaluations of mechanics for employee personnel records. In order to be promoted to field mechanic, the highest paid mechanics' classification, an employee must have Molezzo's recommendation for the job. Molezzo interviews job applicants and makes hiring recommendations to the shop manager. Molezzo's recommendations have always been followed. In addition, Molezzo has authorized time off for employees and has effectively recommended discipline for employees. Accordingly, there is little doubt that Molezzo is a supervisor within the meaning of the Act. However, as stated above, the issue is whether, in view of Molezzo's inclusion in the bargaining unit, his conduct in support of the decertification campaign can be imputed to Respondent.

In September 1982, prior to the circulation of the decertification petitions at either the Fresno or Salinas facility, Molezzo asked employees about his desire to "get rid of the Union." Molezzo testified that he was "not too fond of the Union" because, in his view, his mother did not receive sufficient benefits upon the death of his father. Molezzo discussed this dissatisfaction with the employees. The General Counsel concedes, on brief, regarding Molezzo's conduct in September and October, "as an individual member of the bargaining unit Molezzo had a right to participate in decertification activity, absent evidence that he was acting on behalf of Respondent." However, the General Counsel alleges that Molezzo's conduct, associated with the decertification petition in November, violated the Act, on the ground that Molezzo was acting on behalf of Respondent.

John Larsen, a mechanic supervised by Gary Molezzo, testified that Molezzo walked up to Larsen, placed the petition containing employee signatures in front of Larsen and said, "No, huh?" Larsen answered "No." Loren Herr, another employee under Molezzo's supervision, testified that Molezzo asked him to sign the petition. Herr asked Molezzo if the employees would "be able to get a raise" without the Union. According to Herr, Molezzo answered that Respondent had always been "fair in the past" and there was no reason would "change the policy" in the future.

Norman Clatterbuck, a mechanic at the Salinas facility, testified that Molezzo, his supervisor, presented the petition to him, asked Clatterbuck to read it and asked Clatterbuck to sign if he wanted to do so. Clatterbuck testified that Molezzo made no threats nor promises. Clatterbuck signed the petition. Richard Dampier and Ted McLaughlin, mechanics at the Salinas facility, similarly testified that Molezzo, without making any threats or promises, asked them to sign the petition. Both Dampier and McLaughlin declined to sign the petition to which Molezzo made no response.

Charles "Skip" Bates, a former employee of Respondent, testified that, while he was employed by Respond-

ent, Molezzo was both his friend and supervisor. Bates and Molezzo often ate lunch together and debated the Union, decertification, and related matters. Molezzo expressed displeasure with the Union because Molezzo's mother had received an allegedly inadequate death benefit. According to Bates, Molezzo claimed on more than one occasion that the Union was "holding back Bates and that Bates would be better off without the Union." According to Molezzo, if Respondent was not required to pay lesser skilled employees an inflated wage rate it would be able to pay more skilled employees, like Bates, a better pay rate. Bates argued that Respondent could not entirely be trusted and that there was safety in the employees acting together as a group.

Bates further testified that, some 4 months prior to the decertification petition, Molezzo, while on the telephone to someone at the Fresno facility, asked Bates whether the employees knew that "the Company can save $5,000 on each one of you if you weren't union?" Bates answered, "Yeah, right out of my pocket." On another occasion, Molezzo asked Bates to sign a decertification petition but Bates simply told Molezzo "where to put it." While Molezzo denied telling Bates that management could save $5,000 per employee or that Bates could make more money without the Union, I have decided to credit Bates' testimony over that of Molezzo. Bates appeared to be a forthright and sincere witness. Further, Bates, a former employee, had little to gain by his testimony; rather, he ran the risk of unnecessarily alienating his friend Molezzo.

F. *Quinn's Conversation with Bates*

Bates further testified that he had a conversation with Blake Quinn, Respondent's president, shortly after the employee meeting of November 5. According to Bates, he told Quinn that he liked the Union and believed himself to be better off with the Union. Quinn said the Union was "holding back" Bates and that, without the Union, Bates could make more money because Respondent would not have to pay "as much" to employees less talented than Bates.

In early January 1983, Quinn again discussed the Union with Bates. According to Bates, Quinn said he understood that Bates was supporting the Union but that Quinn would "appreciate" Bates' support, if Bates could "swing over" to Respondent's side in the election. Quinn repeated his claim that the Union was holding Bates back and that Bates, because of his skills, could make more money without the Union. Quinn acknowledged that he had at least one and perhaps more than one conversation with Bates. However, he denied that he told Bates that the employee could receive better wages without the Union or that Bates was being held back by the Union. As discussed above, I found Bates to be a credible witness. In addition, Quinn could not recall the substance of his conversation with Bates. Accordingly, I credit Bates' testimony over that of Quinn.

G. *Analysis and Conclusions*

1. The settlement agreement

It is well established that a finding of an unfair labor practice cannot be based on presettlement conduct unless there has been a failure to comply with the settlement agreement or subsequent unfair labor practices have been committed. See, e.g., *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978); *Northern California Council of Laborers (Joseph's Landscaping Service)*, 154 NLRB 1384 (1965), enfd. 389 F.2d 721 (9th Cir. 1968). A settlement disposes of all issues involving presettlement conduct unless previous violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties. *Hollywood Roosevelt*, supra; *Steves Sash & Door Co.*, 164 NLRB 468 (1967), enfd. as modified in other respects 401 F.2d 676 (5th Cir. 1968). However, the Board has also consistently held that where a charging party requests that a charge be withdrawn, and the Regional Director approves that request, the allegations contained in the withdrawn charge may nonetheless be realleged and litigated. See, e.g., *Gulf States Manufacturers*, 230 NLRB 558 (1977), enf. denied 598 F.2d 896 (5th Cir. 1979); *John F. Cuneo Co.*, 152 NLRB 929 (1965); *Zimnox Coal Co.*, 140 NLRB 1229, 1230, 1237 (1963), enfd. 336 F.2d 516 (6th Cir. 1964). In the absence of a Regional Director signing or approving a settlement agreement, any such agreement between a charging party and a respondent which resulted in the withdrawal of the charge is viewed by the Board as a private arrangement which does not estop the Regional Director from proceeding on any new charges alleging the same conduct as the withdrawn charges. Id.

Applying the above legal principles, I find that while the Regional Director approved the Union's withdrawal request, he did not enter into or approve the private agreement between the parties. *Hollywood Roosevelt*, supra, relied on by Respondent, involved a valid settlement agreement approved by a Regional Director which provided that the employer take certain remedial action. In the instant case, the Regional Director merely approved withdrawal of the charge, apparently to expedite the election process. The Regional Director made no attempt to resolve the unfair labor practices. Accordingly, I find that the Regional Director was not estopped from issuing complaint on the instant charge.

2. The conduct of Molezzo and Harper

While an employer is usually liable for the conduct of its supervisors, an exception exists where the supervisor is also a bargaining unit member. Where supervisors are members of the bargaining unit, they may lawfully solicit signatures on a decertification petition so long as there is no evidence that the employer "encouraged, authorized or ratified the conduct" or that the employer "acted in such a manner as to lead employees reasonably to believe" that the supervisors were acting on the behalf of management. *A. T. & K. Enterprises*, 264 NLRB 1278 (1982); *Times-Herald, Inc.*, 253 NLRB 524 (1980). See also *Montgomery Ward & Co.*, 115 NLRB 645, 647

(1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957).

There is no dispute that Molezzo and Harper were included in the bargaining unit and covered by the last collective-bargaining agreement between the Union and Respondent. Notwithstanding that Molezzo and Harper are supervisors within the meaning of the Act, for the following reasons I find that their conduct cannot be imputed to Respondent.

There is undisputed evidence that Molezzo had strong personal reasons for favoring decertification and that he communicated these reasons to other employees on many occasions prior to the decertification campaign. Molezzo was upset that his mother received only a small sum upon his father's death and he communicated that fact to other employees. Similarly, Harper told employees that he "personally" favored decertification but that the decision to sign was entirely up to them. Leon Brown, employed at the Fresno facility, discussed getting rid of the Union with Molezzo and Harper prior to November. After Brown began circulating a petition on November 1 at the Fresno facility, he spoke to Harper about having a petition circulated at the Salinas facility. The decertification process had begun prior to Respondent's mention of decertification at the meetings of November 5. In fact, Respondent held the employee meetings of November 5 in response to the activities of the unit employees at the Fresno facility. Thus, the fact that Molezzo and Harper circulated the decertification petition after Respondent mentioned decertification at the Salinas employee meeting does not raise an inference that Respondent encouraged, authorized, or ratified their conduct. Nor do I find that Respondent caused employees to reasonably believe that Molezzo and Harper were acting on behalf of Respondent in circulating the decertification petition. Rather, I find that under the circumstances of this case the conduct of Molezzo and Harper, as bargaining unit members, cannot be imputed to Respondent. Accordingly, I shall recommend dismissal of those allegations of the complaint which allege unlawful statements by Molezzo and Harper.

3. The employee meetings

In the absence of union animus, an employer does not violate the Act by providing accurate information regarding the mechanics of decertification, in response to questions from its employees. *GAF Corp.*, 195 NLRB 169 (1972). Similarly, an employer may give its employees advice about how to withdraw support from a union, if the employees have, on their own initiative, requested such advice. *Tartan Marine Co.*, 247 NLRB 646 (1980); *Payless Drug Store*, 210 NLRB 134 (1974). The General Counsel, relying on *Craftool Mfg. Co.*, 229 NLRB 634 (1977), argues that Respondent violated the Act because its remarks concerning decertification were unsolicited and not the result of employee questions. The *Craftool* case, however, is not helpful because, in that case, the employer suggested a decertification petition before the employees took independent action on their own. Moreover, the employer in *Craftool* advised the employees concerning tactics and instructed them to return the petition to him.[5]

In the present case, the decertification campaign clearly originated with the employees and was well underway, at least in the Fresno facility, before Respondent made its remarks. More importantly, the decertification activity was disrupting productivity at the Fresno facility and Respondent sought to minimize the problem by referring employee questions to the Board's Regional Office. Thus, in this case, it cannot be said that Respondent's remarks instituted or directly assisted the decertification drive. Respondent told the employees that there had been rumors and questions about decertification. It then simply informed employees that it would not cease bargaining with the Union based on a decertification petition supported by 30 percent of the unit employees but that, if a majority petitioned to decertify, Respondent would no longer have to bargain with the Union. The employees were then given the Board's telephone number. The giving of such information, unaccompanied by any threat of reprisal or promise of benefit, cannot be found to be violative of the Act.

In my view, the General Counsel's argument ignores the fact that the Fresno employees were included in the bargaining unit. The General Counsel argues that "no employee in Salinas asked at the meeting [or before] about decertification, profit sharing, or about Respondent's health plan." However, Respondent's employees at Fresno were taking worktime to discuss these matters and Respondent chose to minimize this problem by calling an employee meeting at Fresno. It is only logical that Respondent would hold a similar meeting with its Salinas employees. The employees from both facilities were included in the bargaining unit, had telephonic contact with each other, and were similarly affected by these matters.

The General Counsel does not dispute the accuracy of Respondent's remarks concerning the Company's profit-sharing plan. Rather, the General Counsel argues that Respondent implied that the employees would get the Company's plan *only* if they decertified the Union. Further, the General Counsel argues that the discussion of the profit-sharing plan, when "viewed in the context of Respondent's prior unfair labor practices," constitutes direct dealing in violation of Section 8(a)(1) and (5) of the Act.

As discussed above, the employees were told that they could not be covered simultaneously by both the Union's pension plan and the Company's profit-sharing plan. At the same time, the employees were warned that there were no "guarantees" or "promises." Considering the number of years the Company's plan had been in effect, the employees could reasonably discount the warning against "guarantees" and conclude that the plan would continue in existence if they withdrew their support from the Union.

Section 8(c) of the Act states that the expression of "any views, argument, or opinion" shall not be evidence

[5] For other cases in which the employer intitiated the decertification or repudiation activities, see *Texas Electric Coop.*, 197 NLRB 10, 14–15 (1972), and *Pembek Oil Corp.*, 165 NLRB 367, 374–375 (1967).

of an unfair labor practice so long as such expression contains "no threat of reprisal or force or promise of benefit." Moreover, an employer may make a prediction as to the precise effects he believes unionization will have on his company so long as the prediction is "carefully phrased on the basis of objective fact to carry an employer's belief as to demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

An employee benefit plan which restricts coverage to unrepresented employees is per se violative of Section 8(a)(1) of the Act, regardless of whether the employer adds to the misconduct by implementing the restriction or exploiting it during an organizing campaign. See, e.g., *Niagara Wires, Inc.*, 240 NLRB 1326, 1328 (1979); *Greenbrier Hotel*, 216 NLRB 721, 727 (1975). In *Belcher Towing Co.*, 265 NLRB 1258 (1982), the Board found that an employer violated Section 8(a)(1) by implying that company benefit plans would be forfeited if employees voted for the union. The employees' benefits booklet in the *Belcher Towing* case stated that employees could not participate in the plans if they were covered by a collective-bargaining agreement. In addition the employer told employees that they would "lose" the benefit plans if the union came in. These statements were found to be misrepresentations of the eligibility requirements of one plan which lawfully excluded employees from that benefit if they were covered by collective-bargaining agreement providing for the same or similar benefit.

On the other hand, the Board has approved benefit comparisons under a number of circumstances. Absent threats of reduction of benefits or promise of increased benefits, benefit comparisons are permissible campaign techniques which fall within the bounds of free speech permitted by Section 8(c) of the Act. See, e.g., *Thrift Drug Co.*, 217 NLRB 1094 (1975); *Orchard Corp. of America*, 170 NLRB 1297 (1968); *American Thread Co.*, 101 NLRB 1306, 1324 (1952).

Applying the above principles to the facts of this case, I find that Respondent indicated to employees that they could not be covered by the Union's pension plan and the Company's profit-sharing plan at the same time. The employees were not told that the union members were ineligible for the profit-sharing plan. While the distinction between ineligibility due to a plan provided for in the collective-bargaining agreement and ineligibility due to union representation might be too subtle for the employees to distinguish without a fuller explanation than that given by Respondent, I cannot find on the record before me that Respondent impermissibly equated union membership or union representation with disqualification from the profit-sharing plan. In *Belcher Towing*, supra, relied on by the General Counsel, the employer was found to have violated Section 8(a)(1) by misrepresenting the disqualification for a lawful benefit plan. In the instant case there is insufficient evidence that Respondent misrepresented the fact that employees receiving a pension or retirement plan under a collective-bargaining agreement were lawfully ineligible to participate in the profit-sharing plan.

At the employee meeting of February 2, Respondent presented each employee with a personalized document which estimated, based on past experience, what the employee could expect to receive under Respondent's profit-sharing plan. Although the estimates were quite generous, it is not alleged that they were inaccurate; rather, it simply is alleged that the estimates constitute an implied promise of better benefits. However, like the remarks made in November, Respondent qualified the remarks by emphasizing that it was making no promises. Indeed, the document warned that it was no comparison and that the "law expressly prohibited the employer from making any promises in this period before the election." As discussed above, such comparisons have been held to be permissible campaigning. The fact that the comparisons mentioned large sums of money should not make unlawful an otherwise permissible comparison.

4. Quinn's conversations with Bates

As discussed earlier, Charles Bates credibly testified that on two occasions Quinn, Respondent's president, told Bates that the Union was holding Bates back and that, without the Union, Bates could make more money. These conversations occurred on November 5 and sometime in early January 1983. Bates could reasonably conclude, and it is here concluded, that Quinn was impliedly promising Bates an increase in pay if the Union were decertified. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by such conduct. *Cummins Component Plant*, 259 NLRB 456, 460 (1981).

Conclusions of Law

1. Respondent, Quinn Company, is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act on November 5, 1982, and again in January 1983, by promising an employee increased wages if the Union were decertified.

4. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as set forth above, the General Counsel has not established that Respondent has violated the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Quinn Company, Fresno and Salinas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees higher wages, or other benefits, in order to induce them to withdraw their support from Operating Engineers, Local Union No. 3 as their bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Fresno and Salinas, California facilities copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions the National Labor Relations Board found that we have violated the National Labor Relations Act, and has ordered us to post this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promise higher wages, or other benefits, in order to induce you to withdraw your support from Operating Engineers, Local Union No. 3 as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

QUINN COMPANY

Martin-Brower Co. *and* Truck Drivers and Helpers Local Union No. 728 *and* Sandra K. McGill. Cases 10–CA–19074–1, –2, and 10–CA–19400

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 22 February 1984 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified.[3]

The judge found that the Respondent's reasons for abolishing employee McGill's job were pretextual and her discharge violated Section 8(a)(3). We disagree.

In March 1981, because of increased volume and inventory shrinkage, the Respondent created the warehouse clerk position and assigned McGill to the job. According to Warehouse Manager Waters, the shrinkage problem was almost eliminated after McGill became warehouse clerk. Before the organizing campaign commenced, the Respondent began considering abolishing her job and hiring another checker. By the time the Respondent terminated McGill, many of her duties had been discontinued or divided among remaining employees. The Respondent hired no one to replace McGill. Although previously offered a checker position, McGill had declined to accept it. We conclude that the Respondent had a legitimate business reason for abolishing the warehouse clerk position[4] and would have done so absent her alleged protected activity.[5]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

"4. By discharging Stephen M. Fortner, Alvin Lemacks, and Billy E. Powell on 11 March 1983 because of their support of the Union and activities on its behalf, the Respondent violated Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Martin-Brower Co., College Park, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Offer Stephen M. Fortner, Alvin Lemacks, and Billy E. Powell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to several misstatements in the judge's decision. For example, the judge suggested that a pickup order would have had a route number notation on it if it were for the Lemacks/Powell 8 March run because there are two weekly runs to Memphis; but the Respondent asserts that one Memphis run is on the weekend and therefore could not be utilized for pickup orders because pickups cannot be made on weekends. Also, the judge stated that Lemacks told Powell in the presence of a dispatcher that their trip packet did not contain a pickup slip; in fact, the person present was an administrative clerk, not a dispatcher. We correct the misstatements, but we do not believe that they affect the judge's conclusions.

[2] We agree with the judge's conclusion that the Respondent discharged Fortner because of his protected activity. The record supports the judge's findings that Fortner could not have taken Burdette's equipment on 27 February and that Fortner's preparing a hotel receipt was accepted practice. We believe the Respondent took advantage of Fortner's use of Burdette's equipment on 3 March to devise a justification for discharging him. We find it unnecessary to adopt the judge's additional findings concerning questionable discipline and disparate treatment.

[3] In addition to modifying the judge's recommended Order, in accord with the amended Conclusions of Law, we modify the remedy, recommended Order, and notice to conform with the Board's standard reinstatement and expunction language.

[4] The judge stated that Waters was surprised by the abolition of McGill's job. In fact, Waters admitted that the decision was cost effective, and he knew that the Respondent was contemplating abolishing the job and hiring another checker.

[5] Because McGill was terminated, rather than laid off, the Respondent had no obligation to hire her for a different position that unexpectedly opened soon after her discharge.

Member Zimmerman, for the reasons set forth by the judge, would find that McGill was unlawfully discharged. He notes in particular that Supervisor Waters had told McGill that prounion employees' jobs could be eliminated—as McGill's was—and that "they never forgive and they never forget." Further, the majority's finding that McGill's duties had been discontinued or divided (for reasons found a pretext by the judge) is contrary to McGill's credited testimony that there was only a minimal reduction in her work, that business was increasing, and that she worked overtime.

Chairman Dotson and Member Dennis note that the judge ignored the fact that McGill's supervisor wanted to abolish her position; the judge ignored the fact that the problem McGill was hired to correct largely had evaporated; and the judge ignored McGill's own admission that the overtime she worked shortly before her discharge was due partly to seasonal inventory rather than to an increase in her daily duties. Because of these omissions, Chairman Dotson and Member Dennis do not find the judge's pretext finding persuasive.

them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

"(b) Remove from its personnel records or other files any reference to the unlawful discharges of the above-named individuals and notify them in writing that this has been done and that the discharges will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that their jobs may be eliminated if we find out that they support the Union or any other labor organization.

WE WILL NOT tell employees that we will never forgive and forget union supporters.

WE WILL NOT tell employees that we know the names of employees who have signed union cards, and that the Union is going to lose an election.

WE WILL NOT tell employees that they had better get the Union in because we are going to fire them.

WE WILL NOT tell employees that there will be no raises if they vote for the Union, and that we will hold on as long as possible in litigation.

WE WILL NOT tell employees that we will move our plant, and that they will lose their jobs, if they select the Union as their representative.

WE WILL NOT tell employees that we will take away their telephone credit cards, holidays, uniforms, or any other privilege, if they select the Union as their representative.

WE WILL NOT discharge or otherwise discriminate against employees because of their membership in or activities on behalf of Truck Drivers and Helpers Local Union No. 728, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Stephen M. Fortner, Alvin Lemacks, and Billy E. Powell immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify the foregoing employees in writing that we have expunged all reference to their unlawful discharges from our personnel records and other files, and that the discharges will not be used against them in any way.

MARTIN-BROWER CO.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charges in Cases 10-CA-19074-1 and -2 were filed on March 15, 1983,[1] by Truck Drivers and Helpers Local Union No. 728 (the Union), and a complaint issued on April 29. The complaint in Case 10-CA-19400 was filed on July 14, by Sandra K. McGill (McGill),[2] and an amended consolidated complaint on August 5. As further amended at the hearing, the complaint alleges that Martin-Brower Co. (Respondent) solicited employees concerning grievances and promised to adjust same following the advent of a union organizational campaign; created an impression of surveillance of its employees' union activities; threatened its employees with loss of employment benefits, denial of wage increases, and discharge if they engaged in union activities; and further threatened them with closing and removal of the plant if they selected the Union as their collective-bargaining representative—all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Further, the complaint alleges that Respondent, on March 11, discharged Stephen M. Fortner, Alvin Lemacks,[3] and Billy E. Powell, and, on April 30, discharged McGill, because of their union activities, in violation of Section 8(a)(3) of the Act.

A hearing was conducted before me on these matters in Atlanta, Georgia, on August 29 through September 2. On the entire record, including briefs filed by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business located at College Park, Georgia, where it is engaged in the warehousing and transportation of food products. During the calendar year preceding issuance of the complaint, a representative period, Respondent sold and shipped from its College Park, Georgia distribution facility finished products valued in

[1] All dates are in 1983 unless indicated.

[2] McGill's middle initial, omitted in the charge, is set forth as stated by her at the hearing.

[3] The spelling of Lemacks' last name is that set forth in the transcript rather than the complaint.

excess of $50,000 directly to customers located outside the State of Georgia. The pleadings established, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings established, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Campaign and the Representation Petition*

About January 5, alleged discriminatee Stephen M. Fortner asked the Union for assistance, obtained authorization cards, and began distributing them. He gave cards to alleged discriminatee Billy Powell and to Arthur L. Rogers, both of whom returned signed cards to Fortner. Fortner, Powell, and Rogers were the most prominent supporters of the Union. Powell had formerly filed a charge against Respondent, which was settled, while Rogers was the Union's observer in a forthcoming election. These employees organized a meeting of company clericals and truckdrivers at a restaurant in early January, and thereafter arranged several meetings at the union hall.

Robert L. Wallace, a former truckdriver for Respondent who resigned about 4 months before the hearing, testified that he was in the office of Respondent's transportation manager George R. Gertenbach when another employee, Harlan Ford, came into the office. Ford told Gertenbach that the Company did not need a union, and that one was being organized by three individuals because they could not get along with the Company. According to Wallace, Ford identified the employees as Fortner, Powell, and Rogers.

Gertenbach admitted talking to Ford in his office in the presence of Wallace, but denied that Ford ever mentioned the leaders of the union movement. Wallace was the more believable witness, and I credit his testimony.

McGill attended all the meetings, while Lemacks attended at least two of them, and both signed union authorization cards. In addition, Lemacks asked other employees to support the Union.[4]

The Union filed a representation petition on January 24, asking to be represented in one unit composed of office clericals, and another composed of truckdrivers. The elections were conducted on April 1, and the Union was defeated in both of them. No objections were filed.

[4] On cross-examination, Lemacks appeared to testify that his pretrial affidavit affirms that he did not talk to other employees about the Union. However, the transcript is ambiguous in that Lemacks may merely have been denying union activity "while at work." The affidavit is not in evidence, and Lemacks reiterated his attempts at solicitation after having read the statement. I credit this latter testimony.

B. *The Alleged Independent Violations of Section 8(a)(1)*

1. The alleged solicitation to adjust grievances

a. *Summary of the evidence*

In late 1982, Respondent conducted a meeting intended to instruct drivers in the correct preparation of their paperwork, including "logs." On January 20, 1983, the Company issued a notice to drivers requiring them to attend a series of meetings to be held the week of January 31 to "get into the subjects that really concern you" (G.C. Exh. 4). Powell testified that he attended the meeting on January 31, and that Frank W. Quinn, Respondent's distribution manager,[5] told a group of truckdrivers that he wanted to hear about their complaints and problems, and see whether the Company could straighten them out. Thereafter, the meeting got "out of hand" according to Powell, with many complaints from employees. Fortner and Lemacks were "very vocal," and Powell also spoke up.

Fortner attended the same meeting, and averred that Quinn and Transportation Manager Gertenbach said that the purpose of the meeting was to see what could be done about driver complaints. A number of complaints were voiced, including unsafe working conditions and failure to provide copies of insurance policies. The last time such a meeting was held was in 1980, after the filing of a prior representation petition. Rogers also attended the first meeting, and testified that Quinn said that the purpose was to see whether the Company could "work out" some of the employees' problems.

Robert L. Wallace, a former employee who had resigned, declared that he attended the second employee meeting, on February 2, and that Quinn said that the Company brought the drivers together to see whether it could "straighten out" some of their problems.

Gertenbach testified that Quinn referred to the representation petition, and told employees that he could not promise anything because of the petition. Asked whether Quinn promised to adjust any of the grievances that he heard, Gertenbach denied it. "Like I said, at the beginning of the meeting, he told them right up front he couldn't do that." According to Gertenbach, Quinn said the same thing at meetings on February 2 and 4. "Up front he advised them he could not make any promises or changes."

Quinn testified that he spoke at the meetings, and went into "three areas basically"—he could not make any promises which would tend to make employees change their vote; he could not ask questions about their union activities; and he could not make any threats against employees. Quinn was asked whether he made any promises regarding employment conditions. He denied this, but asserted that he told the drivers that the Company "would look into some things and see what could be done about it." However, Quinn denied that he made any promises that the Company "would get anything changed."

[5] The pleadings establish, and I find, that Quinn was a supervisor within the meaning of the Act.

b. *Factual and legal analysis*

The testimony of the employees is consistent—Quinn said that the purpose of the meeting was to ascertain the employees' complaints and to see whether something could be done about them. This evidence is not rebutted by the Company's witnesses, and I credit it. It is thus clear that Quinn solicited the expression of grievances from his employees. Under established Board law, this created an inference that he was implicitly promising to correct any inequities that he discovered, in violation of Section 8(a)(1). *Cutting, Inc.*, 255 NLRB 534 (1981), enfd. as modified 701 F.2d 659 (7th Cir. 1983).

The inference is rebuttable, however, and the real factual issue is whether Quinn expressly said something which negated the inference. Crediting Quinn and Gertenbach, I find that the former told employees that he could not make any promises. Under these circumstances, I conclude that Respondent rebutted the inference that it was impliedly promising to adjust grievances. *Uarco Inc.*, 216 NLRB 1 (1974). Accordingly, I shall recommend that this allegation of the complaint be dismissed.

2. McGill's conversations with Warehouse Manager Waters

a. *Summary of the evidence*

McGill testified that she had a conversation with Warehouse Manager Bill Waters[6] a few weeks after the petition had been filed (January 24). McGill was doing some work in Waters' office, and he remarked that "some things" were happening around the office. When McGill replied that she did not know what he was talking about, Waters told her to close the door, and asked, "Why does the office think that they need a union?" McGill replied that the employees were concerned about job security, and would like to make more money.

Waters leaned over as if telling her a secret, and, according to McGill, said that he had heard a rumor that an employee's job could be eliminated if "they" found out that the employee favored the Union. When McGill denied that the Company could have such knowledge because of the secret ballot in Board elections, Waters replied, "Believe me, they'll know. They know that the Union is going to lose the vote." McGill argued that the election was going to take place in the future, and Waters responded that "they already knew who signed cards." He asked McGill whether her husband knew that she was involved in union activities, advised her not to get involved, and said that the Company was trying to keep her from voting.[7]

[6] The pleadings establish, and I find, that Waters was a supervisor within the meaning of the Act.

[7] During the representation proceeding, the Employer (Respondent) contended that the clerical unit should include customer service representatives, an inventory clerk, and an electronic data processor. The Petitioner (the Union) contended that the warehouse clerk (McGill) should also be included. The Regional Director's Decision and Direction of Election, dated March 2, excluded McGill from the clerical unit (R. Exh. 3).

McGill testified that she had a second conversation with Waters in the warehouse during an inventory, at a time when the decision had been made that she would not be able to vote in the election.[8] McGill said to Waters that her job was "safe," whereupon the warehouse manager replied: "I don't know. They never forgive and they never forget." Thereafter, a few weeks before the election, according to McGill, she said to Waters, "I'm eliminated from the vote, now, so my job is secure, isn't it?" Waters merely replied, "Oh, yes."

Waters acknowledged having a conversation with McGill in his office about the end of February, but gives a different version of it. He asserted that McGill was "shying off" from him, and asked whether anything was worrying her. When she denied this, he said that she was worrying, and that it affected her job. He told her that, if it was "about the Union," she had nothing to worry about, since she was not a clerical employee. McGill said that she did not want to discuss the matter. Waters denied the other statements attributed to him by McGill. Although he acknowledged talking with McGill in May, he did not specifically deny having additional conversations with her prior to the election on April 1.

b. *Factual analysis*

Respondent argues that it is not credible to believe that Waters would have talked to McGill about the Union, since she was not part of the unit. However, this was not known until the Decision and Direction of Election issued. Moreover, it is inconsistent with Waters' admission that it was he who raised the issue of the Union with McGill, professing to believe that she was "worried" about the matter.

McGill's testimony is replete with realistic details which give it verisimilitude. Her averment that Waters said the Company was trying to keep her from voting is corroborated by the record in the representation proceeding. Waters' contention that McGill did not want to discuss the Union is inconsistent with McGill's personality on the witness stand, which was that of a candid and effusive individual. By contrast, Waters' testimony is artificial and contrived. He appeared to be a less credible witness than McGill. Although there is some inconclusive testimony on cross-examination about the dates of McGill's conversations with Waters, it is insufficient to invalidate her testimony on direct examination, and I credit that testimony.

3. Powell's conversation with Waters

Powell testified that he had a conversation with Waters in the mailroom during February. The warehouse manager walked up to him and said, "This time you better get the Union in here. Frank's [Quinn] going to fire you." On cross-examination, Powell testified that Waters said Frank was going to fire "all of them." Powell was one of the principal union activists in a prior attempt to organize the shop.

[8] McGill placed this conversation "around the end of February." The Decision and Direction of Election did not issue until a few days later, on March 2.

Waters' testimony on this subject consists of a simple denial that he ever talked to Powell about the union campaign. Powell was not one of the employees whom he supervised.

Respondent argues that Powell should not be credited because he changed his testimony on cross-examination, and because Waters was not his supervisor. Neither of these reasons is persuasive. Powell amplified rather than contradicted his testimony on direct examination, and the fact that Waters was not his supervisor is irrelevant. Waters did not specifically deny threatening Powell with discharge. Powell was a more credible witness than Waters, and I accept his testimony.

4. Robert L. Wallace's conversations with Transportation Supervisor Holsumback

Former employee Wallace testified that he had two conversations with Transportation Supervisor Carl R. Holsumback[9] while still employed. The first conversation took place in Captain D's, a restaurant, about 2 weeks before the election (April 1). Wallace had come to the office to pick up his check, and Holsumback asked him to go to lunch. They discussed the union campaign. Holsumback told Wallace that he had already seen the company budget, and that it included very good raises for the employees. However, "if the Union was voted in, there would be no raises at all," because of "contract litigation" which the Company would "hold as long as they possibly could."

The second conversation occurred on a date closer to the election, in the dispatch office. Wallace was sitting at one desk, and Holsumback at another. The transportation supervisor said that the Company had acquired an option to purchase land in LaGrange, Georgia, about 60 miles from Atlanta according to Wallace. If the Union was voted in, it intended to move to this location, and the employees would lose their jobs.

Holsumback testified that he participated in preparation of the Company's budget, and acknowledged that he had lunch with Wallace at Captain D's. He stated that Wallace asked him what the budget provided for drivers' raises, and that he replied that he could not tell Wallace the answer to this question. He denied any discussion of the union campaign or litigation or negotiations with the Union. With respect to a prospective company move to LaGrange, Georgia, Holsumback testified that he heard a rumor to this effect from a driver, and informed his superiors. It was just a rumor, according to Holsumback, and he denied telling any drivers that the Company would move to LaGrange if the Union won the election. Other company witnesses denied the existence of any such option.

Holsumback's testimony is improbable. There is ample evidence in this proceeding that the Company was opposed to the union campaign, and it is therefore unlikely that Holsumback would have passed up an opportunity to answer an employee's question about forthcoming raises, if he could have done so in a lawful manner. He did not give the existence of the petition as the reason for his asserted refusal to answer Wallace. In fact, Holsumback gave no reason. Wallace was a candid and believable witness, while Holsumback, as appears more fully hereinafter, was untrustworthy. I credit Wallace's version of these two conversations.

5. Fortner's conversation with Holsumback

Fortner testified that he had a conversation with Holsumback in the equipment trailer on March 3 between 3 and 6 p.m. He had just come back from a trip, and was returning some equipment (rollers) which belonged to another driver. Fortner's equipment had been used by still another driver, after a prior injury to Fortner, had been retrieved by Holsumback, and was in the equipment trailer. Fortner's rollers were aluminum, and were preferred to the heavier steel rollers. This subject is one of the principal issues in connection with Fortner's discharge, and is more fully discussed hereinafter.

Holsumback returned Fortner's rollers to him, according to the latter. When they were inside the equipment trailer, Holsumback said that he would be glad when the union vote was over. He said that it was getting on his nerves, and that all the drivers did was "bitch and complain." The transportation supervisor said that if the Union came in the Company would take away the drivers' privileges such as telephone credit cards, personal holidays, and uniforms. The drivers were "crazy as hell if they [thought] they needed a union." Fortner opposed this view, and the two men left the trailer. As Fortner was putting his rollers away, Holsumback asked him whether he thought the Union was going to win the election. Fortner replied, "If I have anything to do with it, it will."

Holsumback acknowledged that Fortner's rollers were in the equipment trailer, and that he offered them to Fortner on March 3, just after Fortner had returned from a trip. However, Holsumback contended that Fortner declined to take them back, saying that he would return the next day, but never did so. Holsumback denied having a conversation with Fortner in the equipment trailer, and denied the other statements attributed to him by Fortner.

It is unlikely that Fortner would have refused his aluminum rollers, and, because of this improbability and other reasons more fully described in the discussion of Fortner's discharge, I conclude that he did take them back on March 3. I, therefore, infer that Fortner and Holsumback were in the equipment trailer on March 3. It is incredible that the two men went into the trailer to get Fortner's rollers in complete silence. And, whether inside or outside the trailer, Holsumback admitted having a conversation with Fortner on March 3. Fortner was a more believable witness than Holsumback, and I credit his version of the conversation.

6. Summary and conclusions

Waters' statement to McGill that an employee's job could be eliminated if "they," i.e., the Company, found that the employee favored the Union, is obviously coercive under established Board law. After McGill had been excluded from the unit by the Decision and Direction of

[9] The pleadings establish, and I find, that Holsumback was a supervisor within the meaning of the Act.

Election, she announced to Waters that her job was "safe." "I don't know," he replied. "They never forgive and they never forget." This clearly had reference to the prior conversation about the discharge of employees who favored the Union, and implied that employees who favored unions would be discharged without regard to their membership in the voting unit. In this context, the statement was also unlawful, as was Waters' statement to Powell that Quinn was going to fire him.

Waters' telling McGill that Respondent knew who had signed cards, and thus knew that the Union was going to lose the election, constituted the creation of an unlawful impression of surveillance under well-established principles.

Similarly, Holsumback's statements to Wallace that the employees would not receive raises if they voted for the Union and would lose their jobs because the Company would move the plant to another location are classic instances of coercion. Holsumback's statement to Fortner—that the employees would lose their privileges in the event of a union victory—is simply another unlawful variation on the same theme.

C. *The Alleged Violations of Section 8(a)(3)*

1. The discharges of Powell and Lemacks

a. *Respondent's policy on pickups*

(1) Summary of the evidence

Powell, Lemacks, and Fortner were discharged on the same day, March 11. However, Powell and Lemacks worked as a team on the same truck, running "Route 20," and the reasons asserted by the Company for their terminations are different from those advanced to support the discharge of Fortner.

Powell and Lemacks had both been drivers for about 5 years. One of the principal reasons asserted by the Company for their discharges was their failure to make up a pickup when on a run. There were two kinds of pickups, the first where an order was taken by a driver on a long-distance run from a supplier on or near the driver's route to a location other the Company's College Park warehouse (designated a "linehaul" by company witnesses). The second kind of pickup was called a "backhaul" by company witnesses, and indicated a pickup to be delivered back to the Company's warehouse. The record discloses that Respondent's drivers for the most part did not understand the distinctions between linehauls and backhauls, and referred to both as pickups. Since the drivers were paid partially on a mileage basis, they made more money on a run which included an off-route pickup, and there is evidence of drivers protesting the absence of a pickup on a run.

According to Transportation Manager Gertenbach, an order to a driver to make a pickup was formerly indicated at the bottom of the driver's manifest. This proved to be inadequate. Accordingly, on September 8, 1982, Respondent issued a written directive to drivers, reading as follows:

> Beginning immediately, there will no longer be a pick-up written on the bottom of your Driver's Manifest. A copy of the PICK-UP REPORT FORM will be in your delivery packet. Another copy of that form will be kept here if you should happen to lose or misplace the form. (See attached copy.) This procedure is to help insure all pick-ups are made in a timely fashion and to avoid an inventory shortage. Your help and cooperation in this matter is [sic] greatly appreciated [G.C. Exh. 2].

Gertenbach acknowledged that the new directive did not instruct drivers what to do in event of the absence of a pickup order in the delivery packet. He further affirmed that none of his supervisors had issued any such directive.

Billy E. Powell testified that Transportation Supervisor Holsumback was responsible for the preparation of pickup orders and their insertion into the driver's packets containing the shipping documents. If a pickup order was inadvertently omitted from the packet, Holsumback would call the driver on the route, and give him a pickup instruction and an order number. The Company knew the exact sequence of stops which the driver was scheduled to make, and the approximate time he would arrive at each stop. Powell stated that there were no pickup orders in his and Lemacks' packets on three or four of the seven runs prior to their discharges. On these occasions, Holsumback called the drivers during the run and gave them pickup instructions. Wallace gave similar testimony about his routes.

Lemacks affirmed on direct examination that, during the 8 or 9 weeks that he drove the same route with Powell, there were 3 or 4 weeks in which there was no pickup.[10] On one occasion, about Thanksgiving 1982, Dispatcher Hallman told Lemacks that there was a pickup on the route. On arrival at his destination, Lemacks discovered that there was no pickup order in his packet. He called Transportation Supervisor Holsumback, and told him that there was no pickup order and nothing to pick up. Holsumback asked him why he was bothering to call, and instructed him to come back. "Yes, sir," Lemacks answered, and that ended the conversation. Thereafter, Lemacks never called the office when there was no pickup order in his packet. Lemacks distinguished drivers on "bid" runs such as Route 20, which included a pickup in the bid, from "unassigned" drivers whose run had been cut short. In such event, the drivers would normally call the office.

Transportation Manager Gertenbach testified that, after Powell and Lemacks had been discharged, he investigated their drivers' logs and determined that there was a pickup in 6 of the last 7 weeks when they ran Route

[10] Lemacks' testimony on direct examination was unambiguous. On cross-examination, he was asked the leading question as to whether there was only 1 week that he did not have a pickup. He answered that it was 2 weeks "without Billy [Powell]," and 1 week that Lemacks did not have a pickup—a total of 3 weeks. Counsel then asked whether there was only one pickup (linehaul) "the last seven weeks" Lemacks drove with Powell, and the witness answered, "The last one, yeah." In light of the witness' clear testimony on direct and initial cross-examination, I conclude that he misunderstood the last question, and that the substance of his testimony is that there were three occasions on Route 20 in which there were no pickups.

20, i.e., there was no pickup on one run. Dispatcher Hullman affirmed that there was no pickup on this run "once or twice." The logs themselves are not in evidence. Gertenbach denied that a pickup order was supposed to be in the driver's packet every time there was a pickup, despite the contrary language in the Company's September 1982 memorandum (G.C. Exh. 2). He distinguished between "possible" pickups and "designated" pickups (such as Rte. 20), and contended that, if a pickup order was absent in the latter case, it was standard policy for the driver to call the Company. However, Gertenbach admitted that there was nothing in writing that stated this policy. Transportation Supervisor Holsumback in general corroborated Gertenbach's testimony.

Herbert L. Fendley, one of Respondent's truckdrivers, testified that he called regularly from a Florida run whenever there was no pickup order in his driver's packet. However, Fendley acknowledged that he had never seen a written order to this effect, nor had he heard an oral instruction applying to runs in general. On occasion, he would receive a specific order to call on a particular run. Vernon R. Burdette, a driver, gave similar testimony.

(2) Factual analysis

There is nothing in Respondent's September 1982 memorandum, which revised pickup procedure, to indicate that it was a driver's responsibility to call the office in the event there was no pickup order in his packet. Respondent's witnesses Gertenbach and Fendley admitted that no such order had ever been issued. I credit Lemacks' testimony that, on one occasion when he did call Holsumback about the absence of a pickup order in his packet, the transportation supervisor asked why he had called and told him to come back. I credit the testimony of Powell and Lemacks to the effect that it was customary practice for the Company to call the driver on the road whenever a pickup order had inadvertently been omitted from the driver's packet, and to issue appropriate instructions. It was not the driver's responsibility to call the office.

I further conclude that there were no pickups on several, possibly three, of the Route 20 runs which Powell and Lemacks made. Gertenbach and Hallman admitted that this was true with respect to one or two of the runs, and the Company failed to introduce the drivers' logs for the last seven to nine runs. Accordingly, I credit the testimony of Powell and Lemacks.

b. *The DOT regulations and the drivers' logs*

Falsification of the driver's log was one of the reasons asserted by Respondent for the discharge of Powell, and the issue of drivers' logs and the Federal Department of Transportation (DOT) rules which governed them are therefore relevant.

Transportation Manager Gertenbach asserted that the drivers' lack of compliance with DOT rules on preparation of their logs was one of the principal problems which he faced on taking office in August 1982. He arranged for a company specialist in DOT rules, Bud Hargis, to speak to the drivers in October 1982. Gertenbach thereafter prepared a form to advise drivers concerning mistakes in their paperwork (R. Exhs. 4(a)–(d)). All of the drivers received such letters, according to Powell and Lemacks. Some of the early forms contained the legend that continued violations might lead to disciplinary action (R. Exh. 4(c)). However, on November 2, 1982, Gertenbach issued a memorandum reading in relevant part as follows:

> There has been a little confusion recently concerning the purpose of the new driver's "paperwork check-off" sheets. Their purpose is to show individual drivers their paperwork mistakes and not to be used as a disciplinary report . . . .
>
> We got this form from another center and didn't take out the discipline statement at the bottom of the form. That statement has now been taken out and replaced with the following statement:
>
> > Please use this information to help you comply with D.O.T. and Company rules. Thank you for your cooperation. [G.C. Exh. 7.]

According to driver Billy E. Powell, more than 15 hours of work in any 24-hour period, or more than 10 hours of driving, are illegal under DOT rules. However, Powell affirmed, emergencies such as flat tires or breakdowns occasionally made it impossible for the driver to finish the run within the DOT guidelines. In such event, Powell testified, the Company instructed drivers to prepare their logs in a manner which complied with the rules, but did not comport with the actual facts.

The General Counsel introduced several of Lemacks' logs to illustrate this practice (G.C. Exhs. 9(a)–(d)). The top part of the logs contain legends showing whether the driver is driving, on duty, off duty, or in the sleeper. The bottom part, however, reflects the actual hours worked, and it is on this basis that the driver is paid, according to Lemacks. Where the actual facts conflict with the "official" DOT report on the top of the page, the discrepancy is noted on the bottom of the log by a reference to a phone call with a company supervisor authorizing the "illegal" work, according to Lemacks. These logs are dated in December 1982—2 months after Gertenbach brought in Hargis to tell the drivers how to maintain their logs. Powell testified that the drivers protested "illegal" logging as late as their January 31 meeting with Quinn and Gertenbach, and Lemacks affirmed that the Company authorized improper logging after Hargis' talk.

Fortner asserted that the DOT rules also prohibit logging more than 47 miles per hour. However, on occasion the Company needed a trailer out on the road for a "preload" prior to its scheduled arrival time. If the driver logged his actual arrival time, the result would show a violation of the 47-mile-per-hour rule. Accordingly, the driver logs in a later arrival time. If this results in his being out overnight—"on paper"—he gets paid for overnight lodgings.

Gertenbach testified that Hargis told the employees that log falsification would no longer be tolerated. The transportation manager also denied telling drivers to

engage in log falsification, and stated that he had never been present when a supervisor did so.

Gertenbach's denials are obviously insufficient to rebut the preponderance of the evidence, which shows that the Company was willing to bend the DOT requirements whenever business purposes required it, and to instruct drivers to prepare their logs accordingly.

c. *Powell's and Lemacks' last run of Route 20*

(1) Summary of the evidence

Route 20 was a "bid" run, and its initial stops were in Memphis, Tennessee. It normally included a pickup in Stuttgart, Arkansas, for delivery elsewhere on the route, or return to the warehouse in College Park (Atlanta). There are several factual issues, one of which is the question of whether Transportation Supervisor Holsumback placed a pickup order in the drivers' packet.

Holsumback testified that the actual scheduling of pickups is made in the Company's Chicago office, and is transmitted to the College Park warehouse by teletype. The responsibility for preparing the pickup orders and placing them in the drivers' packet is shared by Holsumback and dispatcher Hallman.

Holsumback identified a pickup schedule received from Chicago, dated March 7, containing the pickup locations, purchase order numbers, and destinations for the following week when the drivers were discharged (R. Exh. 19). Holsumback testified that he made some of the entries on this form. Thus, he made the notation "Rt #53" on the first line, and testified that this showed that Route 53, in Florida, was to handle that particular pickup. At the same time, Holsumback averred, he prepared the driver's pickup order. The second pickup was in Florida, and Holsumback wrote "Rt. 52" on the pickup schedule and prepared the driver's pickup order. The third pickup source on Respondent's Exhibit 19 is a company called "Riceland," in Stuttgart, and was on the Powell-Lemacks run. There is no notation of a route number opposite this pickup. In explanation, Holsumback averred that there was no necessity to write down the route number, since the Powell-Lemacks run to Memphis was the only route which could make the pickup. The Company in fact had two runs to Memphis. Nonetheless, Holsumback contended that he did write a pickup order for Stuttgart.

Dispatcher Hallman testified that he prepared driver's pickup orders on occasion. The procedure was to note, on the pickup schedule from Chicago, the route numbers which were making the pickups, and transfer the pickup information to a driver's pickup order. Contrary to Holsumback, Hallman stated that all the route numbers, including the one designating Stuttgart, were noted on the pickup schedule from Chicago. Then, on redirect examination, Hallman contended that the absence of a route number on the pickup schedule sheet would not have any "impact" on whether the route was to be run.

Powell and Gertenbach agree that the former had a conversation with the transportation manager a week before the final run, in which Powell asked whether there would be a pickup the following week. Powell's son, on duty with the Navy, was home visiting his father, and Powell wanted more time at home. Gertenbach replied that he could not eliminate the pickup if in fact there was one, but that he could assign Powell different work. Powell said that he spoke to Dispatcher Hallman the following Monday, March 7, and told him that he did not need a replacement for the Route 20 run because his son's leave had been extended. Hallman agreed that he had a conversation with Powell on Monday, but denied that Powell withdrew his request for a replacement. Instead, according to Hallman, he told Powell that there was a pickup in Stuttgart. However, Hallman testified that it was Holsumback who prepared the pickup order, and that he did not see it himself. Powell denied that Hallman said anything about a pickup during this conversation.

Lemacks called Hallman the following day, March 8, and inquired about the run. According to Lemacks, the dispatcher gave Lemacks the tractor number and other details about the trip, and said that there would "probably" be a pickup. According to Hallman, his information about the pickup was definite. Lemacks informed Powell about this conversation.

Later the same day, March 8, Powell and Lemacks went to the truck rental agency used by the Company, and obtained their tractor. They then returned to the warehouse to get their trailer and shipping documents. Opening the packet, Lemacks did not see a pickup slip, and commented to Powell in the presence of the dispatcher that they did not have a pickup that week. Gertenbach, who testified that he later investigated the matter, said that he determined there had been a pickup slip in the drivers' packet. He relied on Holsumback's affirmation that such was the case. Asked whether there were any copies of the pickup order, Gertenbach replied that it was not company practice to make such copies "at that time," but that the practice later changed.

(2) Factual analysis

The central issue is whether Holsumback placed a pickup order in the drivers' packet. I conclude that he did not do so. Hallman, contradicting Holsumback, said that route numbers were placed on the pickup schedule from Chicago in all instances, including the Stuttgart pickup, and that the information was transferred to a driver pickup order. The fact that there is no route number opposite the order for the Stuttgart pickup on the teletype from Chicago, while such numbers were written by Holsumback for the other pickups, suggests that no pickup order was written for Stuttgart.

Nor is there any copy of the alleged pickup order. Gertenbach testified that the Company did not make copies of pickup orders at the time, i.e., March 8, 1983, and that the practice of making copies did not start until a later time. However, Respondent's own memorandum changing pickup procedure states that a copy would be made of the pickup report form, in the event the driver lost or misplaced the original. That memorandum is dated September 8, 1982 (G.C. Exh. 2). I infer that Respondent did what its own memorandum said that it intended to do, and started making copies of pickup orders in September 1982. The fact that it did not produce at

the hearing a copy of a pickup order allegedly written in March 1983 suggests that no such order was ever written.

Since drivers made substantially more money on runs with pickups, it is incredible that Lemacks and Powell would have passed up such an opportunity to their own financial detriment.

Finally, Powell and Lemacks were inherently more credible witnesses than Holsumback and Gertenbach, and for this reason, in addition to the objective considerations set forth above, I credit their testimony that there was no pickup order in their drivers' packet on March 8.

I also credit Powell's testimony that he told Hallman that his son's leave had been extended, and that he no longer needed a replacement for the run. In addition, I accept Lemacks' testimony that Hallman told him on March 8 that he "probably" had a pickup, rather than telling him definitely that this was so. Hallman acknowledged that he never saw the order, and was a less believable witness than Powell and Lemacks.

d. *The discharges of Powell and Lemacks*

Powell and Lemacks proceeded on their route. There was no call from the office during the run, which in itself was unusual according to Lemacks. They returned on Thursday, March 10, earlier than would have been the case had they made a pickup in Stuttgart. As they pulled into the yard, their truck was approached by Gertenbach, Holsumback, and Hallman. Gertenbach asked why they had not made a pickup, and Lemacks replied that they were not given a pickup (slip) that week. The three management officials then returned to the office.

The drivers turned in their paperwork, and looked for their paychecks. They were not in their usual place, and Holsumback told them that Gertenbach wanted to see them, Powell first, and then Lemacks.

Powell then had a conversation with Gertenbach in the latter's office. According to Powell, the transportation manager said that he was giving Powell warning letters for losing a set of padlocks and for falsifying records. Powell had lost some company padlocks about 2 weeks before. Powell testified that he replaced the padlocks at his own expense, informed Gertenbach of this fact, and never ran his truck without padlocks. Gertenbach denied that Powell informed him of the latter's replacement of the missing locks. Powell's testimony that he did in fact replace the locks is unrebutted, and I credit it. It is unbelievable that he would have failed to inform his supervisor of the replacement at his own expense in the face of company discipline over the matter, and I credit his testimony that he did so inform Gertenbach. The latter replied, according to Powell, that it "didn't matter."

The alleged log falsification had occurred back in mid-January, when Powell's foot was injured by a falling case in the trailer, at a time when his log showed that he was in the sleeper. Gertenbach acknowledged learning about the injury in January, and said that he signed something about the matter in that month, but no warning letter was ever produced by Respondent. In explanation of the approximate 2-month delay in administering this discipline to Powell, Gertenbach asserted that he had not seen Powell very often during that period of time. Powell testified that he asked to see the alleged warning letters, but that Gertenbach refused. I credit Powell's testimony, conclude that Gertenbach's story is incredible, and find that there were in fact no such warning letters.

Powell testified, and Gertenbach admitted, that nothing was said during their March 10 conversation about the alleged missed pickup from Stuttgart, despite the fact that the conversation occurred immediately after Powell and Lemacks had returned from the trip, and after Gertenbach, Holsumback, and Hallman had approached the truck and had questioned them about the pickup. In explanation of this omission, Gertenbach said that he had already told Powell the previous week that the pickup could not be canceled. This answer, of course, is not an explanation of the omission.

Lemacks testified that he then went to talk to Gertenbach, who asked him whether he had talked to Hallman prior to the run. Gertenbach asked whether Hallman had told him that there was a pickup on the run. Lemacks replied that Hallman had mentioned this, but said that he did not have the information on it, and that the paperwork would be in the "pouch." That terminated the conversation.

Gertenbach testified that Hallman had previously informed him that the latter had told Lemacks that the Stuttgart pickup could not be canceled. He then called Lemacks and Hallman into his office together,[11] and asked Lemacks whether Hallman had told him there was a pickup on the trip. According to Gertenbach, Lemacks said, "Yes." Gertenbach then asked Lemacks whether Hallman was his supervisor, and the employee again answered affirmatively.

Gertenbach's version of this conversation is contrary to the credited facts, since Hallman never saw any pickup order, and merely told Lemacks that a pickup was "probable." Accordingly, I credit Lemacks' testimony concerning his March conversation with Gertenbach. Powell was waiting for Lemacks when the latter was in the office with Gertenbach. The two employees left together, and Lemacks told Powell that Gertenbach had mentioned the missed pickup.

On the following day, March 11, according to Powell, Gertenbach called and asked him to come in to the warehouse about noon, and Powell replied that he could not make it until about 1 or 2 p.m. Gertenbach called back, and said that it was not necessary for him to come in, that he could be fired on the phone, and that Powell was dismissed immediately. On direct examination, Powell testified that Gertenbach gave no reason for the discharge during the telephone conversation. On cross-examination, Powell was asked two questions in one—whether Gertenbach or Powell made the call, and whether Gertenbach told Powell that he was fired for missing a pickup "on the 11th." "Right? Not the 10th, the 11th," was counsel's last question. The witness answered, "Yes, sir, that's right." Powell later denied on

[11] Gertenbach reversed the order of the interviews, asserting that he talked to Lemacks before Powell.

cross-examination that he was told he had been fired for missing a pickup. I interpreted the witness' answers on cross-examination as his affirmation that the conversation took place on March 11, and not as a contradiction of his direct testimony that Gertenbach gave no reason for the discharge.

Gertenbach, on the contrary, asserted that he told Powell on the phone that he was discharged for failure to make the pickup in Stuttgart. Powell later called his office, asked about his pay, and further requested the reason for his termination in writing. On the same day, March 11, Gertenbach wrote Powell a letter reading as follows:

> Pursuant to your request we are notifying you in writing that your employment has been terminated due to insubordination [G.C. Exh. 5].

I credit Powell's testimony on direct examination that Gertenbach did not give him the reason for the discharge during the March 11 telephone conversation. Gertenbach admitted that he did not raise the issue of the pickup during his March 10 conversation with Powell in the office. The only subjects he did mention—the alleged log falsification in January and the lost padlocks—could not reasonably be considered "insubordination," nor were they labeled as such by Gertenbach. Powell continued to maintain at the hearing that, although Lemacks told him that a missed pickup was the reason for the discharges, the Company had never told him this. I credit that testimony,[12] and conclude that Respondent alternately gave no reason and inconsistent reasons for the discharge of Powell.

Lemacks was discharged on the same day, March 11, in a very brief interview with Gertenbach and Quinn. Lemacks said that Gertenbach stated that Lemacks was guilty of "gross negligence," and Gertenbach affirmed that he gave the failure to make the pickup in Stuttgart as the reason. The transportation manager admitted that Lemacks had a good record, his only prior deficiency having been an occasion when he inadvertently left his packet of documents in a truck which had broken down, thus causing the Company to send the documents to him in another vehicle.

2. The discharge of Fortner

a. *The visit to the union hall and the telegram to Respondent*

On leaving Gertenbach's office after having been dismissed, Lemacks saw Fortner in the outer office, and the two employees decided to visit the union hall. They stopped on the way, and Lemacks called Powell. In the middle of this conversation, Powell put Lemacks "on hold," and later returned to Lemacks' line to inform him that Powell had just been fired by Gertenbach. Fortner and Lemacks proceeded to the union hall, where they were joined by Powell and Rogers. They consulted a union lawyer, and the Union attempted to send the following telegram, dated March 11, to Center Manager Frank Quinn, in care of Respondent:

> Please be advised that your drivers of their own free will and choice volunteered to help support and actively assist Teamsters Local Union No. 728 . . . in the organization of your company and in general to exercise all their legal rights guaranteed them under Section 7 of the National Labor Relations Act.
>
> Listed below are some of the employees that will be active on the Union's behalf:
>
> Stephen W. Fortner and Arthur Rogers
> [Signed] G. B. Profitt, Assistant Business Agent
> [R. Exh. 9].

The parties stipulated that the manager of the Western Union office, if called as a witness, would have testified that Western Union attempted to read the message to Quinn over the telephone, but that he refused to accept any further reading after 72 words. When a Western Union messenger later attempted physical delivery of the telegram, a company representative first signed for it, then scratched out her name, and returned the telegram to the messenger (R. Exhs. 9, 10).

Quinn acknowledged that he stopped the attempted telephonic reading of the telegram at the point where the operator said she was going to list some names of employees. He also agreed that the attempted physical delivery of the telegram was blocked by the Company. The reason, he said, was that he did not want to know the names of his employees engaged in union activities. Accordingly, Quinn maintained, he did not know on March 11 that the names of Fortner and Rogers were listed in the telegram.

b. *Rogers' trip to Charleston on March 6*

As indicated above, Rogers was one of the union activists, and was the union observer during the April 1 election. He had a route to Charleston on Sunday, March 6. This run had a possible pickup, and the usual departure time was 4 p.m. on Sunday. In the event the run had no pickup, Rogers could leave at 12:30 a.m. Monday, since the elimination of the mileage for the pickup made it possible to complete the run "legally" within the DOT regulations. This would also save the Company money, since it would not be required to pay him overnight expenses.

On Sunday, March 6, Rogers called Warehouse Supervisor Kirk Kitchens and asked him to look in Rogers' packet to determine whether there was a pickup. Rogers did this in order to get an additional 8 hours at home if possible. Kitchens reported to Rogers that there was no pickup order in his packet, and, accordingly, Rogers left at 12:30 a.m.

---

[12] Powell's pretrial affidavit, introduced by Respondent, is not inconsistent with this finding (R. Exh. 8). Although Powell testified that he initialed a statement in the state unemployment office indicating that he had been fired for missing a pickup, he affirmed that it was the Company, rather than he, that told this to the state official. The finding of the State's administrative hearing officer was that Powell was discharged for failing to make a pickup, but that he could not be held at fault because he had been given any bills to make the pickup, and therefore could not have known that they were to be made (G.C. Exh. 6).

On his return, there was a message for him to call Transportation Supervisor Holsumback. The latter asked whether Rogers had made a pickup at Savannah Foods. When Rogers replied in the negative, Holsumback asked the reason, and Rogers replied that there was no pickup slip in the packet. The transportation supervisor replied that there *was* a pickup slip, since he had personally put it there the preceding Friday. Rogers replied that this was not possible, because pickup slips are not placed in the drivers' packets until Saturday or Sunday. Further, Rogers told Holsumback that Rogers called Warehouse Supervisor Kitchens on Sunday, and had been informed that there was no pickup order in his packet of documents.

According to Rogers, Holsumback's reply was, "Ah, ah, ah, you talked to Kirk, huh?" "Yes, sir," Rogers replied, "sure did."

Rogers further affirmed that Kitchens told him that Center Manager Quinn asked Kitchens whether Rogers in fact had inquired about the pickup on Sunday.

Gertenbach corroborated Rogers' testimony. Holsumback testified on both sides of the issue. First, he asserted that he *did* place a pickup order in Rogers' packet of documents. Then, he was asked why Rogers continued to be employed at the Company after missing a pickup, and replied that Rogers had called Kitchens and had discovered that there was in fact no pickup order. Holsumback's contradictions of himself, Gertenbach, and Rogers are substantial factors in my determination that he was a completely unreliable witness, and would testify to anything which he thought might aid Respondent's cause. There was in fact no pickup order in Rogers' packet on March 6.

The following week, when Powell and Lemacks were discharged, Rogers made a run to Macon on March 10. On his return, Gertenbach asked him whether he had obtained permission to leave at midnight on the preceding run to Charleston. When Rogers replied that there was no pickup, but that he had not received permission to leave at midnight, Gertenbach required him to sign a "warning letter," without giving him a copy. Rogers protested this to Quinn, who told him that it was a minor matter. This was the first time that Rogers had ever been reprimanded over a departure time, according to his testimony. Rogers was a trustworthy witness, and I credit his testimony in its entirety.

c. Fortner's injury and loss of equipment

(1) Summary of the evidence

In November 1982, the refrigeration unit in Fortner's trailer failed to function, resulting in damage to food products, and Fortner was reprimanded. In December 1982, he received a 3-day suspension with loss of pay, and a 3-month probationary period ending March 9, 1983, because of customer complaints (R. Exh. 24). On December 31, 1982, there was a fuel leakage at the fuel pump in the company yard, and Fortner's boots became oily. He slipped and fell backwards while getting into the tractor, and was injured and hospitalized for 5 days. Gertenbach reprimanded him for failure to observe safety regulations. As indicated above, when Fortner left the hospital about January 5, he became a leader of the union movement.

According to Fortner, when he was taken to the hospital, his equipment, consisting of a handtruck, stands, and four rollers were left unattended. Holsumback visited him in the hospital to inquire about his paperwork, and at that time Fortner asked the transportation supervisor to check on his equipment. However, when Fortner returned to work, his equipment was missing. It had been stamped with Fortner's clock number, and he testified that he located his rollers in the bin of another driver, Jimmy Mitchell. In late January or early February, according to Fortner, he took Holsumback to Mitchell's bin and showed him the rollers. Holsumback promised to get the equipment back from Mitcheli and return it to Fortner, but did not do so according to the latter. Instead, Holsumback placed Fortner's equipment in the utility trailer, for which Holsumback had the key. Fortner had a conversation with Holsumback about his equipment a short time before making a run to Charleston on February 27, but Holsumback claimed that he had not yet seen Mitchell. It was not until Fortner's March 3 conversation with Holsumback in the utility trailer, described above, that he obtained his equipment.

Holsumback gave a different chronology of events. According to him, Fortner did not return to work after his injury until about the last week of January, and at that time reported that his equipment was missing. Holsumback does not deny Fortner's averment that the latter told Holsumback about the equipment during a hospital visit, in early January.

Continuing with Holsumback's version, when Fortner reported the loss in late January, Holsumback offered him a handtruck, stands, and steel rollers, which Fortner refused because his own were aluminum. Fortner did not need the equipment at that time, since he was making runs with another driver, and the latter's equipment was sufficient.

Holsumback also contended that he investigated on receiving Fortner's report, and located Fortner's handtruck, stands, and two of his (aluminum) rollers "scattered out in the yard." Fortner came by and reported that he had located two of his rollers. At that point, Fortner and Holsumback went to the bin of another driver, where Fortner identified two of his rollers. Fortner did not say whose bin it was, although the bin had an employee's clock number. Holsumback knew it was Mitchell's bin, but did not tell this to Fortner, according to his own testimony. He asserted that Fortner took his handtruck and three stands, but would not take the two aluminum rollers which Holsumback had found in the yard until the other two rollers were retrieved from Mitchell's bin.

Holsumback contended that he reached Mitchell, then on a trip, and the latter asserted that he had found the two rollers in the yard, had placed them in his bin for safekeeping, and had reported the matter to his supervisor. Holsumback reminded Mitchell of a company letter warning drivers that use of another driver's equipment warranted immediate termination (R. Exh. 12). Holsumback asserts that he checked with Mitchell's supervisor,

who corroborated the latter, and Holsumback then gave Mitchell a "verbal warning." The transportation supervisor then took the two aluminum rollers out of Mitchell's bin, and placed them in the utility trailer, together with the other two rollers which he had found in the yard.

Thereafter, as recited above, Holsumback contends that he offered Fortner his four aluminum rollers on March 3, and that the latter declined.

(2) Factual analysis

Holsumback is not explicit on the time that he recovered the two rollers from Mitchell, but the context of his testimony suggests that it took place in late Janaury or early February. This is consistent with Fortner's testimony that he took Holsumback to Mitchell's bin at that time and showed him Fortner's rollers.

As indicated above, Holsumback's position—that Fortner continued to reject his own aluminum rollers, for one reason or another, until after March 3—is incredible. I credit Fortner's testimony, and find that Holsumback placed Fortner's equipment in the utility trailer about early February and, when Fortner questioned him in late February, denied having seen Mitchell. I credit Holsumback's testimony that the discipline administered to Mitchell for having taken Fortner's equipment was a verbal warning.

d. *Fortner's trips to Charleston and Macon, and his discharge*

(1) Fortner's testimony

On February 27, Fortner made his first single run since returning to work. The destination was Charleston, and Fortner did not have his own equipment. However, the Company allowed some equipment left by former drivers to be stacked in the yard, while assigned equipment was supposed to be kept in the drivers' bins. Fortner picked up some equipment in the yard for this trip. He did not know whose equipment it was, if anybody's. According to Fortner, he left at 3:30 p.m. on Sunday, February 27, and replaced the equipment on his return.

On March 3, Fortner made a trip to Macon. Again, he picked up equipment in the yard. He discovered that it belonged to another driver, Vernon Burdette, because of the clock numbers on the equipment. When he returned the same day, Holsumback offered Fortner his own equipment, and Fortner said that Burdette would probably be glad to get his back. Holsumback inquired whether he had Burdette's equipment, and Fortner replied affirmatively. Fortner returned it.

According to Fortner, March 10 was "bid" day, and Fortner was in the office examining his options for the next routes to be bid. He took his bids into Gertenbach's office, and the latter asked whether he had used Burdette's rollers. Fortner replied affirmatively, explaining that Holsumback had Fortner's equipment locked up in the trailer. "Is there a problem?" Fortner asked Gertenbach, "No," replied Gertenbach, "[T]here's no problem. I just wanted to ask you about them." Lemacks later came out of Gertenbach's office and said that he had been fired. As this actually took place on March 11, Fortner's March 10 date is erroneous.

Later in the afternoon of March 11, Fortner and Rogers were at the union hall, as described above, and caused the telegram to be sent to Quinn which the latter rejected. Gertenbach called Fortner that afternoon and said, "Per our conversation this morning, this is to inform you that you have been terminated with the Martin-Brower Company." He then hung up. Fortner received a telegram from Gertenbach reading as follows:

> This is a confirmation copy of a telegram addressed to you. This is to confirm that your employment with the Martin-Brower Company was terminated effective today as we discussed on the phone [G.C. Exh. 10].

Fortner filed a claim for unemployment compensation benefits, and, a few days later saw the Company's response, alleging that he was discharged for unauthorized use of another employee's equipment, and for falsification of records (G.C. Exh. 11).[13] Fortner testified that this was the first time he knew the Company's reasons for discharging him.

(2) The Company's position

Respondent's witnesses contended that Fortner falsified his log by showing that he left on the February 27 trip at 3:30 p.m., whereas he did not really leave until after midnight. Respondent supports this position with evidence that Burdette last saw his own rollers about midnight on February 27, as he was leaving on a trip with another driver utilizing the latter's equipment. Accordingly, the Company argues, Fortner could not have left at 3:30 p.m. with Burdette's equipment, and must have left after midnight. When asked to produce a motel receipt, Fortner could only produce a form receipt without the name of any motel, and could not recall where it was that he stayed that night. His motive, the Company argues, was to obtain expenses for a night's lodging to which he was not entitled.

(3) Gertenbach's testimony

Gertenbach testified that Burdette reported to him on March 1 that his equipment was missing since February 28, after having been secured in the trailer. The transportation manager asserted that Holsumback told him on March 4 that the latter had obtained Burdette's equipment from Fortner the prior day, March 3. Gertenbach stated that he called Fortner's house on March 4, but that the call was not returned until Sunday, March 6, to the Company's answering service. Gertenbach returned the call, and Fortner's wife informed Gertenbach that her husband was ill. Gertenbach asserts that he finally reached Fortner on Monday, March 7, and that Fortner then told him that he had taken Burdette's equipment on February 27, with Holsumback's permision. Gertenbach said that he questioned Holsumback, who denied giving

[13] The State's claims examiner allowed the Company's defense, on the ground that Fortner had falsified his logbooks.

Fortner permission to take Burdette's equipment. Gertenbach asserts that he concluded that the "timing was off," since Fortner was supposed to have left for Charleston on Sunday afternoon, whereas Burdette had reported seeing his equipment about midnight. Gertenbach testified that Fortner's log showed an arrival in Summerville, South Carolina, at 10:30 p.m., and that the driving time is 5-1/2 to 6 hours.

The log actually shows that Fortner left at 3:30 p.m. on February 27, arrived in Columbia, South Carolina, at 8 p.m. ("20.00"), was off duty an hour, left at 9 p.m., drove until 10:30 p.m., and was then "off duty" (R. Exh. 22). The next log shows him arriving at Summerville, South Carolina, at 6 a.m. on February 28, remaining there 15 minutes, and arriving at Charleston, South Carolina, at 8:45 a.m. Fortner worked until 6:15 p.m. on February 28 (R. Exh. 23).

According to Gertenbach, Fortner was told to come into the office to make his bid for the next route. Also, Gertenbach wanted to talk to him about Burdette's rollers. Fortner did so, but on March 11, rather than March 10. Fortner was first given his bids, and then had a conversation with Gertenbach. The latter told Fortner that he had said "on Monday the 27th" [sic] that he had taken Burdette's equipment with Holsumback's permission.[14] According to Gertenbach, Fortner denied this, saying that he had told Gertenbach that he took the equipment on March 3 on a solo run to Macon. Gertenbach asked Fortner the name of the town and motel where Fortner had stayed on February 27, and Fortner could not remember.

Gertenbach, on the assumption that it was February 27 that Fortner took Burdette's rollers—and therefore could not have left at midnight—testified that he conducted an investigation to determine when it was that Fortner actually left. The alleged investigation was singularly inconclusive.

None of the warehousemen remembered seeing Fortner leave on February 27. The supervisor on duty (Kitchens) could not remember seeing Fortner that afternoon. Although there is a dispatch sheet, the departure time is not listed. Although Fortner was hauling a refrigerated trailer, whose temperatures were supposed to be recorded every 2 hours by a security guard, Gertenbach did not investigate any such records. He asserted that Warehouse Manager Waters had supervision over the security guards, and that he did not talk to Waters about the matter. According to Gertenbach, a driver could simply walk in, get his papers, hook up the trailer to his tractor, and leave without talking to a security guard.

The truck itself, or tractor, was rented by Respondent from a rental company (Ryder). Gertenbach asserted that he called Ryder, but did not know whether it had a log on the time that Fortner picked up the tractor on February 27. As far as Gertenbach could determine from Ryder, the keys are left in the ignition, and Fortner simply arrived, got in, and drove off without talking to anybody. On Gertenbach's theory, this took place some time after midnight, February 28. Fortner then drove to Respondent's warehouse, hooked up a trailerload of refrigerated merchandise, and again drove off without talking to anybody, and without any record of departure time.

Gertenbach testified that he discussed the matter with Quinn, and that the decision was made to terminate Fortner. The first reason was log falsification—Fortner's claim that he had a layover on February 27, whereas in fact he drove straight to his first stop. Gertenbach conceded that the question about the rollers and the layover money was "a bit shady," but gave major consideration to Fortner's prior discipline and the probationary period. However, if Fortner had been able to come up with the name of a motel where he stayed on February 27, this would have indicated that he could not have taken Burdette's equipment on that day.

Quinn communicated with his own superior in Chicago, and Fortner was informed of his discharge by telephone about 3 p.m., Friday, March 11, followed by a telegram.

(4) Burdette's testimony

Burdette asserted that his rollers were imprinted with his clock number, and were locked up in his bin at midnight on February 27, when he left with another driver using the latter's rollers. Burdette's rollers were missing when he returned on February 28 (R. Exh. 26). He said that Holsumback told him about 3 days later that he had found them, i.e., about March 3. However, it was not until about a week and a half later that Burdette got his rollers back, and was told that it was Fortner who had them.

(5) The General Counsel's evidence on motel receipts

The actual motel receipt which Fortner submitted to the Company is in evidence. It is a printed form without the name of the motel. Fortner's name and address are printed on the form, together with an indicated arrival date of February 27, and a departure date of February 28. The room number is "16," and the room rate is $26 (R. Exh. 13). Fortner testified that he could not remember the name or motel, or the name of his first stop. He returned to the warehouse on Tuesday, and submitted two expense vouchers for layovers in the amount of $32 each. He testified that he had turned in similar receipts in the past, and none had been questioned.

The General Counsel elicited additional evidence on this point. Thus, Powell testified that the nightly layover rate at the time he was employed was $32, and that no motel bill was required to substantiate the charge. Powell turned in receipts which he made up himself, and most of the drivers have their own "receipt book" for this purpose. At one point, Gertenbach said that he was trying to eliminate the receipts completely, and "just pass the money up front." Wallace testified to similar effect, and said that expense receipts were never investigated. Lemacks made similar averments, and stated that Holsumback explained the Company needed something on file for "tax purposes." Rogers, currently an employ-

[14] The transcript is erroneous at this point since Gertenbach's actual testimony was that Fortner told him on Monday, March 7, that it was on February 27 that Fortner took Burdette's equipment.

ee of Respondent, identified a blank receipt form which is the same as the one Fortner submitted, and testified that he is routinely paid by the Company on submission of such a form (G.C. Exh. 13).

(6) Factual analysis

The distance from Atlanta to Columbia, South Carolina, is 214 miles and from Atlanta to Charleston, South Carolina, is 289 miles.[15] At the "legal" DOT speed of 47 miles per hour, the trip from Atlanta to Charleston would have required more than 6 hours of driving time alone, exclusive of rest stops, meals, etc. Fortner's log shows that he reached Charleston at 8:45 a.m. on February 28. Respondent has submitted nothing to cast doubt on this arrival time. Burdette asserted that his rollers were locked in his bin at midnight on February 27. In order for Fortner to have taken Burdette's rollers on that night, as Respondent asserts that he did, Fortner would have had to arrive at the warehouse some time after midnight, take the time necessary to break the locks on Burdette's bin, take out the rollers, place them in his tractor or trailer, hook up the trailer to the tractor, and *then* start out for Charleston, with stops at Columbia and Summerville on the way. It may have been possible for a determined driver in a passenger car to have reached Charleston by 8:45 a.m. by sacrificing rest stops and meals. It is highly improbable that a commercial driver, with a relatively cumbersome tractor-trailer combination, would have started out after midnight, somehow raced to Charleston by 8:45 a.m., and then would have worked throughout the day without any rest whatsoever.

Gertenbach's alleged investigation of the time that Fortner left on February 27 resulted in conclusions which are unbelievable. According to that investigation, an individual was able to walk into the Ryder yard, find a tractor with gasoline in the tank and a key in the ignition, drive off without being seen, go to the Martin-Brower warehouse sometime after midnight, break the locks on a bin, hook up a trailer loaded with valuable refrigerated perishables, and drive off again without being seen and without any records. This attains the height of incredibility.

Because of the foregoing improbability of the time factor, the incredibility of Gertenbach's investigation, and the fact that Fortner was a more believable witness, I accept his testimony that he left on Sunday afteroon, February 27, as recorded in his log.

I also find that Fortner stayed at a motel the night of February 27. The fact that he could not remember the name of the motel is of no moment, since only a driver with computerized recall could remember the name of every motel where he stayed. The fact that Fortner could not supply a motel receipt with the name of the motel imprinted on it is also irrelevant, since the General Counsel supplied abundant evidence, which I accept, that it was company practice to accept personalized receipts without such names.

I conclude that Fortner in fact did not take Burdette's rollers on February 27. There is no reason to question his testimony that he found them in the yard on March 3, and took them on his trip to Macon, and I credit that testimony. How Burdette's rollers came to be in the yard on March 3 is unknown.

Since Fortner did not take the rollers on February 27, would he then have told Gertenbach that he took them on that date with Holsumback's approval? This assertion by Gertenbach is also incredible, and I reject Gertenbach's testimony that, during his conversation with Fortner on March 11, he asserted, and Fortner denied, that the latter had admitted in a prior conversation on March 7 that it was on February 27 that he took Burdette's rollers. Like Hamlet, Gertenbach staged a play within a play. His object was to justify his false accusation that Fortner had logged his departure time inaccurately on February 27. Gertenbach was tied into this date by Burdette's testimony.

I reject Gertenbach's account of his conversation with Fortner on March 11, and accept Fortner's version, with the correction that it took place on March 11 instead of March 10. I, therefore, find that Gertenbach asked Fortner whether the latter had used Burdette's rollers, and that Fortner replied affirmatively, explaining that Holsumback had locked up Fortner's rollers in the trailer. Fortner asked whether there was any "problem," and Gertenbach replied that there was none. Later that day, Gertenbach called Fortner, discharged him, and sent him a telegram advising him that he was terminated per that conversation.

3. Legal conclusions on the discharges of Powell, Lemacks, and Fortner

Respondent's animus against the union movement is established by its violations of Section 8(a)(1) described above. The Company threatened employees with loss of privileges, pay raises, plant removal, and discharge for favoring or voting for the Union, and engaged in other unfair practices showing its hostility to the union movement.

The Company also knew that Powell, Fortner, and Rogers were the leaders of the union movement, since Ford informed Gertenbach of this fact. Quinn's rejection of the union telegram, identifying Fortner and Rogers as union supporters, was a calculated stratagem. Fortner's conversation with Holsumback on March 3 showed that he was a strong union supporter. Waters told McGill that the Company knew who had signed cards. Powell spoke up at the employee meeting on January 31, and Waters flatly told him that he had better get the Union in, because Quinn was going to fire him. Lemacks, together with Fortner, was "very vocal" at the employee meeting. Although not identified by Ford as one of the leaders of the union movement, Lemacks also attended union meetings, asked other employees to support the Union, and was known by management to be the co-driver with known union activist Powell. The General Counsel has thus established a strong prima facie case that Respondent discharged Powell, Lemacks, and Fortner because of their union activities.

[15] I take judicial notice of the mileage figures set forth in "Standard Highway Mileage Guide," p. 36, published by Ran McNally & Company (Chicago, New York, San Francisco, 1978).

Respondent has not rebutted this case. With respect to Powell, Respondent wandered from one excuse to another for his discharge. On March 10, after the missed pickup, all that Gertenbach talked about was log falsification and lost padlocks. The former concerned a picayune matter 2 months before, where Powell's log showed that he was in the sleeper when in fact he was in the trailer. The Company, despite the lecture from Hargis on accuracy of logs, tacitly or explicitly advised drivers to alter their logs to make them "legal" when business circumstances required it. Nor has Respondent advanced any convincing reason why it waited 2 months to mention this infraction to Powell. As for the lost padlocks, Powell told Gertenbach that he had replaced them at his own expense, but the transportation manager said that that fact did not make any difference.

On the next day, March 11, Gertenbach fired Powell on the telephone without giving him any reason. He followed this with a letter saying that the discharge was for "insubordination." Although this reason was never explained to Powell, it apparently referred to the company theory that Powell and Lemacks had defied direct orders from Gertenbach and/or Hallman to make a pickup in Stuttgart. As the facts show, however, there were only conjectural statements from Gertenbach the week before, and from Hallman just before the last trip, but no direct order, and there was no pickup slip in the drivers' packet of documents. Although the route was supposed to have a pickup, on several prior runs there was none.

With respect to Lemacks, Respondent explicitly gave the missed pickup as the reason for the discharge, calling it "gross negligence." However, as the facts show, Respondent's new policy was to order pickups by means of a pickup order in the driver's documents, and to call them on the road when such an order had inadvertently been omitted. There was no written or verbal order requiring drivers to call the office on long-distance runs to inquire about pickups, despite Respondent's recent publication of a memorandum on the subject. When Lemacks on one occasion did not make such a call, after having been told by Dispatcher Hallman that there was a pickup and after discovering that there was no pickup order, Holsumback asked him why he was bothering to call. It is obvious that Respondent's charge of "gross negligence" under these circumstances is itself gross exaggeration. This is especially so in light of Lemacks' good record, which the Company admitted.

The case of union activist Rogers, still employed by the Company, is the same as that of Powell and Lemacks, with one important difference. Like the latter two employees, Rogers was charged with missing a pickup. Unknown to Respondent, however, Rogers had called the warehouse manager and had determined that there was no pickup order in his packet, thus disproving Holsumback's assertion that he had prepared one. The Company reluctantly withdrew its case against Rogers, on learning this, and charged him only with changing his scheduled departure time. The General Counsel suggests that the Rogers case indicates that Respondent was following a policy of entrapment by prearranging reasons for the discharges of Powell, Lemacks, and Rogers. I need not decide this issue, but merely find that the stated reasons for the discharges of Powell and Lemacks were obviously pretextual under established Board criteria.

The fact pattern in Fortner's case is different, but with the same result. After Fortner showed Holsumback his missing equipment in Mitchell's locker, Holsumback retrieved the equipment, but locked it up in the utility trailer instead of returning it to Fortner. When Fortner went on his first solo run and needed equipment, he picked it up in the yard, first on February 27, and again on March 3. Discovering on the latter occasion that he had Burdette's equipment, he returned it to the Company which thereupon invented the concatenation of absurdities and contradictions, outlined above, to justify Fortner's discharge.

I have carefully considered Fortner's record, which Respondent states was important in its decision to discharge him. The 3-month probationary period was apparently grounded on customer complaints, but had expired 2 days before Fortner was discharged. The reprimand to him for violating safety regulations, when it was a leaky fuel pump which made his boots oily and caused him to slip, seems to have been rather questionable discipline. In any event, the Company discharged him in part for using Burdette's equipment, and gave Mitchell merely a verbal warning for using Fortner's equipment. The disparate nature of the discipline is evidence of discriminatory motivation in Fortner's case.

I conclude that Respondent has not established that it would have discharged Powell, Lemacks, and Fortner even if they had failed to engage in protected activity. Accordingly, Respondent has not rebutted the General Counsel's prima facie case, and its discharge of those employees on March 11, 1983, was violative of Section 8(a)(3) and (1) of the Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

4. The discharge of McGill

a. *McGill's hiring and employment history*

McGill started working for Respondent in 1979. She was first classified as a temporary employee. However, Respondent moved into its new facility in College Park about March 1981 and began experiencing problems. One of these was increased volume, and another was inventory shrinkage. Accordingly, Respondent created the position of warehouse clerk, and assigned McGill to the position. This permitted Warehouse Manager Waters to spend more time on the floor, and resulted in a general tightening of receiving procedures.

Waters testified that the inventory shrinkage problem improved "almost 90 percent" after the hiring of McGill. In November 1981, McGill received a performance evaluation which rated her as "proficient" in six categories and "more than proficient" in three categories. There were written comments on the evaluation report, such as "very good, catches a lot of receiving errors," and "always on top of her functions and helps out the Inventory Control Coordinator (ICC)." The report described her as "real good" in learning ability, with no complaint

about learning new procedures. She volunteered her services when needed, and manifested initiative to assure the accuracy of receiving reports. McGill had a "real good attitude towards the Company and employees, and [got] along well with everyone." She was "a very intelligent and conscience [sic] employee" (G.C. Exh. 14).

In August 1982, McGill received another performance evaluation almost the same as the first one, although her overall performance rating was raised from "proficient" to "strong proficient." This evaluation was signed by Warehouse Manager Waters and Center Manager Quinn (R. Exh. 29). A few months thereafter, McGill received a pay raise.

As already described, McGill attended the union meetings in early 1983. She also had the conversations with Warehouse Manager Waters about the union campaign and about her own job, set forth above. On April 29, Quinn told McGill that she was laid off because her job no longer existed.

b. *McGill's duties*

In addition to Waters as warehouse manager and McGill as warehouse clerk, there were three warehouse supervisors and various warehousemen and checkers. There was also an inventory control coordinator (ICC). He had overall responsibility to maintain compliance with the Martin-Brower inventory control system, and various specific responsibilities.[16]

McGill was in an office on the warehouse floor, and performed a variety of functions. Drivers from vendors delivering merchandise to Martin-Brower would bring freight bills to her, and McGill would check to see that the Company had received exactly what the warehouseman reported. Thereafter, she stamped the vendor's document "Received." These drivers came in at various times scattered throughout the day until 3 p.m., when receiving was stopped. The Company never knew at what time a product was being delivered to it, and McGill was therefore required to be on a standby basis much of the time. She started at 7:30 a.m., and handled up to 30 or more inbound carriers daily. The number of such carriers fluctuated on a daily basis. When there were about 15, it was a "slow" day but, when the number reached 30, it was a "hectic" day.

McGill also answered the telephone in Waters' absence from the warehouse office, and made truck-driver appointments. She brought incoming mail upstairs. On occasion in the late afternoon, she did typing for company officials upstairs. Quinn said that McGill's typing for him only took 15–30 minutes, and not on a daily basis. McGill, however, testified that she also typed for other company officials, and that the total time ran to half an hour to an hour a few times a week. The Decision and Direction of Election states that about 10 percent of warehouse clerk's time was spent upstairs doing copying and typing (R. Exh. 3), but McGill said that it was more like 20–25 percent. Waters admitted that McGill stayed upstairs after 2 or 2:30 p.m.

For a time, McGill was also "logging product codes for Red Lobster." She was relieved of this work, and assigned the duty of assisting the ICC with "receivers," i.e., a tally sheet containing detailed information on incoming freight. McGill prepared this document, checked it with other records, made copies, and transmitted them to Chicago. She also did some filing for the ICC and some checking of linehaul-backhaul allowances.

c. *The replacement of the ICC*

Waters testified that the ICC during 1982, an employee named Garland Smith, was doing unsatisfactory work, and Waters began interviewing other individuals to replace him. McGill asked Waters for the job, but he did not consider her qualified because she did not have a college degree, and because of his belief that she could not "take the pressure." Smith was replaced by Mark McCormick on January 3, 1983.

Waters contended that the hiring of McCormick reduced McGill's duties. Thus, the warehouse manager asserted that McGill did not "do receivers" after the hiring of McCormick. He stated that McGill continued "to make Xerox copies and put them together for mailing," but denied that she had any telecopying responsibilities. In fact, Waters argued, McGill used the telecopying equipment only 5–10 times after the release of Smith. Unlike Smith, McCormick did his own typing, and had a better attendance record than the former. His office was moved downstairs.

McGill testified to the contrary. McCormick did not do any more than Smith did with "receivers." He took the purchase order and made an entry of the number, but it remained for McGill to make the copies, send them to Chicago, and make entries in the receiving log. McGill continued to check linehaul-backhaul allowances with transportation. She checked the daily inventory analysis (DIA) against the purchase orders under both Smith and McCormick. Smith's attendance had actually improved during his last months at Martin-Brower. The only difference in McGill's work after McCormick was hired is that she had less filing to do.

Waters was less credible than McGill. I accept her testimony and find that the replacement of Smith by McCormick resulted in only a minimal reduction in McGill's duties.

d. *The increase in Respondent's business*

McGill testified that, during the last 3 months of her employment, she was required to type a weekly report for Quinn justifying overtime for various employees. The explanation invariably was that the warehouse was breaking receiving and shipping records. Waters admitted that McGill prepared such reports. McGill said that she and other administrative employees were busier during the last 3 months than during the preceding months. McGill, who normally worked a 40-hour week,

[16] The ICC was required to prepare "receivers," i.e., receiving documents, on a daily basis, prepare them for mailing, coordinate with transportation to assure proper credit for backhaul-linehaul allowances, check receiving records for accuracy, transfer information from receiving records to the proper purchase order, teletype all purchase orders daily, check the daily inventory against purchase orders, transmit them to Respondent's office in Chicago, maintain "cycle counts" of products, coordinate with the purchasing department, and "assist in all phases of inventories" (R. Exh. 15 and testimony of Waters).

earned over $250 in overtime from January to mid-April, just before she was laid off. (G.C. Exh. 15.)

Waters testified that the Company had attained a record volume of business during the 9-month period ending in August 1983. However, Waters contended, the volume of business in April 1983, when McGill was released, was about the same that it had been in the fall of 1982.

The import of Waters' testimony is that the Company's volume of business stayed about the same level from the end of 1982 through April, and then suddenly increased. This assertion is contradicted by the statistical reports prepared by McGill for Quinn, by the documented evidence of McGill's overtime, and by McGill's more credible testimony. I find that the Company's business increased during the first 4 months of 1983, and that McGill worked overtime.

e. *Waters' analysis of McGill's productivity*

Waters testified that McGill spent some of her time reading newspapers, magazines, and books in the receiving office, and that Garland Smith complained that she was twiddling her thumbs. The warehouse manager analyzed her duties, contended that each of the functions she performed took only a few minutes a day, and concluded that she had only 2 hours of "productive time" out of an 8-hour workday. This had been the case for "a pretty good while" before she left the Company.

McGill agreed that she read a newspaper at work, but affirmed that this took place only on breaktimes. She never "shirked" her work. Other employees, customer service representatives (CSR's), listened to the radio when they were finished with their work for the day. McGill denied that she only worked productively 2 hours a day during her last months of employment. In fact, her work picked up because of the increased volume of business.

Since the Company never knew the exact arrival time of incoming freight, part of McGill's work was to be on a standby basis. This is simply the nature of one of her jobs. However, Waters' assertions are almost ludicrous in light of the documented record that Respondent was paying McGill overtime for working more than 40 hours a week, when, according to Waters, she was really working only 10 hours. The warehouse manager's contentions are implicitly contradicted by Respondent's evaluations of McGill. For these reasons, I reject Waters' analysis of McGill's productivity.

f. *McGill's "layoff"*

About the end of the day on April 29, McGill was called to the conference room. Quinn told her that she knew that the warehouse clerk's job was a "created" job, because there was no other position like it in the Martin-Brower system. That position no longer existed. McGill asked whether she had been laid off, and Quinn replied affirmatively. He said nothing about recalling her to work. Waters corroborated McGill on this latter point.

Waters testified that the abolition of McGill's job came as a surprise to him. He had made no recommendation in the matter, and the decision was made by "higher authority." Waters said that he would have liked to retain McGill, since he thought highly of her as a worker and an employee.

g. *Availability of other work*

McGill testified that another checker position was created after she left the Company. This was filled by a new employee, Mike Shelton. In addition, Cindy Hogan, one of the customer service representatives (CSR), resigned a week or two after McGill left. This position was filled by another new employee, Mickey Rich. McGill said that she was familiar with the product codes which would have been helpful in the checker's position, and that she was familiar with the paperwork requirements of the CSR position.

Waters said that he had hired a checker in late 1982, and that McGill knew about this and did not apply for the job. A checker had to be able to lift 74 pounds, according to Waters, and all of his checkers were men. However, on cross-examination, the warehouse manager refused to affirm that a woman was unable to perform the job of checker. He had made no decision on the matter. He also refused to deny that McGill was qualified for the CSR job, and his testimony suggests that "with training" she could perform this job. The "Red Lobster book," which McGill maintained for a time, was maintained by a CSR before and after McGill's tenure with the Company.

Quinn asserted that there were no job openings in the CSR department on April 29. On May 1, he took on Mickey Rich as a "temporary" CSR. Fifty percent of Cindy Hogan's work was done on the Burger Chef account, which Quinn knew that the Company was going to lose, and which it did lose in July. Hogan resigned without notice on May 5. Quinn interviewed some people for the job, kept Rich on as a temporary employee for some time, and offered her the CSR job in mid-June. She accepted.

I conclude that, after McGill's "layoff" on April 29, work became available for which she was qualified. This was clearly the case with respect to the CSR job which Rich obtained, and Waters had not ruled out the checker position as a job for women. It is also clear that Respondent did not offer McGill either of these jobs.

h. *Legal conclusions*

As described above, McGill attended union meetings and signed a union card and Waters told her that the Company knew who had signed cards. After McGill had been excluded from the voting unit, and said to Waters that her job was "safe," he replied: "I don't know. They never forgive and they never forget." This clearly establishes Respondent's animus against union supporters in general, and against McGill in particular.

I conclude that McGill in fact was discharged, rather than laid off, on April 29. She was never recalled, although work for which she qualified became available. I also conclude that the General Counsel has established a prima facie case that her discharge was discriminatorily motivated. This case is established by the specific evidence of Respondent's animus against her as a union sup-

porter, and is buttressed by her record of good work, and by the fact that her immediate supervisor, Waters, was not consulted concerning her discharge, and, indeed, wanted to retain her.

Respondent has not rebutted the General Counsel's case. The reasons given by Respondent for the alleged abolition of her job are pretextual. The need for the warehouse clerk position was clearly recognized by Respondent when it created that position, and that need became even greater as Respondent's business increased in early 1983. The reason given to McGill by Quinn on April 29 for elimination of the job—that it was the only one in the Martin-Brower System—is irrelevant, since Respondent was obviously aware of that fact when it created the job in the first place. Waters' attempt to demonstrate that there was no real need for the job, and that McGill really worked only 2 hours a day, was unpersuasive for the reasons set forth above.

I, therefore, conclude that Respondent has not established that it would have terminated McGill even if she had not been a union supporter. Accordingly, the General Counsel's case is unrebutted, and I find that, by discharging McGill on April 29, because of her support for the Union, Respondent thereby violated Section 8(a)(3) and (1) of the Act. *NLRB v. Transportation Management Corp.*, supra, *Wright Line*, supra.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Martin-Brower Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers and Helpers Local Union No. 728 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Telling an employee that her job could be eliminated if Respondent found out that she favored the Union.

(b) After a union supporter said that her job was "safe" following her exclusion from the voting unit, replying to her: "I don't know. They never forgive and they never forget."

(c) Telling an employee that it knew who had signed union cards, and that the Union was going to lose the election.

(d) Telling a known union supporter that he had better get the Union in, since Respondent was going to fire him.

(e) Telling an employer that if the employees voted for the Union, there would be no raises, only litigation, and that the Company would "hold as long as they possibly could."

(f) Telling an employee that Respondent had purchased an option to buy land elsewhere, and that if the employees voted for the Union, Respondent would move its plant to this new location, and the employees would lose their jobs.

(g) Telling an employee that Respondent would take away the employees' telephone credit cards, holidays, and uniforms, if they voted for the Union.

4. By discharging Stephen M. Fortner, Alvin Lemacks, and Billy E. Powell on March 11, 1983, and by discharging Sandra K. McGill on April 29, 1983, because of their support of the Union and activities on its behalf, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as hereinabove set forth.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged Steven M. Fortner, Alvin Lemacks, and Billy E. Powell on March 11, 1983, and Sandra K. McGill on April 29, 1983, it is recommended that Respondent be ordered to offer each of them immediate and full reinstatement to his or her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges, dismissing if necessary any employee hired to fill the position, and to make him or her whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful conduct, by paying him or her a sum of money equal to the amount he or she would have earned from the date of his or her unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[17] In addition, it is recommended that Respondent be required to expunge from its personnel records all references to its aforesaid unlawful discharges, and to notify each employee in writing that this action has been taken and that evidence of its unlawful discharge of him or her will not be used as a basis for future personnel action against him or her.

I shall recommend that Respondent be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

---

[17] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Martin-Brower Co., College Park, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that their jobs can be eliminated if Respondent finds out that they favor the Union.

(b) Telling known union supporters who have been excluded from the voting unit, and who then affirm that their jobs are safe, that Respondent never forgives and never forgets.

(c) Telling employees that it knows who signed union cards, and that the Union is going to lose the election.

(d) Telling a known union supporter that he had better get the Union in, and that Respondent was going to fire him.

(e) Telling employees that if they voted for the Union there would be no raises, only contract litigation and that the Company would "hold as long as they possibly could."

(f) Telling employees that Respondent had purchased an option to buy land elsewhere and that, if the employees voted for the Union, Respondent would move its plant to this new location, and that the employees would lose their jobs.

(g) Telling employees that Respondent will take away their telephone credit cards, holidays, and uniforms if they voted for the Union.

(h) Discouraging membership in Truck Drivers and Helpers Local Union No. 728, or any other labor organization, by discharging or otherwise discriminating against its employees with regard to their hire, tenure of employment, or any term or condition of employment.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Offer Stephen M. Fortner, Alvin Lemacks, Billy E. Powell, and Sandra K. McGill immediate and full reinstatement to their former positions or, if any such position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges, discharging if necessary any employee hired to replace him or her, and make him or her whole for any loss of earnings he or she may have suffered by reason of Respondent's discrimination against him or her in the manner described in the section of this decision entitled "The Remedy."

(b) Expunge from its personnel records or other files of the above-stated individuals, any reference to his or her unlawful discharge, and notify him or her in writing that this action has been taken and that evidence of his or her unlawful discharge will not be used as a basis for future personnel actions against him or her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in College Park, Georgia, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

---

[19] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Health Care Logistics, Inc. *and* Jon B. Jacobs *and* Mark A. Cox *and* Robert D. Fox, Jr. Cases 9-CA-20594, 9-CA-20712-1, and 9-CA-20712-2

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 24 July 1984 Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Health Care Logistics, Inc., Circleville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Near the beginning of his decision the judge mistakenly stated that Jacobs was discharged on 8 December 1984 instead of 8 November 1984. Additionally, in his notice the judge inserted the name of the wrong labor organization involved. The notice is revised to correct this error.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Steel Workers of America, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jon B. Jacobs, Mark A. Cox, and Robert D. Fox Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the terminations of Jon B. Jacobs, Mark A. Cox, and Robert D. Fox Jr. on 8 November 1983, and WE WILL notify them in writing that this has been done and that evidence of these unlawful actions will not be used as basis for future personnel actions against them.

HEALTH CARE LOGISTICS, INC.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated proceeding was litigated before me at Circleville, Ohio, on May 10 and 11, 1984, pursuant to charges timely filed and consolidated amended complaint issued April 17, 1984. It is alleged, and Health Care Logistics, Inc.[1] (Respondent) denies, that Respondent violated Section 8(a)(1) and (3) of the Act by terminating Charging parties Jon B. Jacobs,[2] Mark A. Cox, and Robert D. Fox Jr. in order to discourage union membership and activity among its employees.

On the entire record and my observations of the testimonial demeanor of the witnesses, and after considering the arguments advanced by the parties in their posttrial briefs, I make the following

[1] Respondent's name appears as amended at hearing.

[2] The charge prepared and signed by Jacobs shows the proper spelling of his name to be Jon.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, an Ohio corporation, is engaged in the manufacture of carts, cabinets, and related products used in the health care industry at its facility in Circleville, Ohio. During the past 12 months, a representative period, Respondent, in the course and conduct of these business operations, sold and shipped from its Circleville, Ohio facility goods, products, and materials valued in excess of $50,000 directly to points outside the State of Ohio. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The United Steelworkers of America (the Union) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[3]

At the time of the events giving rise to this proceeding Respondent was manufacturing medical carts and cabinets in a 2000-square feet one-story building, about the size of a three-car garage, divided into an open manufacturing area, a paint room, and a restroom. The work force then was about 10 or 12 employees, including Operations Manager Ted Salyers and Shop Supervisor Robert Erwin.[4] Salyers and Erwin spent their working time at this facility. Respondent's president Gary L. Sharpe had his office in a house three doors away from the manufacturing operation.

Some time in early or mid-October 1983 the employees, including Supervisor Erwin, began discussing the possibility of union representation. There were several such informal conversations among the employees continuing into early November. Jon Jacobs became the leader in these discussions, and expressed his feelings in favor of a union. When a number of employees, including Cox and Fox, stated a desire to further explore the matter, Jacobs called Union Representative Hoover on November 7, about 1:30 p.m. during a work break, and arranged a meeting between Hoover and the employees for November 10. After completing his call to Hoover, Jacobs returned to the work area and told all the employees and Erwin of the scheduled meeting. Sharpe decided on the evening of November 7 to let Jon Jacobs, Mark Cox, and Robert D. Fox Jr. go. They were terminated on Tuesday, November 8.

Jacobs, Cox, Fox and other employees were clearly engaged in statutorily protected activity when they discussed union representation, decided to meet with a union representative to further explore it, and arranged the meeting with Hoover through Jacobs. Respondent's knowledge of that activity would ordinarily be imputed from the presence of Erwin, Respondent's agent, during these activities, but Erwin, Sharpe, and Salyers credibly agree that Erwin did not tell Sharpe or Salyers of the employee union activities. I therefore conclude that knowledge of union activities may not be imputed to Sharpe or Salyers merely because Erwin had such knowledge. *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983). I do, however, agree with the General Counsel that the circumstances warrant the application of the "small plant rule" permitting a presumption of employer knowledge where the facility is small and open, the work force is small, employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity. See, e.g., *Class Watch Strap Co.*, 267 NLRB 276 (1983); *NLRB v. Instrument Corp. of America*, 714 F.2d 324 (4th Cir. 1983). The activities were carried out on Respondent's very small and open facility where Salyers was always present when at work. The no more than seven or eight employees involved took no special precautions to conceal their activities. It is highly improbable that the employees' interest in union representation, expressed in several conversations within the shop, would remain a secret unknown to Salyers who spent his workday in the facility. The absence of any office or other private place where Salyers might have fortuitously stationed himself and thus avoided any knowledge of any of the union talk in a building of such small dimensions lends support to this conclusion. I am persuaded the small plant rule is here applicable and the resulting presumption of employer knowledge on this ground has not been credibly rebutted. The timing of the termination in midworkweek and on the very next day after the meeting with the Union was arranged and announced to employees also indicates knowledge, *Class Watch Strap*, supra, as well as cause and effect. There is no evidence that Respondent expressed any hostility toward union activities during the October-November period in which the protected conduct occurred, but Jacobs gave credible testimony of such expressions by Sharpe and Salyers in June 1983.[5] On a day in June, while investigating a workmen's compensation claim, Salyers told Jacobs that the brother of the employee involved had threatened to beat up Sharpe's father, or perhaps bring a union to Respondent's facility to "straighten things up." Salyers then told Jacobs that if a union representative walked in "we'll run him out." The following day Jacobs was discussing the situation vis-a-vis the former employee with Sharpe when Sharpe commented that if a union ever got in his facility he would close it down. Salyer's statement

[3] The facts set forth below are derived from the credited aspects of the testimony of all witnesses, the exhibits, comparative testimonial demeanor, and careful consideration of the logical consistency and inherent probability of the facts found. Although I may not, in the course of this decision discuss every bit of record testimony or documentary evidence, it has been weighed and considered. To the extent that evidence not mentioned herein might appear to contradict my factfindings, that evidence has not been disregarded but has been rejected as incredible, lacking in probative worth, surplusage, or irrelevant.

[4] Salyers and Erwin are alleged and admitted to be statutory supervisors and agents of Respondent.

[5] There are some differences between the version Jacobs gave on direct examination and that which he gave on cross-examination when confronted with his pretrial affidavit. Neither version is denied by Sharpe or Salyers. Jacobs' version, after Respondent refreshed his recollection with his pretrial statement, is credited because the written statement was closer in time to the events and more likely to be accurate than his later recollection.

does not necessarily connote hostility toward unions, but strikes me as being more in the nature of a determination to respond to a threat with resolute action regardless of the identity of the emissary of the person issuing the threat. The comment of Sharpe does, however, amount to a declaration of obdurate opposition to unionization of his employees even to the extent of closing his business. The General Counsel has established the existence of union activity, Respondent knowledge, Respondent hostility, and precipitous adverse action hard on the heels of significant union activity. This is sufficient to establish a prima facie showing that the separations were discriminatorily motivated. This being so, the burden now shifts to Respondent to demonstrate that it would have taken the same action in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980).

In addition to its claim, which I have rejected, that it had no knowledge of the protected activities before it terminated the three employees, Respondent advances various other reasons for the separations. The major contention is that financial and production problems required termination of the least productive employees, and that Jacobs, Fox, and Cox were selected on the basis of comparative performance. The record fairly reflects that Respondent was in financial difficulty and had production problems prior to the onset of the discussions about a union, and continued in such straitened circumstances into February 1984, long after the dismissal of the three, yet Respondent hired one employee on November 21, 1983, and three in January 1984. By far the worst month for Respondent financially was September 1983,[6] Respondent's financial situation in November 1983 has not been shown to be more severe than in immediately prior months. Quite the contrary. The $8000 loss in November represents a considerable improvement over the $15,000 September loss. The record reflects nothing other than Respondent's ipse dixit to support a notion that the termination of three employees was urgently needed for financial, production, or other reasons on November 8, 1983. The hiring of a new employee the same month and three more in January suggests the terminations were not in fact a necessary exercise of good business judgment.

Respondent's purported reasons for the selection of each of the three separations were enunciated at trial by Gary Sharpe, Respondent's president, in testimony that was often vague, circumlocutory, and evasive.[7] Respondent's posttrial brief also specifies reasons for selection, as does Respondent's answer to the consolidated amended complaint in this case. These different expositions are not always consistent each with the other or with additional evidence elicited from Respondent's witnesses.

Jon Jacobs

With respect to Jacobs, Respondent first advances the defense that Jacobs was a supervisor and therefore not protected by the Act. There is sufficient evidence in the record to indicate that Jacobs was foreman of the second shift and was probably a statutory supervisor for 3 weeks or so in September 1983. This, however, is irrelevant because Jacobs' protected activity and discharge occurred after the second shift was terminated at the end of September 1983. The issue is whether he was a statutory supervisor commencing in October 1983 when he once again went on the first shift which was already supervised by Salyers and Erwin. Respondent's contention that there were three supervisors on the first shift where there were no more than seven or eight employees working together in a small area, a ratio of one supervisor to two or three employees if Jacobs be found to be a supervisor, is extremely improbable. I also note that Jacobs was paid $3.65 an hour, the same as Mark Cox who was clearly not a supervisor, but less than the $3.90 paid Erwin.

Jacobs was given the title of field maintenance supervisor on his return from the second shift to the first. Titles are not dispositive of supervisory status,[8] nor do conclusory statements that an employee possesses any or all of the supervisory authorities enumerated in Section 2(11) of the Act establish that he or she in fact does.[9] Jacobs spent 30 to 40 percent of his worktime in October 1983, and until his discharge, traveling to customers' facilities for the purpose of repairing Respondent's products. He traveled and worked alone with no one to supervise. He had the authority to purchase repair parts on Respondent's behalf as dictated by the needs of the article being repaired. This involved no significant exercise of independent judgment of the type involved in assessing possible managerial or supervisory status. When not on his field maintenance trips, Jacobs performed routine assembly work in the shop and conducted a materials in-

[6] Respondent lost $15,000 in September and $8000 in November. The loss in December dwindled to $1917, but this obviously could not have been due to the discharge of the three employees after only 5 working days in November.

[7] The following is a representative sample of Sharpe's periphrasis:

Q. Mr. Sharp, are you telling us this morning that these problems that you have mentioned from Mr. Jacobs, Mr. Cox, and Mr. Fox were confined to them alone, that you had no problems with any other employees in your employ?

A. Well—I can't say—you know—it is an ongoing thing sometimes, things come up and it was a process there of I couldn't afford to carry unproductive employees and I had to make some decisions.

People don't like it when they don't get their paycheck and I didn't want to be forced into a situation where I couldn't make a payroll.

Q. Are you telling us that you have had similar problems with other employees such as the same you have had with Mr. Cox, Fox and Jacobs?

A. You know, at any one time an employee may have a problem. You try to work with them and sometimes given certain conditions, and you have to make a decision, should I bet on them that they will come along, do I have the time, the resources, the energy, should I bet on them or not, should I go with them, what can I do.

These—through September and October leading up—it was getting tighter and tighter, and consultation with Ted, why isn't productivity better than it is. I reached a point that I had to make some cuts, who were the least productive.

JUDGE WOLFE: The real question was, have you had production and quality problems with other employees, not why you selected these at that given time, but have you?

THE WITNESS: Yes.

[8] *Saladmaster Corp.*, 216 NLRB 769, 773 (Santiago) (1975).

[9] *United States Gypsum*, 118 NLRB 20, 25 (1957).

ventory. The inventory was a solitary affair with no one else involved. On occasion Jacobs showed less senior employees how to do their work, and answered their work-related questions. He also occasionally transmitted Salyers' instructions to Erwin and other employees. There is no evidence he had any independent authority to nullify Salyers' instructions, and I conclude he was merely acting as Salyer's messenger. The only control Jacobs exercised over other employees at times relevant to this proceeding was that derived from his superior experiences. This does not make him a statutory supervisor.[10] A careful reading of the entire record convinces me that Respondent has not shown by reasonable modicum of credible evidence that Jacobs at the time of his discharge possessed any of the supervisory authorities enumerated in the Act. Respondent therefore has not carried its burden of proving Jacobs was a supervisor at relevant times.

The answers filed by Respondent in response to the complaint in Case 9-CA-20594 and the consolidated amended complaint assert that Jacobs was discharged due to poor work performance and misappropriation of Respondent's funds. Respondent's posttrial brief does not mention the alleged misappropriation, but argues poor performance as the cause for Jacobs' selection. Sharpe's file memo, drafted the evening of November 7 and dated November 8, 1983, notes that he and Salyers concurred in firing Jacobs. He recites poor productivity of second shift under Jacobs, unsatisfactory dress when on field maintenance work, "verbal reports" that Jacobs was "mouthing off" to Salyers, and "reports" that Jacobs used poor judgment when sorting scrap. He also notes that Jacobs took 8 hours on November 7 to do an hour's work of making small dividers, "on another recent occasion" he and another employee took 6 hours each to build two wooden cart frames (although another man by himself built three large crates with hinged doors in 6 hours.) After he discharged Jacobs on December 8, Salyers noted the following on the bottom of Sharpe's memo to file:

> The above employee was informed by undersigned on November 8, 1983 he was being terminated for his poor unacceptable quality of work, failure to attain production goals, poor and discourteous attitude in general toward co-workers and employer. Also, a payroll deduction had been made in his final check for his mis-use of Company Travel Funds.

Salyers' note of misuse of company funds relates to Jacobs' purchase of a radio from his travel allowance while in Philadelphia doing field maintenance. Jacobs credibly testified that his personal radio, which he carried with him in the van, fell and broke. He could not get a motel room that night so he slept in the van and used $60 of his expense money to buy the radio. He reported the purchase to Sharpe when he returned, presented Sharpe with the receipt, and offered to pay for the radio. Sharpe merely nodded his head and never thereafter mentioned the radio purchase.[11] Sharpe concedes the decision to discharge was made without reference to the purchase of the radio. Salyers agrees that he first learned of the radio purchase when he had Jacobs' final check prepared on November 8, 1983. There is no evidence of any other incident that might possibly be construed as misappropriation. Accordingly, I find that misappropriation of Respondent's funds was not a reason for Jacobs' discharge as Respondent's answers contend. The positing of a false motive for discharge warrants an inference there is an unlawful motive the employer wishes to conceal.[12] My decision with respect to Jacobs does not rest on this inference alone but it is entitled to some weight and has been considered along with the other relevant factors discussed in this decision.

Sharpe says Jacobs was discharged because his performance had started deteriorating while he was on the second shift, continued to deteriorate, until it reached the point on November 7, 1983, that Jacobs took a day to do an hour's work. When pressed for particulars, Sharpe conceded that a major production problem on the second shift was paint failure caused by bad paint. This obviously cannot be blamed on Jacobs. Sharpe further explained that, although Jacobs had trouble supervising and made mistakes in judgment, "That's common. We all do and that's part of the growing process." Although agreeing that Jacobs was out of town several times doing field maintenance work in October, Sharpe asserts that during that month Jacobs took too much time doing his portion of the work on some night cabinets. The final incident which led to Jacobs' discharge was, testifies Sharpe, that Sharpe thinks Jacobs took all day on November 7 to produce only seven or eight small drawer dividers, an hour's work. Sharpe is not sure how many dividers were produced. In view of Sharpe's uncertainty and Jacobs' positive testimony on the matter, I credit Jacobs that on November 7 he produced 24 dividers and also gave assistance to other employees in their work. Salyers gave no testimony on this matter. I further credit Jacobs that neither Sharpe nor Salyers ever complained about his work or attitude or told him his work performance needed improvement. Both Sharpe and Salyers contented themselves with vague assertions that they had spoken to Jacobs generally about overall plant and employee productivity.

Salyers testified that Jacobs was fired because of his declining leadership ability on the first shift, attitude, and inability to produce products in an orderly fashion. Salyers indeed told Jacobs that his discharge was caused by a dropoff in his work and attitude. He, like Sharpe, offered little in the way of particulars. As far as the claim of declining leadership ability on the first shift, there is no probative evidence to support the conclusion. The same is true of the "attitude" criticism. Neither Salyers

[10] *Rich's Precision Foundry*, 250 NLRB 1317, 1320 (1980), enfd. 667 F.2d 613 (7th Cir. 1981).

[11] I do not credit Sharpe, who concedes Jacobs told him of the purchase, that he told Jacobs to set up a weekly deduction schedule with Sharpe's father, and became angered when he told his father to make up Jacobs' final check and only then found Jacobs had made no such payments. Jacobs was more believable. Sharpe's father did not testify.

[12] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

nor Sharpe give any evidence to support the bare conclusions of Sharpe's November 8 memo insofar as it notes Jacobs dressed unsatisfactorily, "mouthed off" to Salyers, or used poor judgment when sorting scrap. Salyers, like Sharpe, does advert to the amount of time Jacobs spent working on night cabinets, even though conceding they were not rush jobs, and says he is sure other employees worked with Jacobs on these cabinets but "can't recollect" whether they did or not. Salyers adds that Jacobs failed to carry out his instructions on occasion, but cites no specific occasion.

Jacobs relates that he did indeed spend 14 to 16 days on the cabinets, and that this was due in large part to faulty instructions from Salyers. Salyers does not deny this claim and it is credited. Jacobs also credibly relates he finished the cabinets by himself except for the painting.

Mark Cox

According to Sharpe, Mark Cox was selected for layoff because all Cox wanted to do was shear and break work, wanted help on that work, and had no interest in performing other assembly functions even though he did so without protest. Sharpe's impression of lack of interest in duties other than shear and break was garnered from his observation that Cox took a long time and was lackadaisical when on the other duties. He adds that the problem of getting Cox to perform other functions was affecting Erwin's abilities as a supervisor because Cox always wanted a helper when shearing and breaking. This confused proffer simply does not make sense. Salyers testified that he chose Cox as one to be eliminated because Erwin had said that Cox did not want to do anything other than shear and break because that is what Cox excelled in. This testimony was then amended by Salyers on cross-examination when he explained that Erwin actually said that Cox liked to do shear and break best and would excel at that. Salyers added that he did not from that statement of Erwin arrive at the conclusion Cox did not want to do anything else but shear and break, nor was he of that opinion. Salyers agrees Cox would and did do other work.

Erwin relates that Cox was hired as a fabricator which usually includes only shear and break work. He continues that Cox occasionally did assembly work, and was not skilled at work other than shear and break, and it was sometimes a problem getting Cox to perform other functions. Erwin gives no details of any problems encountered with assigning Cox to other functions.

Cox, who gave direct answers without hesitation and impressed me as a credible witness, agrees that his primary job was shearing and breaking, and that he did other work once or twice a week as needed and instructed by Erwin. He never refused to do other work, or stated he would only do shear and break work. He never received any complaints or warnings, written or oral, from supervision about his work and, on October 13, 1983, was given a 30-cent pay raise and a $50 bonus by Sharpe who told Cox the reasons were that Cox had done good work on some cabinets and Sharpe liked the way he was working. The work referred to by Sharpe was apparently shear and break work.

Salyers laid Cox off about 3:15 p.m. on November 8, 1983, told Cox his work was good, and gave as a reason for the layoff the transfer of work to Wolf Welding.

Robert D. Fox Jr.

When Robert D. Fox Jr. was discharged on November 8, Salyers told him that he was fired because his work was unsatisfactory. Fox was told on hire that there was a 90-day probationary period. He was still within that period at the time of his discharge. In addition to general statements that Fox was not a satisfactory fabricator, Sharpe and Salyers focus on two specific incidents. The first involved a failure by Fox, in spite of explicit instructions, to use the proper clamps and jigs in performing welding fabrication, with the result that the finished products, carts, were warped and unsatisfactory. Fox concedes some carts he worked on within a day or two of his discharge were crooked, but claims this was due to a crooked jig. In the face of the testimony of Salyers, Erwin, and employee Keith Hudson to the effect that the crooked carts were the result of Fox's failure to follow instructions and due entirely to his poor work, I do not credit Fox's contention that the problem was due to a defective jig, and therefore find his work was indeed unsatisfactory on this occasion. In so finding I am mindful that he received a 15-cent raise on October 13 for good work, but this does not mean his work in the first week in November was satisfactory. The second incident Respondent adverts to occurred on November 8 when Fox did unacceptable aluminum welding work. Fox admits this work was unsatisfactory, but avers he told Respondent he could not do aluminum welding. There is no need to resolve this issue because it occurred on November 8, after the decision to discharge Fox had already been reached on November 7, and played no part in that decision.

Conclusions

Respondent's asserted reasons for a reduction of employees on November 8, 1983, and the selection of Jacobs and Cox lose persuasive effect because the evidence offered to support the reasons is singularly unconvincing and sometimes refutes the very reason it is introduced to support. Much of the supporting testimony offered by Respondent is given to sweeping generalization, displays no objective basis, and is the product of circumlocution. Some of Respondent's evidence reveals the pretextual nature of reasons advanced (e.g., the alleged misuse of company funds by Jacobs.) In short, Respondent's defenses are not convincing, and Respondent has failed to demonstrate that it would have taken the same action in the absence of union organizing activity. See *Wright Line*, 251 NLRB 1083 (1980). Accordingly, I find the terminations of Jacobs and Cox were designed to discourage union membership and activity, and violated Section 8(a)(3) and (1) of the Act.

With respect to Robert Fox, Respondent has demonstrated that he was a probationary employee whose work was unsatisfactory. It therefore cannot be said that Fox might not have been discharged for cause in the absence of union activity. This does not, however, answer the

question of whether he would have been discharged in any case. The matter is not entirely free from doubt, but I am persuaded that the frailty of Respondent's reasons for having any reduction of force on November 8, 1983, and its efforts at trial to suggest that Fox's poor aluminum welding, which was performed after the decision was made to discharge, was a reason for his discharge requires a conclusion that Respondent was in Fox's case, as well as the cases of Jacobs and Cox, consciously erecting pretextual defenses. As I have noted above, an inference of unlawful motivation is permissible in such circumstances. Moreover, the proffer of pretexts seriously diminishes the probative weight of evidence favorable to Respondent. On the evidence before me Respondent has not shown that it would have discharged Fox on November 8, 1983, if there had been no threat of union activity present, and has therefore not rebutted the General Counsel's prima facie case. His discharge is found to be in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Health Care Logistics, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jon B. Jacobs, Mark A. Cox, and Robert D. Fox Jr. in order to discourage union activity and union membership, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist order and notice posting, my recommended Order will require Respondent to offer Jon B. Jacobs, Mark A. Cox, and Robert D. Fox Jr. unconditional reinstatement to former jobs, or substantially equivalent positions if their former jobs no longer exist, and make them whole for all wages lost as a result of their unlawful discharge. Said backpay and interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[13] There was some indication at hearing that Respondent no longer manufactures, and that there may be a successor liable to remedy the unfair labor practices found. This is a matter for compliance proceedings if the Board agrees the law has been violated in this case. I shall also recommend that Respondent be ordered to remove from its files any reference to the terminations of Jon B. Jacobs, Mark A. Cox, and Robert D. Fox Jr. on November 8, 1983, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.

[13] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Health Care Logistics, Inc., Circleville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging union activity or membership in the Union, or any other labor organization, by discharging or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of employment.

(b)In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Jon B. Jacobs, Mark A. Cox, and Robert D. Fox Jr. immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for any loss of earnings they may have suffered by reason of their discriminatory discharge, in the manner set forth in the section of this decision entitled "The Remedy."

(b) Remove from its files any reference to the terminations of Jon B. Jacobs, Mark A. Cox, and Robert D. Fox Jr., on November 8, 1983, and notify them in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Circleville, Ohio offices and facilities copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Operative Plasterers and Cement Masons International Association, Local Union 744, AFL–CIO (Chamac Inc.) ***and*** **Dennis O. Jones.** Case 21–CB–8734

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 31 July 1984 Administrative Law Judge Earldean V. S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Operative Plasterers and Cement Masons International Association, Local Union 744, AFL–CIO, San Diego, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in its governing documents the restrictions on resignations set forth in bylaw 47(d) and in the corresponding provision of the Operative Plasterers and Cement Masons International Association's constitution.

(b) Restraining or coercing Dennis O. Jones, Orvel Jones, or any other employee who has resigned from, and is no longer a member of, the Respondent in the exercise of the rights guaranteed them in Section 7 of the Act, by fining them because of their post-resignation conduct in refusing to leave a jobsite when requested to do so by the Respondent's business agent.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from its governing documents the restrictions on resignations set forth in bylaw 47(d) and in the corresponding provision of the Operative Plasterers and Cement Masons International Association's constitution.

(b) Rescind the fines levied against Dennis O. Jones and Orvel Jones because they refused to leave a jobsite when requested to do so by the Respondent's business agent; expunge from its records any reference to such fines and all disciplinary actions which led thereto and notify them in writing that this has been done; and refund any money paid to the Respondent as a result of such fines, plus interest.

(c) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's finding that, although the Respondent had not notified its International Association of its receipt of Dennis and Orvel Jones' resignations prior to their refusal of the Respondent's order to leave the jobsite of a nonsignatory employer, this notification was not a precondition under the Respondent's bylaws to perfecting their resignations. We also agree with the judge's conclusion that the Respondent accordingly violated Sec. 8(b)(1)(A) of the Act by fining Dennis and Orvel Jones for refusing its order after they had effectively resigned from the Respondent's membership. We find, moreover, that the restrictions on resignations in the Respondent's bylaws are invalid, and that the Respondent violated Sec. 8(b)(1)(A) by imposing fines on Dennis and Orvel Jones pursuant to such provisions. See *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984).

For the reasons stated in his dissenting opinion in *Neufeld Porsche*, supra, Member Zimmerman agrees that Sec. 47(d) of Respondent's bylaws, which restricts resignations only to union members who have been on the rolls for 5 years, constitutes an unreasonable restriction on a member's right to resign and violates Sec. 8(b)(1)(A) of the Act.

[3] The order is modified to require the Respondent to notify Dennis and Orvel Jones, in writing, that it has rescinded its fines against them and that it has expunged from its records evidence of its unlawful discipline of them. It is also modified to require the Respondent to expunge the restrictions on resignations set forth in bylaw 47(d) of its governing documents. See *Neufeld Porsche-Audi*, supra.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

Accordingly, we give you these assurances.

WE WILL NOT restrain or coerce Dennis O. Jones, Orvel Jones, or any other employee who has resigned from, and is no longer a member of, the Union, in the exercise of the rights guaranteed them in Section 7 of the Act, by fining them because of their postresignation conduct in refusing to leave a jobsite when requested to do so by our business agent.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the fines levied against Dennis O. Jones and Orvel Jones because they refused to leave a jobsite when requested to do so by our business agent, and expunge from our records any reference to such fines and all disciplinary actions which led thereto and notify them in writing that this has been done; and WE WILL refund any money paid to us as a result of such fines, plus interest.

WE WILL expunge from our governing documents the restrictions on resignations set forth in bylaw 47(d) and in the corresponding provision of the Operative Plasterers and Cement Masons International Association's constitution.

MASONS INTERNATIONAL ASSOCIATION LOCAL UNION 744, AFL–CIO

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge. This matter was heard before me in San Diego, California on May 3, 1984. The charge was filed by Dennis O. Jones, an individual, on January 18, 1984, and served on Operative Plasterers and Cement Masons International Association, Local Union 744, AFL–CIO (Respondent), on January 19, 1984. The complaint, which issued on February 8, 1984, alleges that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act). The basic issue herein is whether Respondent imposed court-collectible fines on employees Dennis Jones and Orvel Jones for refusing Respondent's instructions to leave a jobsite where they were working for a nonsignatory contractor at a time when both Dennis Jones and Orvel Jones had tendered valid resignations from Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Chamac Inc. (the Employer) has been a California corporation engaged in business as a general building contractor in Southern California. In the normal course and conduct of its business operations, during the 12-month period preceding the issuance of the complaint herein, the Employer performed services valued in excess of $50,000 directly to customers located outside the State of California and, during that same period, purchased and received goods valued in excess of $50,000 directly from suppliers located within the State of California, each of which suppliers, in turn, purchased and received those same goods directly from suppliers located outside the State of California.

The complaint alleges, Respondent admits, and I find that the Employer is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The facts herein are undisputed. Dennis and Orvel Jones were employed by Chamac at the time that Chamac's most recent agreement with Respondent expired in mid-June 1983.[1] They continued to work for Chamac and, after consulting with an attorney, submitted individual written resignations from the Union. The resignations, which were delivered to the Union office on June 21 by Bruce St. John, state:

> I hereby resign from your union effective 6-21-, 1983, or the earliest legally-permissible date. However, I will continue to pay all regular dues and fees.

[1] Unless otherwise indicated, all dates herein will be in 1983.

St. John testified, without contradiction, that he gave the completed resignation forms of both Dennis and Orvel Jones to the man behind the counter at the union office, whereupon the man behind the counter showed him a paper which St. John read and which seemed to indicate that the resignations submitted by the Joneses were not valid. St. John asked for a copy of the paper, but was told he could not have one. He then told Dennis Jones, who was waiting outside, that the man behind the counter had shown him a typewritten letter which seemed to indicate that the resignations were invalid. St. John further reported that this person would not give him a copy of the letter, but said that Dennis and Orvel Jones would receive copies of it in the mail.

Later that day, Dennis Jones returned to the union office and spoke to the office clerk, Larry French. Jones said he was there in reference to the forms he had delivered to Respondent. French said, "Yes, those are invalid. They are no good." Jones asked why, and French handed him a copy of a letter. According to Jones, the letter said they could not resign from the Union unless they were members in good standing for 5 years. Jones told French that both he and his father, Orvel Jones, had been in the Union for over 5 years. French said that was not the part which pertained to them. Another portion of the letter said a member had not properly resigned until the secretary-treasurer mailed a certain form to the International and they received the form. Jones said it was their understanding that the resignations were valid and he asked French if he could keep the letter. French said no, and Jones left. Jones denies, without contradiction, that he ever received a copy of the letter he was shown by French.

On October 17, Woodrow Bailey, an officer of Respondent, came onto the Chamac jobsite where Dennis and Orvel Jones were working. According to Dennis Jones, Bailey said, "You know, I'm going to have to ask you guys to leave." Dennis Jones said, "Yes, I understand that and we can't leave. We are working for Chamac and we want to do their work." Bailey said, "Okay, as long as you understand."

On November 29, Respondent sent identical letters to Dennis and Orvel Jones, the body of which reads:

> Please be advised that on *Wednesday, December 21, 1983, at 7:30 p.m.*, at 3909 Centre Street, San Diego, California 92103, charges preferred against you by *Woodrow W. Bailey* will be heard by the Executive Board of Cement Masons Local #744.
>
> Any evidence, witnesses who are members of O.P. & C.M.I.A., etc., should be presented at this time.
>
> If you should have any further questions regarding the above, please feel free to contact the undersigned.

Enclosed with each of the letters was the following excerpt from Respondent's bylaws:

> VIOLATION OF LOCAL UNION BYLAWS
>
> ART. 3. SEC. 1 When members are called off the job by the Business Agents of this Union, they shall immediately quit work without discussion and leave the job without making any disturbance.

The hearing was held as scheduled on December 21. Bailey explained the basis of the charge, that he had asked Orvel and Dennis Jones to leave the jobsite and they had refused. When the Joneses pleaded "Not guilty," one of the board members asked how could they plead not guilty if the facts were correct. Dennis Jones said it was his understanding that they did in fact resign from the Union, that they had submitted their resignations with the intention to continue to pay dues, which they had been paying, and it was his understanding that they could work a nonunion job and not be subject to being fined.

Nevertheless, fines were imposed against them and each of them was so notified by letter dated January 13, 1984, the body of which reads:

> Please be advised that the fine of $250.00 imposed on you by the Executive board of Cement Masons Local #744, has been reduced to $200.00 by the International Association. In addition to the $200.00 fine, you must also submit $40.00, which is the percentage due the International, for a total of $240.00.
>
> You are advised that you have the right to appeal or protest this fine, but you must enter such protest within 30 days that follow the registration of such fine, or until February 10, 1984. If you desire to protest, the fine must be paid to the International in full by Money Order or Certified Check, before the General Executive Board will consider any protest.
>
> You are further advised that this fine will be held in abeyance for sixty days, or until March 10, 1984, and if not paid or arrangements made to pay by that date, you will be dropped from the rolls.

The complaint alleges that by the imposition of these fines following Dennis and Orvel Jones' resignations from the Union, Respondent has violated Section 8(b)(1)(A) of the Act. The Union argues that the resignations were not valid and therefore the fines were lawful. It is well established that a labor organization violates Section 8(b)(1)(A) of the Act when it fines or attempts to discipline an employee for conduct in which the employee engages following the employee's valid resignation from the labor organization. It is not necessary to show that the union has actually instituted a court proceeding seeking to enforce the fine. *NLRB v. Textile Workers Local 1029, Granite State Joint Board*, 409 U.S. 213, 217 (1972); *Machinists Local 1994 (O.K. Tool Co.)*, 215 NLRB 651 (1974); *Auto Workers Local 647 (General Electric)*, 197 NLRB 608 (1972); *Chemical Workers Local 6-578 (Gordy's, Inc.)*, 238 NLRB 1227 (1978); *Electrical Workers IBEW Local 2131 (Rucker Electronics)*, 217 NLRB 46 (1975). Further, the Board has recently held that a union may not lawfully restrict the right of its members to resign from membership. *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984).

Respondent argues, in essence, that it did not seek to restrict the right of Dennis and Orvel Jones to resign,

but rather that its constitution and bylaws contain a valid rule which sets forth the method by which a member may effect his resignation from Respondent, that Orvel and Dennis Jones did not comply with this rule and therefore their resignations were not valid and, accordingly, the fines were permissible under the Act.

The provision on which Respondent relies reads as follows in both the International constitution and Respondent's bylaws:

> Section 47(d). Any member who has been on the rolls of the International Association for the period of five (5) continuous years prior to requesting right to resign, may submit resignation if paid up in all dues and assessments at the time of resigning and his Local Union may accept such resignation but must so notify the International Association on appropiate forms to be made available by the General Secretary-Treasurer.

Clearly, the restrictions as to length of membership and the payment of dues and assessments are unlawful. However, no attempts to enforce these restrictions are involved here, and essentially Respondent is arguing that a requirement that resignations be submitted to the International is permissible. It is not clear from *Neufeld* whether a union may enforce a reasonable rule as to the method or form of a resignation. However, even assuming arguendo that such a rule is permissible, Section 47(d) does not appear on its face to prescribe a method of effecting a resignation. Rather the rule appears to prescribe only for notification from the Local Union to the International that the Local Union has accepted the resignation.

Here, Dennis and Orvel Jones tendered their unequivocal resignations on June 21. At that point, they had done all they were required to do under Respondent's rules. Yet Respondent is contending that the resignations were not perfected because as of October 17, the day they refused to leave the jobsite on the request of a union officer, Respondent and/or its parent body had not completed the ministerial acts required by Rule 47(d). Thus even if Section 47(d) is interpreted as urged by Respondent and if a rule is permissible which provides that resignations are effective only upon submission to the International Union, the rule was not reasonably enforced as required by *Scofield v. NLRB*.[2] Accordingly, I find that by imposing fines on Dennis Jones and Orvel Jones, former members who had duly resigned from the Union, for refusing to leave a jobsite, where they were working for a nonsignatory contractor, when instructed to do so by Respondent's business agent, Respondent has violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. Chamac is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning ofSection 2(5) of the Act.
3. By imposing court-collectible fines on Dennis Jones and Orvel Jones, former members who had duly resigned from Respondent, because of their postresignation conduct in refusing to leave a jobsite when requested to do so by Respondent's business agent, Respondent has committed unfair labor practices in violation of Section 8(b)(1)(A) of the Act.
4. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

Having found that Respondent has unlawfully imposed fines against Dennis Jones and Orvel Jones, I shall recommend that Respondent be ordered to rescind the unlawful fine levied against them because they refused to leave a jobsite when requested to do so by Respondent's business agent, refund any money paid to Respondent as a result of such fines, plus interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977),[3] and expunge from its records any reference to the fines and all disciplinary actions which led thereto.

[Recommended Order omitted from publication.]

[2] In *Scofield v. NLRB*, 394 U.S. 423 (1969), the Supreme Court articulated a three-part test for determining when a union disciplinary rule is reasonable. A union is free to enforce a properly adopted rule that (1) reflects a legitimate union interest, (2) impairs no policy that Congress has embedded in the labor laws, and (3) is reasonably enforced against union members.

[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Local 825, A, B, C, D and R, International Union of Operating Engineers, AFL–CIO *and* George Harms Construction Co., Inc. and its wholly-owned subsidiary G. R. Roberts Construction Co., Inc. and United Steelworkers of America, Local 15024, AFL–CIO, CLC. Case 4–CD–627

14 December 1984

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The charge in this 10(k) proceeding was filed 11 April 1984 by the Employer, alleging that the Respondent, Local 825, A, B, C, D, and R, International Union of Operating Engineers, AFL–CIO (Operating Engineers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by United Steelworkers of America, Local 15024, AFL–CIO, CLC (Steelworkers). The hearing was held 9 August 1984 before Hearing Officer David Berger.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Company, George Harms Construction Company, Inc. and its wholly-owned subsidiary, G. R. Roberts Construction Company, Inc., a New Jersey corporation, is engaged in heavy and highway construction, from its P.O. Box 817, Farmingdale, New Jersey 07727 location. During the 12-month period prior to the hearing, the Employer's gross volume of business was in excess of $500,000 and it purchased and received supplies valued in excess of $50,000 directly from points located outside the State of New Jersey. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Operating Engineers and Steelworkers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In 1983 the Employer was low bidder on a contract to replace the Bridgeboro Bridge on Route 130 which connects Delran Township with Delanco and Willingboro Townships. The contract is with the New Jersey Department of Transportation and the project is funded with both Federal and state funds.

Work began on the project in November 1983 and the target date for completion is December 1986. In addition to building a new bridge, the Employer is involved in road construction at either end of the bridge, including filling, grading, paving, and curb work. The Employer hired labor to do the work on its project through two wholly owned subsidiaries, G. R. Roberts Construction Company, Inc. (a party to this proceeding), and George Harms Excavating Corporation. The Employer employed employees represented by the Steelworkers to perform various tasks, including the operation of heavy and power-driven equipment. There were approximately 60 pieces of such equipment on the jobsite, including cranes, bulldozers, graders, bucket loaders, compaction equipment loaders, and a concrete plant.

According to testimony of the Employer's president George Harms in late September 1983 he met with Pat Campbell and Kenneth White, business manager and business agent, respectively, for the Operating Engineers. Campbell told Harms that he wanted to negotiate a contract for the Operating Engineers to operate heavy and power-driven equipment on the instant project. Harms replied that he could not negotiate such a contract with the Operating Engineers because he (i.e., the Employer) already had a contract with the Steelworkers covering the work in dispute. According to Harms, Campbell asserted that the Employer's contract with the Steelworkers was "no longer any good," because large bridge projects such as the instant one were "his [i.e., Campbell's] ballgame and we [i.e., Employer] had to employ his people to run the equipment." Harms offered to employ a couple of operating engineers. Campbell declared that to be "unacceptable." Instead, Campbell suggested that he would take the Employer's steelworkers into the Operating Engineers, and then the Employer could negotiate a contract with the Operating Engineers. Harms declined, and the meeting ended.

Work began on the project shortly thereafter, in November 1983, with the Employer's employees represented by the Steelworkers performing the work in dispute.

During the first week of January 1984[1] Campbell and White came to the jobsite. Campbell again sug-

[1] Unless otherwise indicated, all dates are in 1984.

gested that Harms negotiate a contract with the Operating Engineers. Harms again offered to hire a couple of employees represented by the Operating Engineers, but Campbell indicated that that was not an adequate solution. Campbell advised Harms to do what Harms thought he should do and that Campbell in turn would "do what he had to do."

The following week, White came to the jobsite with a photographer who took pictures of employees' personal vehicles as well as pictures of construction equipment at the site.

There was no further contact between the Employer and the Operating Engineers until April. According to Harms, rumors were circulating on 5 April that there was to be a "mass demonstration" on Saturday, 7 April, at the jobsite. On 7 April there was a demonstration of 400 to 500 people picketing the site. The picket signs read:

NOTICE TO THE PUBLIC
EMPLOYEES OF
GEO. HARMS CONST. CO. INC.
OPERATING POWER DRIVEN
CONSTRUCTION
EQUIPMENT AT THIS JOB SITE ARE
RECEIVING LESS THAN LOCAL 825's
AREA
STANDARD WAGES AND CONDITIONS
WE HAVE NO DISPUTE WITH ANY
OTHER
EMPLOYER AT THIS SITE
LOCAL 825, A-B-C-D&R
INTERNATIONAL UNION OF
OPERATING ENGINEERS
AFL-CIO

The Employer immediately obtained a court order limiting the number of pickets to 30. From 7 April onward, there was daily picketing of the jobsite. As a result of the picketing a number of the Employer's suppliers refused to make deliveries, delaying work on the project.

On 11 April the Employer filed an unfair labor practice charge against the Operating Engineers, alleging that the picketing was in violation of Section 8(b)(4)(D) of the Act. On 23 April the Regional Director for Region 4 sought a temporary injunction against the picketing under Section 10(l) of the Act in the United States District Court for the District of New Jersey. On 3 May, in a letter to the Regional Director, the Operating Engineers "specifically disclaim[ed] any and all interest in" the work in dispute. Subsequently, the Operating Engineers and the Regional Director entered into a consent decree of the Federal district court, under the terms of which the Operating Engineers were enjoined from picketing the jobsite for a period of 14 days, from 5 through 19 May.

On 21 May the Operating Engineers resumed picketing at the jobsite with the same signs that had been used prior to the hiatus. On 6 July the Regional Director filed a motion for further injunctive relief under Section 10(l) of the Act. On 16 July the court granted the Regional Director's motion, and issued an order enjoining the Operating Engineers from engaging in picketing the jobsite for a period of 30 days, from 16 July through 16 August.[2]

On 23 July in another letter to the Regional Director, the Operating Engineers called the Regional Director's attention to its earlier, 3 May, specific disclaimer of interest in the work in dispute, asserted that there was therefore no controversy over the assignment of the work in dispute, and requested that the hearing in the instant case be "dismissed." The Operating Engineers' request was not granted.

B. *Work in Dispute*

The disputed work involves the operation of heavy and power-driven equipment for George Harms Construction Company, Inc. and its wholly-owned subsidiary G. R. Roberts Construction Company, Inc., at the Bridgeboro Bridge construction site on Route 130 in Willingboro, Delran, and Delanco Townships, New Jersey.

C. *Contentions of the Parties*

None of the parties to this proceeding filed briefs with the Board. However, statements of the parties' positions were made at the hearing.

The Employer contends that a violation of Section 8(b)(4)(D) has been committed, that there is a dispute over the above-described work, and that the Operating Engineers' disclaimer is a hollow disclaimer. The Employer contends further that the work should be assigned to the employees represented by the Steelworkers, and that its collective-bargaining agreement with the Steelworkers, company preference and past practice, and economy and efficiency of operation all favor that result.

As seen, prior to the hearing the Operating Engineers had specifically disclaimed any interest in the work in dispute. At the start of the 9 August hearing, the attorney for the Operating Engineers stated that "We specifically, and unequivocally disclaim any interest" in the work in dispute. The Operating Engineers steadfastly adhered to that disclaimer during the hearing. The Operating Engi-

[2] The hearing in this case closed on 9 August, at which time the 30-day injunction was still in effect.

neers argued that its picketing was at all times permissible "area standards" picketing, and that it at no time had an unlawful object of forcing the Employer to assign the work in dispute to employees represented by the Operating Engineers rather than to the Employer's employees represented by the Steelworkers. In the alternative, the Operating Engineers argued that the initial 14-day hiatus in picketing, from 5 through 19 May, and the 16 July through 16 August hiatus in picketing in effect at the time of the 9 August hearing, brought on by the court injunction, "wiped the slate clean" of any arguably unlawful aspects of its picketing before and after the first hiatus; that in the absence of any evidence of potentially unlawful conduct on its part subsequent to the start of the 30-day hiatus in picketing on 16 July, there was no reason for conducting the hearing and it should be adjourned.

The Operating Engineers' request for adjournment of the hearing was not granted. Upon completion of preliminary matters and statements of position, the attorney for the Operating Engineers, consistent with his position as summarized above, voiced a standing objection in advance to the introduction of any evidence about events prior to 16 July. Following the hearing officer's overruling of that objection, the attorney for the Operating Engineers left the hearing room and remained away for the duration of the hearing.

With regard to the assignment of the work in dispute, the Steelworkers asserted at the hearing that they agreed completely with the position taken by the Employer.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) there is no agreed-upon method for the voluntary resolution of the dispute.

With respect to (1) above, the record establishes that in September 1983 and again in January 1984, before the start of its alleged area standards picketing in April 1984, the Operating Engineers demanded that the disputed work be assigned to employees it represented, rather than to employees represented by the Steelworkers. On 7 April the Operating Engineers began picketing the jobsite and several suppliers refrained from making deliveries. As noted above the Operating Engineers later stopped picketing for 14 days pursuant to a consent decree and sent a letter to the Regional Director disclaiming the disputed work. After the 14-day hiatus they began picketing again carrying the same signs as they had carried prior to the hiatus.

The Board in a 10(k) proceeding is only required to determine that reasonable cause exists to believe that Section 8(b)(4)(D) of the Act has been violated. Here, the Operating Engineers made unequivocal demands for the work in dispute in September 1983 and again in January 1984. Although the Operating Engineers subsequently disclaimed the work in dispute at the time of its first hiatus in picketing pursuant to the May consent decree, and again disclaimed the work in dispute at the time of its second hiatus in picketing pursuant to the July court injunction, these disclaimers do not per se "wipe the slate clean" of the evidence of an unlawful object shown by the earlier demands for the work in dispute. Moreover, the validity of the Operating Engineers' asserted area standards picketing is undermined by the fact that it made no attempt whatsoever to determine the accuracy of its claim that the Employer was paying less than area standard wages. Indeed, had the Operating Engineers simply inquired, it would have found out that, in view of the combined Federal and state funding of the instant project, the Employer was required by both Federal and state statute to pay its employees on the project the prevailing area standard wages and benefits—which, as it turns out, are no less than the wages and benefits that the Operating Engineers itself would receive for doing the work in dispute.[3] There is no evidence that the Employer failed at any time to pay the required area standard wages—a fact which the Operating Engineers would have learned had it asked prior to starting, or at any time during, its alleged area standards picketing.

In consideration of the above circumstances, we find reasonable cause to believe that the Operating Engineers' alleged area standards picketing was pretextual in nature, designed to mask an unlawful object of obtaining the work in dispute for its members, as evidenced by the demands for that work made by the Operating Engineers prior to the onset of its alleged area standards picketing. In this regard, we find that the Operating Engineers' initial 3 May disclaimer of the work in dispute was tainted by what we have reason to believe was subsequent pretextual area standards picketing following the first hiatus, and that the validity of the Operating Engineers subsequent disclaimers on 23 July and again at the hearing are materially under-

[3] The Employer's president George Harms testified that the New Jersey prevailing wage law as well as the Federal Davis-Bacon Act applied to the wages it paid on the instant project. According to Harms, the prevailing wages and benefits paid pursuant to the state statute were the local union wage rates, i.e., in this case, the Operating Engineers' wage and benefit rates. Also according to Harms, the New Jersey prevailing wage rate on this project was higher than the wage rate that would have been required under the Davis-Bacon Act.

mined by the apparent invalidity of the initial disclaimer.

In sum, we find there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated and that the Operating Engineers continues to claim the work in dispute.

With respect to an agreed-on method for the voluntary resolution of the dispute, there is no evidence in the record and no party otherwise contends that such a method binding on all parties exists for the voluntary resolution of this dispute. We therefore find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electric Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

There is no evidence that either of the labor organizations concerned herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees.

G. R. Roberts Construction Company, Inc., the wholly-owned subsidiary of the Employer responsible for performance of the work in dispute, has had a collective-bargaining agreement with the Steelworkers for about 12 years. The most recent agreement covers the period from 1 January 1982 to 31 December 1984. The agreement covers all persons employed by G. R. Roberts in the performance of construction work including employees who operate heavy and power-driven equipment.

The Employer has no collective-bargaining agreement with the Operating Engineers. Accordingly, while there are no certifications which would favor award of the work to employees represented by either labor organization, the collective-bargaining agreement between the Employer and the Steelworkers favors an award of the disputed work to employees represented by the Steelworkers.

2. Company preference and past practice

The Employer's president Harms testified that during the past 4 years the Employer has completed three similar bridges. All three involved the same kind of work as the Bridgeboro Bridge including the operation of heavy and power-driven equipment. On these and other construction projects over many years, the Employer has employed employees represented by the Steelworkers to operate the heavy and power-driven equipment. Harms testified that the Employer has been fully satisfied with the work performed by employees represented by the Steelworkers, that they are efficient, multiskilled, and "get the work done" and the Employer prefers they be assigned the work in dispute. Accordingly, we find that company preference and past practice favor award of the work to employees represented by the Steelworkers.

3. Area and industry practice

The record does not establish the existence of a particular area or industry practice of assigning the work in dispute to employees represented by either the Steelworkers or Operating Eningeers. According to Harms, employees represented by the Operating Engineers as well as employees represented by the Steelworkers operate heavy and power-driven equipment in the area. Accordingly, this factor does not contribute to the determination of the present dispute.

4. Relative skills

Harms testified that its employees represented by the Steelworkers have operated heavy and power-driven equipment in a satisfactory manner, and that their skills and abilities are excellent. However, we also note that, according to Harms, employees represented by the Operating Engineers also operate heavy and power- driven equipment in the local area. Accordingly, it is reasonable to infer that employees represented by the Operating Engineers also possess the requisite skills to perform the work in dispute in a satisfactory manner. Accordingly, we find that the factor of relative skills does not favor the award of the work in dispute to either Union.

5. Economy and efficiency of operations

The Employer asserts that working with employees represented by the Steelworkers is more efficient and economical. However, the Employer presented no basis for this belief. Accordingly, the Employer's view is considered in relation to Employer preference. As to efficiency and economy, there is nothing in the record that indicates this

factor favors award of the work in dispute to employees represented by either Union.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the United Steelworkers of America, Local 15024, AFL–CIO, CLC are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement and the Employer's preference and past practice. In making this determination, we are awarding the work to employees represented by the United Steelworkers of America, Local 15024, AFL–CIO, CLC not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of the George Harms Construction Company, Inc. and its wholly-owned subsidiary G. R. Roberts Construction Company, Inc. represented by the United Steelworkers of America, Local 15024, AFL–CIO, CLC are entitled to perform the operation of heavy and power-driven equipment for George Harms Construction Company, Inc. and its wholly-owned subsidiary G. R. Roberts Construction Company, Inc. at the Bridgeboro Bridge construction site on Route 130 in Willingboro, Delran, and Delanco Townships, New Jersey.

2. Local 825, A, B, C, D, and R, International Union of Operating Engineers, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force George Harms Construction Company, Inc. and its wholly-owned subsidiary G. R. Roberts Construction Company, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 825, A, B, C, D and R, International Union of Operating Engineers, AFL–CIO shall notify the Regional Director for Region 4 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Kut-Kwick Corporation *and* Mark B. McCullum. Case 10–CA–19484(E)

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 4 June 1984 Administrative Law Judge Hutton S. Brandon issued the attached supplemental decision on application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA). The Applicant, Kut-Kwick Corporation, filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Applicant, Kut-Kwick Corporation, Brunswick, Georgia, for an award under the Equal Access to Justice Act is dismissed.

[1] The Applicant excepts to the judge's failure to specifically rule on its "Request for Non-Production of Certain Information." On 13 March 1984 the General Counsel filed a motion to dismiss based in part on the Applicant's failure to furnish the net worth of the individual majority shareholder of its parent corporation. On 23 March 1984 the Applicant, in response to the motion, contended that the contested information need not be produced as it was irrelevant to its application and in contravention of the Board's Rules and Regulations.

On 28 March 1984 the judge denied the General Counsel's motion to dismiss but specifically directed the Applicant to provide the contested information. Rather than provide the information, however, the Applicant filed with the judge a "Request for Non-Production of Certain Information," reiterating its contention that it should not be required to produce the information. The judge dismissed the application on the basis of the filing deficiency without ruling on the Applicant's motion.

We find that the judge committed no prejudicial error in dismissing the application before ruling on the Applicant's motion. The judge on 28 March 1984 unequivocally directed the Applicant to submit the contested information after considering the Applicant's contention that it was not required to do so. The judge was not required to rule on this issue a second time before issuing his decision. It is the Applicant's burden to comply with the EAJA filing requirements, and its attempt to unduly delay this proceeding contravenes the Board policy of disposing of fee proceedings with dispatch and minimum cost.

SUPPLEMENTAL DECISION AND ORDER

(Equal Access to Justice Act)

HUTTON S. BRANDON, Administrative Law Judge. This is a supplemental proceeding under the Equal Access to Justice Act (EAJA) (Pub. L. 96–481; 94 Stat. 2325; 5 U.S.C. § 504), and Section 102.143 et seq. of the Board's Rules and Regulations.

Kut-Kwick Corporation, herein called Applicant, filed on February 13, 1984,[1] an application for an award of fees and expenses under EAJA seeking a total of $12,487.41 for cost in litigating a complaint issued in the underlying case on September 16, 1983. I issued a decision on January 12 (JD–(Atl)–1–84) in which I recommended that the Board issue an order dismissing the complaint. No exceptions were filed to the decision and the Board, on February 15, issued an order adopting the decision. By order dated February 23, the Board referred the application to me for appropriate action.[2]

The General Counsel, on March 13, pursuant to Section 102.15(a) of the Board's Rules, filed a motion to dismiss the application on the grounds that the application: (1) failed to set forth sufficient information to establish that Applicant meets all requirements of eligibility because it failed to specify the absence of affiliates other than those named and otherwise failed to establish the net worth of all affiliates; (2) failed to specify the category and work locations of employees as required by Sections 102.147(a) and 102.143(g); (3) failed to fully document the fees and expenses for which an award was sought; (4) improperly sought fees and expenses incurred prior to issuance of the complaint in the case; and (5) improperly included fees and expenses incurred in the filing of the application. The General Counsel asserted as further grounds for dismissal that the General Counsel's position in the underlying case was "substantially justified."

On March 23, Applicant filed a reply to the General Counsel's motion supplying in part information relative to the alleged deficiencies claimed by the General Counsel and expressing a willingness to provide even further information if directed by me. On the same date, Applicant also filed a motion to supplement its application for fees adding $1995 for further expenses.

By Order dated March 28, I granted the General Counsel's motion to dismiss to the extent of dismissing Applicant's claim for precomplaint legal fees. I denied the General Counsel's motion to dismiss in all other repects. By the same order, I granted Applicant's unopposed nonconfidential motion to withhold information from public disclosure and Applicant's motion to supplement its application. The same order directed Applicant to supply within 14 days of the order further information with respect to its net worth to specifically include the net worth of the majority stockowner of Applicant's parent company, Torco, Inc. (Torco). Finally, the order

[1] All dates are in 1984 unless otherwise stated.

[2] The application was filed subsequent to the expiration of the period for filing exceptions under the Board's Rules, but 2 days prior to the date of the Board's Order adopted, in the absence of exceptions, the recommended Order in the initial decision. In her motion to dismiss, the General Counsel noted the filing and order dates and stated she assumed the Board considered the filing as timely. However, in her answer, the General Counsel attacks the application as not filed in accordance with the Board's Rules at 20 CFR 102 "issued . . . pursuant to 5 U.S.C. 504(c)(i)." It is not clear from the memorandum accompanying her answer whether the General Counsel now contends the application was prematurely filed. In any event, the Board having accepted the original filing prior to its entry of a final order, it must have considered it timely filed. At that point in time the entry of the order was simply a ministerial act. Accordingly, and in the absence of any showing of prejudice by the General Counsel, I conclude the application herein was not untimely filed.

sua sponte extended the time for the General Counsel to file an answer in the matter to 30 days following service by Applicant on the General Counsel of the information required from the Applicant under the order.

On April 13, pursuant to the March 28 order, Applicant submitted additional information, except that Applicant took the position that the personal net worth of the majority stockholder of Applicant's parent company was "unrelated to the two companies." Further, Applicant related that such information regarding the net worth of the majority stockholder was not available to it.

On May 11, the General Counsel filed her answer contending, inter alia, that Applicant was ineligible inasmuch as Applicant had not demonstrated that its net worth, including the personal net worth of the majority stockowner of Applicant's parent corporation, fell within the standards set by the EAJA. I concur in the General Counsel's position as set forth below and find it unnecessary to treat the other issues raised in the General Counsel's answer.[3]

On May 11, the General Counsel filed her answer contending, inter alia, that Applicant was ineligible inasmuch as Applicant had not demonstrated that its net worth, including the personal net worth of the majority stockowner of Applicant's parent corporation, fell within the standards set by the EAJA. I concur in the General Counsel's position as set forth below and find it unnecessary to treat the other issues raised in the General Counsel's answer.[3]

Section 102.143(g) provides:

> The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant . . . will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant and other than those described in this paragraph may constitute special circumstances that would make an award unjust.

This rule is identical to the model rule promulgated by the Administrative Conference of the United States which explains the rule as follows:

> The final model rule, accordingly, requires aggregation of net worth . . . when an individual or entity holds a majority interest in an applicant and when an applicant holds a majority interest in another entity, unless the adjudicative officer determines that such treatment would be unjust in light of actual relationship between the affiliated entities. When an applicant owns less than 50% of an entity, we believe that the employees should not be aggregated and that inclusion of the interest itself (rather than the second entity's entire net worth) in the assets of the applicant will ordinarily be adequate to reflect the applicant's net worth. 46 FR 39200 et seq.

The rule, as explained, was applied in *Glenmar Cinestate, Inc.*, JD–171–83, adopted in the absence of exceptions in an unpublished order of the Board dated May 24, 1983. There, Administrative Law Judge Gershuny in finding a majority stockholder in a parent corporation of an applicant to be an "affiliate" for purposes of the rule, stated (slip op., p. 3):

> The rules thus establishes two criteria relevant to the present case: first, it looks to control of majority ownership of an applicant's voting stock, rather than control of the applicant itself and, second, it looks not only to direct control of that majority interest, but to indirect control as well. As to the first element, the test is a simple one—only those owning or controlling more than 50% of the voting stock are to be considered an affiliate. As to the second element, the indirect control of that majority ownership, the test may not be as simple as the inquiry may extend to majority ownership of an entity which has a majority—and thus a controlling—interest in the applicant.

Judge Gershuny went on to find:

> On this record, application of the rule is an uncomplicated one. Farragut [corporate owner of applicant], with its 100% stock ownership, is an affiliate of applicant and Cook, [an individual], with his 51% stock ownership in Farragut, controls indirectly Farragut's ownership of Applicant's stock. Cook thus falls not only within the terms of the regulations, but within the spirit of the Act as well. As to the latter, it must be remembered that the purpose of the Act is the aid of truly small businesses, rather than those that are part of larger groups or affiliated firms. One has only to substitute the name of a multinational corporate giant for that of Cook to see the importance of including as affiliates those who indirectly (through majority ownership of a parent) control a majority interest (or greater) of the party to the administrative proceeding.

The application of Section 102.143(g) to the instant case is as clear and uncomplicatd as it was in *Glenmar Cinestate, Inc.* Applicant is a wholly-owned subsidiary of Torco so that Torco is clearly an affiliate. The individual owner of Torco with his 100-percent stock ownership in Torco controls indirectly Torco's ownership of Appli-

[3] Such other issues argued by the General Counsel include her claim that issuance of the underlying complaint was "substantially justified," the claim that Applicant's net worth statement is inadequate even as enlarged by Applicant's responses to my March 28 order to establish eligibility, and the claim that Applicant's fees and expenses are unreasonable and not sufficiently detailed.

[3] Such other issues argued by the General Counsel include her claim that issuance of the underlying complaint was "substantially justified," the claim that Applicant's net worth statement is inadequate even as enlarged by Applicant's responses to my March 28 order to establish eligibility, and the claim that Applicant's fees and expenses are unreasonable and not sufficiently detailed.

cant. Applicant has not demonstrated how treatment of the individual owner as an affiliate is unjust or contrary to the purposes of the Act. Accordingly, I am compelled to conclude that the individual owner of Torco is an affiliate under the rule. It follows that Applicant has failed to establish its eligibility under the EAJA since its net worth statement does not include the personal net worth of its affiliate, the individual owner of Torco. Because Applicant has declined to provide information regarding the personal net worth of the individual, the application, I conclude, must be denied.

ORDER[4]

It is ordered and directed that the application for fees and expenses be denied.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Harvard Folding Box Co., Inc. *and* Boston Local No. 600, Graphic Arts International Union, AFL–CIO, CLC. Cases 1–CA–20070 and 1–CA–20350

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 29 July 1983 Administrative Law Judge Mary Ellen R. Benard issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Harvard Folding Box Co., Inc., Lynn, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following paragraphs for paragraph 2(a) and (b) and reletter the subsequent paragraphs.

"(a) Make unit employees whole for any losses they may have suffered as a result of the Respondent's unlawful unilateral change in its vacation pay policy, including interest thereon."

"(b) Make unit employees whole, with interest, for any losses they may have suffered as a result of the Respondent's unlawful unilateral institution of employee contributions for health insurance, including any excess health insurance costs and/or medical expenses."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HUNTER, dissenting in part.

I cannot join my colleagues in adopting the judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening to lay off employees as a result of a pending Board proceeding.

The judge, crediting the Respondent's president Ross, found that Ross stated at an employee meeting that an administrative law judge's decision in another case[1] required the reinstatement of 20 employees who had been discharged and that if the Respondent lost its appeal and had to reinstate those employees, "other people might have to leave." The judge further found, however, relying on a letter sent by the General Counsel to the Respondent listing the names of 12 unlawfully discharged employees, that the figure Ross used was inaccurate because reinstatement would be required for at most 12 employees. The judge therefore found that by exaggerating the possible adverse consequences to current employees of the pending Board proceeding, Ross' statement "reasonably tended to cause the employees to believe that their

[1] We do not adopt the judge's discussion of our decision in *Associated Grocers*, 253 NLRB 31 (1980), concerning its application of Sec. 10(b) of the Act. In *Associated Grocers*, notice of the alleged unilateral action was contained in a letter sent by the employer to hundreds of employees. 253 NLRB at 43. Under the circumstances, the administrative law judge was reluctant to conclude that the union was not on notice, either actual or constructive, of the change. The administrative law judge's decision in that case turns on its particular facts, and does not cast doubt on the well-established principles that the 10(b) period does not start to run until the charging party has notice of the events underlying the charge and that the proponent of the 10(b) defense has the burden of establishing notice. *Strick Corp.*, 241 NLRB 210 (1979); *AMCAR Division*, 234 NLRB 1063 (1978).

Member Dennis finds that the unilateral change in vacation pay policy was within the 10(b) period and therefore unlawful because the Union was unaware of the change (or proposed change) before June 1982. Member Dennis finds it unnecessary to consider whether or not the announcement of the proposed change, had the Union been aware of it, would have started the 10(b) period.

The Respondent's president Ross testified on direct examination that the employees voted to investigate other insurance carriers, rather than the contrary as stated by the judge (pp. 16–17). We correct this nonmaterial and inadvertent error.

We agree with the judge that the Respondent went beyond the protection afforded predictions based on objective considerations when the Respondent's president Ross stated that Administrative Law Judge Maloney's decision required reinstatement of 20 employees and that if the Respondent had to reinstate those employees other people would have to leave. There was, as the judge found, no dispute that the Respondent would have been required to offer reinstatement to at most 12 individuals in order to comply with Administrative Law Judge Maloney's decision. Thus, Ross had no basis for his statement that Administrative Law Judge Maloney's decision required reinstatement of 20 employees. The reliance by our dissenting colleague on the General Counsel's statement that the list was not necessarily final is misplaced. That statement was obviously made so that the General Counsel would not be foreclosed should he later become aware of additional employees who were entitled to reinstatement. However, the Respondent did not present any evidence that the number exceeded 12. Further, contrary to the implication of the dissent, there were no suspended employees who would be entitled to reinstatement. Each of the suspensions was for 1 week or less and the affected employees had been returned to work. Thus Ross' comment reasonably tended to cause the employees to believe that 20 jobs were in jeopardy as a result of Board proceedings when in fact, at the most, 12 jobs were at issue. Accordingly, we adopt the judge's finding that Ross' comment violated Sec. 8(a)(1).

[2] We find merit in the General Counsel's exception that the judge failed to order an adequate make-whole remedy for the Respondent's unilateral changes in health insurance payments. The record shows that certain employees dropped out of the health plan rather than pay the rate increases instituted in 1982. Accordingly, we shall order the Respondent to make whole employees for any excess health insurance costs and/or medical expenses incurred as a result of the unilateral changes found unlawful herein. Any determinations necessitated by this remedy shall be left to appropriate compliance proceedings.

[1] *Harvard Folding Box Co.*, Case 1–CA–17917, which was pending before the Board at the same time as the instant case.

jobs were in jeopardy . . . when such was not the case."

Contrary to the judge, I would find that Ross' statement was a reasonable prediction based on available objective facts and as such was protected by Section 8(c) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The General Counsel's list mentioned above contained the names of 12 employees who had been discharged, as well as 16 employees who had been suspended, under the new disciplinary system which was found to be unlawful. The letter further stated, "This list is not necessarily a final listing of all suspensions and discharges." Thus, it is not at all obvious or certain that the figure of 12 reinstatements was the only accurate figure nor that Ross' mention of 20 reinstatements was necessarily an exaggeration. Moreover, as the judge generally recognized, it was not unlawful in itself for the Respondent to have predicted that if employees were reinstated in compliance with a Board order, the Respondent might be forced to lay off current employees in order to make room for the reinstatements. In these circumstances, I find that the Respondent made a reasonable prediction, based on the available facts, as to the probable consequences of events—e.g., a forthcoming Board decision—which were beyond its control. Accordingly, I would dismiss this 8(a)(1) allegation of the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Boston Local No. 600, Graphic Arts International Union, AFL–CIO, CLC as the exclusive representative of our employees in the following unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All production and maintenance employees, including truck drivers, employed at our Lynn, Massachusetts plant, excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT require employees to contribute to health insurance premiums or increase the amounts employees contribute to such premiums, or institute changes in vacation pay policies or health insurance plans or any other terms or conditions of employment of employees in the above-described unit without first notifying the Union and affording it an opportunity to bargain about such changes.

WE WILL NOT exaggerate to employees the number of persons who might be reinstated pursuant to order of the National Labor Relations Board and indicate that as a result some current employees may be laid off.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make employees whole, with interest, for any losses they may have suffered as a result of our change in the vacation pay policy.

WE WILL make employees whole, with interest, for any losses they may have suffered as a result of our unlawful unilateral institution of employee contributions for health insurance, including any excess health insurance costs and/or medical expenses.

WE WILL, on request, bargain with the Union with respect to the wages, hours, and other terms and conditions of employment of the employees in the unit set forth above.

HARVARD FOLDING BOX CO., INC.

DECISION

STATEMENT OF THE CASE

MARY ELLEN R. BENARD, Administative Law Judge. The original charge in Case 1–CA–20070 was filed on July 21, 1982, and amended on September 3, 1982, by Boston Local No. 600, Graphic Arts International Union, AFL–CIO, CLC (the Union) against Harvard Folding Box Co., Inc. (Respondent). On September 8, 1982, a complaint issued alleging, in substance, that Respondent engaged in certain conduct which violated Section 8(a)(1) of the National Labor Relations Act, that the Union is the certified representative of Respondent's employees in an appropriate bargaining unit, and that about June 1, 1982, Respondent violated Section 8(a)(5) and (1) of the Act by modifying its vacation pay policies and the unit employees' work schedule without notifying the Union or affording it an opportunity to bargain. On Oc-

tober 18, 1982, the Union filed a charge in Case 1–CA–20350, as amended December 2, 1982, against Respondent, and on December 16 the Acting Regional Director for Region 1 of the National Labor Relations Board issued an order consolidating Cases, amended complaint and notice of hearing. The consolidated complaint includes the allegations of the original complaint in Case 1–CA–20070, and further alleges that Respondent additionally violated Section 8(a)(5) and (1) of the Act by increasing the amount employees contribute toward premiums for their group health insurance.[1] The complaint was further amended at the hearing to allege that about September 1, 1982, Respondent changed its employees' health insurance plan from a "group premium" to a "cost plus premium" plan, that about September 1, 1981, Respondent began to deduct money for health insurance premiums from employees' paychecks, and that the requirement that the employees pay a portion of their health insurance premium violated Section 8(a)(3) as well as Section 8(a)(5) and (1) of the Act. Respondent has denied the commission of any unfair labor practices.

A hearing was held before me at Boston, Massachusetts, on February 23 and 24, 1983. Following the hearing the General Counsel and Respondent filed briefs, which have been considered.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is a Massachusetts corporation engaged in the manufacture, sale and distribution of folding boxes and related products with an office and place of business in Lynn, Massachusetts. Respondent annually, in the course and conduct of its business operations, ships from its Lynn plan goods valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts. The answer admits, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act, and I further find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union was certified as collective-bargaining representative of Respondent's production and maintenance employees on September 11, 1980. Respondent thereafter refused to bargain with the Union on grounds that the certification was invalid and, consequently, on October 2, 1980, the Union filed a charge in Case 1–CA–17917 alleging that Respondent's refusal to bargain violated Section 8(a)(5) and (1) of the Act and that Respondent engaged in other conduct which violated Sections 8(a)(1), (3), (4), and (5) of the Act. The Regional Director issued a complaint in that case and, subsequently, the General Counsel filed a motion for summary judgment limited to the allegations that Respondent had refused to recognize and bargain with the Union. On December 11, 1981, the Board issued its decision in *Harvard Folding Box Co.*,[2] granting the motion for summary judgment and ordering Respondent to recognize and bargain with the Union. It appears that Respondent did not seek court review of the Board's decision, and Respondent and the Union commenced bargaining in early 1983.

A hearing was held before Administrative Law Judge Walter H. Maloney Jr. in December 1981 on the remaining allegations of the complaint, which alleged that Respondent had made various unilateral changes in unit employees' terms and conditions of employment, as well as committing violations of Section 8(a)(1), (3), and (4) of the Act, before Administrative Law Judge Walter H. Maloney Jr., in December 1981. Judge Maloney issued his decision on March 4, 1982, finding that Respondent had (1) violated Section 8(a)(3) and (1) of the Act by discharging employees George Madden and Robert Lewis and, additionally, violated Section 8(a)(4) of the Act by discharging Lewis; (2) violated Section 8(a)(5) and (1) of the Act by unilaterally granting an increase in wages, changing the terms of its attendance bonus and instituting a performance bonus, and announcing and instituting new procedures to discipline employees for tardiness and absenteeism and a new system of progressive discipline and for processing grievances, all without notifying the Union and offering it an opportunity to bargain; and (3) engaged in various other conduct which independently violated Section 8(a)(1) of the Act. Respondent and the General Counsel filed exceptions to Judge Maloney's decision which are pending before the Board.

B. *The Alleged Violations of Section 8(a)(1) of the Act*

1. The alleged threat to lay off employees

Employee Keith King testified that in late May or early June 1982 he attended a meeting of all employees on his shift with various management officials, including President Melvin Ross, General Manager Mike Swartz, Production Manager James McGee, and Foreman Bill Lemmo. According to King, Ross told the employees that he had lost in court, apparently referring to the decision of Administrative Law Judge Maloney which had issued 2 to 3 months earlier,[3] and further said that he

[1] The consolidated complaint alleges that the Union has been the representative of bargaining unit employees since May 1, 1980. On January 18, 1983, the complaint was further amended to allege that the Union had been the representative of these employees at all times material herein and at least from September 11, 1980, which Respondent admitted in a second amended answer dated February 7, 1983.

[2] 259 NLRB 686.

[3] In that decision, Administrative Law Judge Maloney found, inter alia, that in order to remedy Respondent's unilateral imposition of a new disciplinary system and rules, Respondent should be required to offer reinstatement to any employees who had been discharged pursuant to that system.

had to send letters to 40 or 41 people who had been laid off or fired telling them that they had a job if they wanted it, and that he would "have to make room for these people."

McGee, Swartz, and Respondent's controller, Thomas Quinn, all testified, in substance, that at that meeting Ross told the employees that a decision had issued and that Respondent was required to offer reinstatement to Madden and Lewis, and that a settlement had been reached with Madden and he would not be coming back to work, but that Respondent was offering reinstatement to Lewis. These witnesses further testified that Ross said that Respondent had been instructed to offer jobs to a number of people who were no longer working for it and that if Respondent made such offers and all those individuals accepted them, Respondent would have to make room for those employees, which might necessitate layoffs.

According to Swartz and Quinn, Ross did not specify how many individuals might be rehired.[4] However, Ross testified that at that meeting he said that Respondent was complying with the judge's decision with respect to Lewis and Madden, that the decision also required that some 20 people who had been discharged had the right to apply for reinstatement, that he did not agree with that ruling, and that the matter was still being litigated. According to Ross, he told the employees that if these individuals were reinstated there would have to be some place for them to go to work, which meant that other people might have to leave. Ross further testified that he referred specifically to the number 20 when discussing how many people might be reinstated because that was the number of employees that Respondent had told the Board had been discharged.

It is undisputed that after Administrative Law Judge Maloney's decision in Case 8–CA–17917 issued counsel for the General Counsel sent Respondent a list of employees who had been suspended or discharged pursuant to the rules and procedures which Administrative Law Judge Maloney found to be unlawful. That list included the names of 12 employees who had been discharged and 16 employees who had been suspended.[5]

There is no dispute that the list accurately reflects those employees who were suspended and/or discharged. Accordingly, the General Counsel contends that Ross exaggerated the number of employees who might have to be reinstated and consequently the number of current employees who might be laid off, and thereby unlawfully threatened employees with layoff. In support of this contention, the General Counsel relies on King's testimony that Ross referred to laying off some 40 employees, and argues that there was no legitimate reason for Ross to exaggerate the number of employees who might have to be reinstated. Respondent, on the other hand, contends that Ross merely predicted the obvious consequences of events over which he had no control, i.e., the requirement that he reinstate employees if Respondent lost its appeal before the Board, and thus his statement cannot be found unlawful.

As the Supreme Court has stated,

> . . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective facts to convey an empoyer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already derived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.[6]

I credit Ross as to what he said at the meeting, for he seemed to testify more candidly on this issue than either the other witnesses for Respondent or King. I therefore find that Ross told the employees that he would be required to reinstate 20 former employees if Respondent lost the case. However, it is clear that even the figure Ross gave as the number of employees who might be reinstated was inaccurate, for there is no dispute that Respondent would have been required to offer reinstatement to at most 12 individuals in order to comply with Judge Maloney's decision. Had Ross correctly stated the number of employees to be reinstated if Respondent complied with the judge's decision, his comment that other employees might be laid off to make room for them could perhaps be considered as a prediction based on objective considerations beyond Respondent's control. Instead, Ross did not accurately state how many employees Respondent might eventually be required to reinstate, and he thus exaggerated to the current employees the possible adverse consequences of the pending Board proceeding. In these circumstances, I find that Respondent went beyond the protection afforded to predictions based on objective circumstances and I therefore agree with the General Counsel that Ross' comment reasonably tended to cause the employees to believe that their jobs were in jeopardy as a result of Board proceedings when such was not the case. Accordingly, I find that Respondent thereby violated Section 8(a)(1) of the Act.

2. The alleged threat to close the plant

King testified that sometime subsequent to the meeting discussed above, he attended an employee meeting at

[4] McGee was not asked whether Ross stated how many people Respondent would be required to reinstate.

[5] Some of the employees are counted twice because they were suspended and subsequently discharged.

[6] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

which Ross stated that he had lost in court, that the employees would not want to pay union dues, and that he would "just as soon close the place down because of the Union." Ross denied ever having made such a comment and the other Respondent officials who testified stated that no such comment was made at any employee meetings that they attended.

Although, as discussed below, I do not credit Ross on all issues about which he testified, I do credit his denial that he threatened to close the plant because of the Union, for his testimony about these meetings seemed candid and straightforward. Further, it is noteworthy that, although King testified that some 100 people were at the meeting, no employee except King was called to testify about what occurred there. Accordingly, I find that the General Counsel has not established by a preponderance of the credible evidence that Ross threatened to close the plant, and I shall therefore recommend that this allegation of the complaint be dismissed.

C. *The Alleged Unilateral Changes in Terms and Conditions of Employment*

1. Vacation pay

The parties stipulated that as of June 1981 Respondent's practice was to pay employees in June for the vacation time they had earned during the previous 12 months, and that the employees were not paid when they actually took their vacations sometime during the next 12 months. The parties further stipulated that commencing in 1982, Respondent changed this arrangement and that in 1982 employees received their vacation pay at the time they took their vacation rather than at the end of June. As an illustration of how the vacation pay policy was implemented before and after the change, Quinn credibly testified that under Respondent's prior policy, if an employee was entitled to 5 weeks of vacation sometime in the next 12 months he received 5 weeks' pay at the end of June. Under the new arrangement, if an employee took 2 weeks of vacation in July and 3 weeks in December he would receive the 2 weeks' pay in July and 3 weeks' pay in December in addition to being paid for whatever time in those months he worked.

There is no question that the employees were advised of the new policy well before it went into effect in June 1982: Quinn and Ross both credibly testified that Ross announced the change as to when vacation pay would be received at an employee meeting in June 1981, telling the employees that in the future they would be paid for their vacations when they took them and that because they were paid in June for vacations taken later some of them did not have any money when it came time for their vacations. The employees were reminded of the new policy sometime during the fall of 1981, when Respondent distributed a document entitled "Vacation Policy Guidelines" which explicitly stated "vacation pay will be paid when you take vacation. Vacation pay will not be paid as a lump sum in July." Also, Ross and Quinn further testified that when Ross distributed employees' performance bonuses at a meeting in December he noted that the plant would be closed over the Christmas and New Year's holidays and that the employees should use their performance bonuses to carry them through the period when there would be no salary because they had already received their vacation pay for the year in June. Ross reminded the employees again that under the new plan they would be able to use their vacation pay at any time, including the Christmas shutdown.

However, it is undisputed that Respondent did not notify or offer to bargain with the Union prior to announcing or implementing this change, and George Carlsen, the Union's executive vice president credibly testified that he first became aware of the change when Robert Lewis told him about it in June 1982, after his reinstatement.

The allegation that elimination of the lump sum vacation payment violated Section 8(a)(5) and (1) of the Act was first made in an amended charge filed September 3, 1982. Thus, the charge was filed less than 6 months from the time the change was implemented but more than 6 months after it was announced.

a. *The 10(b) issues*

Section 10(b) of the Act provides "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." Respondent contends that the 6-month limitation period began to run in June 1981 when it announced to employees the change as to when vacation payments would be made and, thus, the allegation that the change was unlawful is barred by Section 10(b) of the Act. The General Counsel, on the other hand, contends that implementation, rather than announcement, of a unilateral change triggers the limitations period and that, in any event, the Union was unaware of the decision to change the vacation payment policy until implementation of that policy in June 1982 and, thus, Section 10(b) does not bar litigation of this allegation.

As the Supreme Court stated in *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960):

> . . . due regard for the purposes of Section 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the 6-month limitations period in and of themselves may constitute, as a substantive matter unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters ocurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice, there the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time barred, to permit the event itself to be so used

in effect results in reviving a legally defunct unfair labor practice.[7]

In the instant case, the unfair labor practice alleged is Respondent's implementation, which did not occur until June 1982, of its decision to cease its practice of making vacation payments for the entire year in June.[8] In *Elmac Corp.*, 225 NLRB 1188 (1976), respondent put into effect a new vacation pay policy on May 9 which stated that employees must be on the active payroll as of June 30 in order to receive vacation pay for the previous year. In consequence, those employees who had gone on strike in April and were still on strike at the end of June did not receive their vacation pay. The charge was not filed until December 18 of the same year. The judge, affirmed by the Board, found that the 6-month limitation period began when the employees were entitled to receive their vacation pay (i.e., sometime after the end of June) but did not get it. This view is also in accord with *Swift Service Stores*, 169 NLRB 359, 360 (1968), in which respondent had paid a bonus for some 16 years to its employees on the basis of points which they earned, but the bonus plan contained a disqualification clause for those employees who engaged in a work stoppage. In April 1965 the employees engaged in a one day strike, and in consequence, respondent removed the bonus scores from the bulletin board and did not pay the bonus at Christmas as it had in the past. The charge was filed the next month. The Board found that the 10(b) limitation did not apply because although the announcement in April that the employees would not be able to earn bonus points may have been unlawful, the failure to pay the bonus in December was also unlawful by itself and, thus, there was no need to depend on events occurring outside the 10(b) period in order to find the violation.

I recognize, of course, that the Board has not invariably found that the announcement of an intended unilateral change is insufficient to begin the 10(b) period running. For example, in *Catholic Medical Center*, 236 NLRB 497, 500–501 (1978), cited by Respondent, respondent announced in March 1976 that it would not grant convention benefits to unit employees the next year, and the charge was filed within 6 months of the implementation of that announcement but not within 6 months of the announcement itself. The administrative law judge, affirmed by the Board, dismissed the allegation that the unilateral withholding of convention benefits from unit employees was unlawful, on grounds that the announcement started the 10(b) period running. Respondent also relies on *Charles Mfg. Co.*, 245 NLRB 39 fn. 1 (1979). In *Charles*, the Board held that respondent did not violate Sec. 8(a)(5) of the Act by implementing wage increases in October 1977 when it had announced the amount and the effective date of the increases to employees a year earlier, before the union campaign. However, the reason stated by the Board for dismissing the allegation was that the announcement had been made prior to the advent of the union's organizing campaign, and there was no discussion of whether Sec. 10(b) applied. In the instant case, of course, the Union had been certified well before the unilateral actions at issue. In any event, although *Catholic Medical Center* would seem to stand for the proposition that the announcement of a unilateral change, rather than its implementation, might trigger the 10(b) period, I note that subsequent to *Catholic Medical Center* the Board issued *Bay Medical Center*, 252 NLRB 1138, 1144 (1980). In that case, the Board found that respondent's announcement in 1976 that it contemplated changing the hours in a new facility which did not open until November 1977 did not begin the 6-month period because the announcement was too remote in time from implementation of the change and respondent could have decided to bargain about the matter in the meantime.

As another administrative law judge, affirmed by the Board, emphasized in a case involving similar issues under Section 10(b), "a respondent could insulate itself from liability merely by carrying out the unfair labor practice (i.e., the act itself) 6 months and 1 day after the discriminatory decision is made. I visualize this argument as freeing from liability a respondent who wishes to set off a bomb by using a fuse which takes more than 6 months to burn. Neither *Bryan Mfg. Co.* nor any other case of which I am aware would permit such a result."[9]

I find *Elmac, Swift Service Stores*, and the administrative law judge's analysis in *California School of Professional Psychology*, all supra, persuasive on the issue here, and, consequently, find that the 10(b) period did not begin to run until June 1982 when Respondent put into effect the change which it had announced a year earlier.

I further find that, even if the announcement of a planned unilateral change would ordinarily be sufficient to initiate the 10(b) period, the announcement in June 1981 of the change in vacation pay policy did not cause the time limitations period to begin because the Union was unaware of the change until June 1982. As the United States Court of Appeals for the Sixth Circuit has stated, "the Board has consistently held, with the endorsement of at least two circuits, that the 6-month limitation does not begin to run until the . . . unlawful activity, which is the basis of the unfair labor practice charge, has become known to the Charging Party."[10] I find such a holding to be especially appropriate here, where Respondent attempts to use the same conduct which is the basis for the unfair labor practice charge, i.e., its failure to notify the Union and/or bargain with it prior to im-

[7] 362 U.S. at 416–417.

[8] The question of whether Respondent violated the Act by announcing in June 1981 a new policy to take effect in June 1982 is not before me. See *Renton Village Cinema*, 228 NLRB 377 (1977), in which the Board found that the announcement of a wage increase required by state law violated Sec. 8(a)(1) of the Act, even though the pay increase itself was lawful.

[9] *California School of Professional Psychology*, 227 NLRB 1657, 1666 (1977). Although the United States Court of Appeals for the Ninth Circuit disagreed with this analysis and denied enforcement of the Board's order in this case, 583 F.2d 1099 (1978), I am bound by the Board's decision.

[10] *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977), quoted and followed in *K & E Bus Lines*, 255 NLRB 1022, 1029 (1981) (involving a discharge); and in *Plumbers Local 40 (Mechanical Contractor)*, 242 NLRB 1157, 1161 (1979) (involving deletion of charging party's name from a referral list outside the 10(b) period, but of which he was not aware until a month before he filed the unfair labor practice charge).

plementing a unilateral change in unit employees' terms and conditions of employment, as the basis for precluding litigation of the issue. In other words, Respondent defends against the allegation that it unlawfully failed to notify the Union before implementing this change on grounds that the Union did not file the charge in a timely fashion, but the Union did not know about Respondent's action because Respondent did not tell the Union about it.

The view that notice to the charging party is required to start the 10(b) period is supported by a number of Board decisions. For example, in *Avila Group, Inc.*, 218 NLRB 633, 639 (1975), respondent's decision to close a warehouse was made more than 6 months before the charge was filed, but the Board found that the limitations period did not start to run until the earliest date the union could have become aware of it, noting that "Respondent's silence, even if it were not active deceit, was sufficient to toll the limitations period." Similarly, in *Strick Corp.*, 241 NLRB 210 fn. 1 (1979), the Board held that the notice which causes the 10(b) period to run, "whether actual or constructive, must be clear and unequivocal, and . . . the burden of showing such notice is on the party raising the affirmative defense of Section 10(b)," citing *ACF Industries*, 234 NLRB 1063 (1978). In the latter case, involving respondent's subcontracting of work, the Board held that, even if the employees knew that nonemployees were doing unit work, the inference was nonetheless not warranted that the union had notice of the unlawful subcontracting.

Nonetheless, I note that the cases are not entirely clear on this question. Thus, in *Associated Grocers*, 253 NLRB 31 fn. 3, 55 (1980), the Board held that litigation of respondent's change in the probationary period from 60 to 90 days during the course of a strike was barred by Section 10(b) because there was no evidence that the union was unaware of the change. This case seems to contradict the language in *Strick Corporation*, supra, that the notice must be clear and unequivocal and that the burden of showing notice is on the party raising the affirmative defense. However, subsequent to the Board's decision in *Associated Grocers*, it issued *American Olean Tile Co.*, 265 NLRB 1625 (1982), finding that the 10(b) period did not begin to run until the charging party union was put on notice of the facts constituting the unfair labor practice and noting that there was no evidence that the charging party was aware of respondent's oral announcement of the policy at issue prior to its effectuation. I conclude that the most applicable precedent supports the finding, which I make, that the allegation that Respondent unlawfully unilaterally changed its vacation pay policy is not barred by Section 10(b) of the Act.

b. *The merits*

There is no dispute that Respondent was under an obligation to bargain about its vacation pay policy. Nonetheless, at the hearing, Respondent contended that no violation should be found on this issue because the change in this policy was, in any event, de minimis. I disagree. First, it is undisputed that prior to June 1982 the employees received their vacation pay in a lump sum in June and that that money was then available to them for whatever purposes they chose. As of June 1982, however, the employees received their vacation pay only when they took their vacation and did not have it available to them earlier. Second, Ross credibly testified that under the old policy those employees who spent their vacation pay before they took a vacation and consequently could not afford to be without a paycheck worked through their vacation time and got paid for it, but that after 1981 employees were paid for a vacation only when they actually took it. Ross further testified that he believed that Respondent insisted on employees taking vacations. In these circumstances, it is clear that the unilateral change had a substantial impact on unit employees, both as to when vacation money would be made available to them, and because it eliminated the option employees previously had of choosing whether to take a vacation or not.[11] I therefore find that by making this change without notice to the Union or affording it an opportunity to bargain, Respondent violated Section 8(a)(5) and (1) of the Act.

2. The unilateral reduction in working hours

The parties stipulated that prior to August 9, 1981, Respondent's normal workday for employees who worked Monday through Friday was 10 hours per day and that as of the week ending August 9, 1981, Respondent changed that workday to 9 hours per day. It is undisputed that Respondent did not notify the Union of its intention to change working hours or afford the Union an opportunity to bargain about the matter at the time the change occurred. Respondent concedes that a change in the number of hours in the workday is a mandatory subject of bargaining. Nonetheless, Respondent contends that no finding can be made that the change was unlawful because the charge pertaining to this matter was not filed until September 3, 1982, and, therefore, litigation of this allegation is barred by Section 10(b) of the Act.

As discussed above, I have concluded that where an employer's unilateral changes in the terms and conditions of employment of employees represented by a collective-bargaining agent are alleged to constitute unfair labor practices, the limitations period does not commence until that agent is notified of the employer's allegedly unlawful conduct. The General Counsel contends that the Union did not have notice of the change in the number of hours in the workday until less than 6 months before the charge was filed and that, therefore, the 10(b) proscription is inapplicable. However, at the hearing in Case 1-CA-17917 on December 14, 1981, Lewis testified that prior to his discharge he worked a 50-hour week[12] and later had the following exchange during his cross-examination by then counsel for Respondent, David Grunebaum, about how many days per week the plant operated and with how many shifts:

> Q. Now, in the summer of 1980 you knew that Harvard was operating 7 days a week?
> A. No.

[11] The change from permitting employees to forgo vacations to insisting that they take time off from work is not alleged as an unfair labor practice nor litigated as such and I make no finding regarding it.

[12] Tr. in Case 1-CA-17917, pp. 37, 38.

Q. You didn't know that?

A. No.

Q. And that it had at least two shifts going at all times during the summer of 1980 in certain departments?

A. No.

Q. And in some cases three shifts—you didn't know that?

A. No.

JUDGE MALONEY: Is this a fact? Or are you saying you just don't know?

THE WITNESS: I never knew this, not seven days a week. More like 40, 45 hours a week. Not 7 days.

Q. (By Mr. Grunebaum) Well, you worked 50 hours week?

A. Yeah. I know it.

Q. And you only worked 5 days?

A. Yeah, *but it's down to 45 now.*

Q. We're talking about in the summer of 1980?

A. Oh, summer of 1980. I don't remember ever seeing 7 days a week there.[13]

It is undisputed that George Carlsen, the Union's executive vice president, was in the hearing room during the exchange just quoted. In these circumstances, and even though I recognize that Lewis' comment about the workweek being reduced to 45 hours was made in the context of testimony about another matter; nonetheless, it was said and Carlsen presumably heard it. Accordingly, I find that the Union was put on notice of the unilateral change in hours on December 14, 1981, more than 6 months before the charge alleging the change to be unlawful was filed, and that, therefore, litigation of this allegation is barred by Section 10(b) of the Act. I shall therefore recommend that this allegation of the complaint be dismissed.[14]

3. The 1981 deductions from employees' wages to pay a portion of their insurance premiums

The parties stipulated that prior to August 1981 Respondent paid the entire premium for group health insurance it carried for employees. It is undisputed that in August 1981 Blue Cross/Blue Shield, the carrier for that insurance plan, increased the premiums for the plan, and the parties stipulated that as of the payroll period ending August 20, 1981, Respondent began to deduct from unit employees' paychecks the difference between what it had been paying for premiums and the new premium. Specifically, the parties stipulated that as of that payroll period the sum of either $2.97 a week for family coverage or 65 cents per week for single coverage was withheld from the employees' paychecks. It is also undisputed that Respondent took this action without notifying the Union or affording it an opportunity to bargain.

Respondent does not dispute that the proportion of insurance premiums to be paid by employees is a mandatory subject of bargaining, but contends that (1) the allegation that this unilateral change was unlawful is time-barred because the charge which included it was not filed until October 18, 1982, and (2) Respondent announced to employees in June 1979 that they would be required to pay all increases in insurance premiums in the future and, thus, the deductions from employees' paychecks to pay for such increases in 1981 did not constitute a unilateral change.

a. *The 10(b) issue*

With respect to Respondent's defense based on Section 10(b), Carlsen testified that in late August or early September 1982 Lewis who, as noted above, had been reinstated in June of that year, told him that Respondent was deducting health insurance premiums from the employees' paychecks. According to Carlsen, prior to this conversation with Lewis the Union was not aware that Respondent was making such deductions.

Carlsen further testified that he saw the employee handbook distributed by Respondent prior to the hearing in December 1981.[15] That handbook, which was distributed in July 1981 and has not been amended, states specifically that Respondent pays 100 percent of Blue Cross/Blue Shield premiums for employees and, for married employees, their families, starting with an employee's ninth month on the job. Accordingly, I find that the Union was not on notice until August or September 1982 that Respondent had begun making deductions from the employees' paychecks for insurance premiums and, for the reasons stated above with respect to the allegations concerning Respondent's change in its vacation pay policy, I therefore find no merit to Respondent's Section 10(b) defense.

b. *The contention that the deductions implemented a preexisting policy*

As noted, Respondent contends that it announced in 1979 that it would pass on all premium increases to employees and that, consistent with that announcement, it passed on to employees the first such increase in September 1981.[16] Therefore, according to Respondent, it has adhered to its established practice of passing on premium increases and has not made any unilateral change in this respect which is cognizable under Section 8(a)(5) of the Act.

In support of this contention, James Robbins, a consultant to Respondent on insurance and employee benefits, testified that some time in June 1979 he met with Ross and told him that he had surveyed the policies of-

[13] Transcript in Case 1-CA-17917, pp. 140, 141 Emphasis added.

[14] The change in hours is also reflected in timecards which were subpoenaed by the General Counsel and produced at the December 1981 hearing, but Carlsen credibly testified that he did not assist the General Counsel in that case in examining the material. I find that the mere fact that the timecards were present in the hearing room was not sufficient to put the Union on notice of the change in hours. I further note that Lewis testified before me that at the time he testified in the previous hearing he probably thought that the plant was temporarily working a 9-hour shift and that he did not know that the change was permanent. However, the issue is not why Lewis testified as he did in the 1981 hearing, but what he said, and the consequence of that testimony insofar as whether it put the Union on notice of the change. As discussed above, I find that it did.

[15] I credit Carlsen on these matters. He seemed to testify forthrightly and his testimony on this issue is uncontroverted.

[16] Respondent also asserts that the employees agreed to this policy in 1979, a contention discussed below.

fered by some seven insurance companies and that, because two of those offered policies he considered very attractive, he thought that there was a strong argument in favor of switching from Blue Cross to another insurance carrier. Ross replied, however, that Respondent would stay with Blue Cross because it had been a fixture of its benefit package and the employees liked it.[17]

Robbins, corroborated by Swartz, further testified that Ross then called a meeting of the employees and asked them whether they would prefer to retain Blue Cross/Blue Shield as the insurance carrier, and apparently a substantial majority of the employees indicated that they would. Ross then announced, according to Robbins and Swartz, that he would pay any increases for 1979 but that he wanted it understood that any future increases would be absorbed by the employees.[18]

On direct examination Ross similarly testified that at that meeting he asked the employees how they felt about investigating other insurance carriers to avoid any increase in the premium and that the employees voted "unanimously" not to investigate any other programs but to stay with Blue Cross, and that he then told the employees that all future increases in the premiums would be passed along to them. However, on cross-examination Ross testified that the employees not only voted to retain Blue Cross but "agreed unanimously" that they would pay future increases in the premiums.

Lewis, the only employee witness who had worked at the plant in 1979, credibly testified that prior to his discharge he was not present at any meetings where employees voted on whether they would rather change insurance carriers or pay part of the premium and that, although at some meetings Ross announced that he might have to deduct a portion of the premiums from the employees' pay, he never in fact did so.[19]

I credit the testimony of Swartz, McGee, and Robbins as to what occurred at the June 1979 meeting. Accordingly, I find that at that time, which was before the advent of the Union's organizing campaign, Ross announced to the unit employees that they would be required to pay future increases in insurance premiums.

It is undisputed that, notwithstanding Blue Cross' statement to Respondent in 1979 that the insurance premiums would increase that year, there was in fact no increase in the 1979 premium from what it had been in 1978 and that there was no actual increase in Blue Cross premiums for either individuals or families until 1981.[20]

Respondent argues that it had announced the policy of passing along 100 percent of the increases to the employees and was bound to follow that policy. Nonetheless, the policy was merely announced before the advent of the Union, and not implemented until more than 2 years later. Even more significantly, the handbook, which was not distributed to employees until more than 2 years after the 1979 announcement, made no reference to any policy of ever passing on increases in health insurance premiums to employees. Thus, the inference is warranted that the policy of passing on such increases, which had never (as far as this record shows) been distributed in written form to employees, could be considered as withdrawn. Further, since at the time of the June 1979 announcement it was not clear when, if ever, the policy of passing on to employees increases in their insurance premiums would be implemented, I find that this announcement did not constitute establishment of a practice which would serve to justify Respondent in refusing to bargain 2 years later about whether it would deduct portions of insurance premiums from its employees' paychecks.[21] I therefore conclude that, by unilaterally requiring employees to pay a portion of their group health insurance premiums, without affording to the Union notice of this action or an opportunity to bargain before implementing it, Respondent violated Section 8(a)(5) and (1) of the Act.

---

[17] According to Robbins, Ross did not consult with the employees before making this statement.

[18] Plant superintendent McGee testified that he was also present at that meeting and that at that time Ross said that any increase from that day on would be passed on to the employees. Quinn testified that the employees "pleaded" at that meeting to retain Blue Cross. However, Quinn was not even employed by Respondent at that time, much less present at the meeting.

[19] I recognize that Lewis conceded on cross-examination that there was a 1979 meeting at which Ross announced that in order for the employees to retain Blue Cross/Blue Shield as their health insurance carrier the employees would have to pay the increases in premiums. However, Lewis' specific denial that the employees ever voted to pay the increases is not inconsistent with this testimony.

[20] Thus, the monthly premiums for individuals were $47.75 in 1978, $43.77 in 1979, $41.39 in 1980, and $44.00 in 1981. The monthly premiums for family coverage were $117.30 in 1978, $111.53 in 1979, $108.79 in 1980, and $120.70 in 1981.

[21] Respondent cites, inter alia, *A-V Corp.*, 209 NLRB 451 (1974), in support of its position. In that case, prior to entering into its first collective-bargaining agreement with a union, respondent contributed approximately half of the premiums for its employees' group insurance program. The first union contract provided that the cost to employees of insurance coverage should be reduced by one half and not be increased and this provision was carried into the next contract. When insurance premiums increased a month after that contract's effective date, respondent passed along one quarter of the increase so that again the employees paid approximately 25 percent of the total. When the insurance policy was renewed a year later with an increased premium, respondent again passed along the same percentage of the increase. In the following 2 years there were no increases in premiums, but a year later the proposed increases were substantial and respondent therefore changed carriers and obtained an identical program with premiums that were higher than those it had paid under the old policy but lower than would have been entailed by a renewal of the former policy. Respondent advised the employees of the change in carriers and that there would be no increase in the cost of premiums to them because it would absorb the additional premium cost. In consequence, the employees' share of the premium was reduced from approximately 25 to 21 percent of the total. When this policy was renewed the next year, respondent allocated 21 percent of the increase to the employees, and at this point the union protested for the first time. The Board found that respondent's consistent practice had been to allocate a portion of an insurance premium increases to employees on a pro rata basis, that respondent's one departure from this practice in February 1971 did not establish a new condition of employment, and that the union had acquiesced in the practice for a number of years. Consequently, the Board found that the 1-year deviation from this practice was not intended to be the new practice and that respondent's reversion to its former practice of passing on to employees the same share of the increase in insurance premiums represented a continuation of its past practice and not an unlawful unilateral change. In the instant case, however, Respondent's decision in 1981 to begin deducting insurance premium increases from the employees' paychecks was not a continuation of a preexisting practice, but merely the first implementation of a policy announced more than 2 years earlier which was not even referred to in the employee handbook published in the interim. In these circumstances, I conclude that *A-V Corp.*, supra, is inapposite.

4. The increased deductions for health insurance premiums in 1982

At the hearing the parties stipulated that, as of the payroll period ending September 2, 1982, Respondent began to deduct $5.13 from the weekly paycheck of each unit employee who had elected single health insurance coverage and $12.69 from the paycheck of each employee who had elected family coverage. It is also undisputed that Respondent neither notified the Union about this increased deduction nor offered to bargain with the Union about it.

The complaint alleges that, by unilaterally deducting an increased amount from the employees' paychecks, Respondent further violated Section 8(a)(5) and (1) of the Act. Respondent contends that, in light of its announced policy in June 1979 of passing along premium increases to the employees and its implementation of that policy in September 1981, the increased deductions in 1982 were not a change but merely a further implementation of that policy.

Having found that Respondent's initial deductions of sums from employees' paychecks toward health insurance premiums in 1981 was taken in derogation of its bargaining obligation to the Union, I further find, for the same reasons as those discussed above, that Respondent's increase in the amount to be deducted from the employees' checks was also a unilateral change in the employees' terms and conditions of employment. I therefore find that by this conduct Respondent further violated Section 8(a)(5) and (1) of the Act.

5. The change in the type of funding for the insurance plan

Prior to 1982 Respondent's group health insurance plan with Blue Cross/Blue Shield was what is referred to in the record as a "premium group plan." As William Rooney, a marketing representative employed by Blue Cross, credibly explained at the hearing, under such a plan a group pays Blue Cross a predetermined amount or premium every month for the 12 months of the contract, and each year Blue Cross reviews the contract and adjusts the premium up or down depending on several criteria, including, in a group such as Respondent's, the group's own experience. Rooney further credibly testified that in its annual review Blue Cross analyzes the last 2 years of its experience with the group and extrapolates that trend to determine what it would have to pay for the same claims if they arose in the next 12 months. Blue Cross then compares the group's experience to that of other small groups and applies a formula in order to establish the single and family premium rate for the group.[22] The premium plan also includes a refund if the group's claims and administrative costs come to less than a certain percentage of the total premium. When Blue Cross determines that a refund is in order, the refund is nonetheless not paid until 12 months after the close of the contract in order to allow excess claims to be processed.

In 1982 Respondent, while retaining Blue Cross as the insurance carrier, switched from the premium plan to what is called a "cost-plus" program. It is undisputed that Respondent made this change without notifying the Union or affording it an opportunity to bargain about the matter.

As Rooney credibly explained it, under this plan a group pays its actual claims every month plus an administrative cost to Blue Cross of 6.5 percent of the amount of the claims. In addition, Respondent also purchased reinsurance. Under the specific stop-loss policy, Respondent has a maximum liability of $15,000 for claims submitted by any one employee in any one year. Similarly, Respondent purchased an aggregate stop-loss policy under which it would not be liable for any claims in excess of 110 percent of the amount projected by Blue Cross as the anticipated losses for the year. The premiums for these policies cost $8 per individual or $20 per family per month.

It is undisputed that a covered individual receives the same benefits and has his claims processed in the same manner regardless of whether the insurance policy is a premium group plan or a cost-plus plan. Rooney explained that under a reinsurance cost plus program there is a cash-flow savings to the group in the first year because of the timelag between when services are provided and when the claim is paid. Consequently, in the first year of such a program the group pays claims on 9 or 10 months instead of the entire year.[23] Rooney further testified that another advantage to the cost plus plan is that a group may consider Blue Cross' projections of its claims experience too high, or the group's members may be of the view that if they know that the group is paying the precise amount of their claims they may be better able to control their medical costs.

Quinn credibly testified that in order to determine how much of the Blue Cross premium should be deducted from the employees' paychecks, he first recalculated the Blue Cross premium, which is stated as an amount per month, as an amount per week because employees are paid weekly. As a result of his discussions with Rooney and Robbins, Quinn projected a total cost of $150,000 for claims, administrative expenses, and the reinsurance premiums. Quinn then multiplied the 69 family subscribers by 3,[24] added that total of 207 to the 23 single subscribers, and then divided the $150,000 projected cost by the total of 230, thereby obtaining the yearly rate. Quinn then divided that number by 12 for the monthly rate for a single subscriber and finally multiplied the monthly rate for a single subscriber by 3 to obtain the family rate

[22] The premium for the total group for the year is the number of individuals times the premium rate for individuals added to the total number of families times the premium rate per family. Consequently, inasmuch as some members of the group may leave it and others join, the total premium bill for the group will fluctuate during the year.

[23] In order to ensure that claims that are submitted after the contract expires for services provided during the contract term, Blue Cross requires a deposit equal to approximately 2 months of anticipated claims. However, since the lag in claims is frequently 3 to 4 months, there is still a cash-flow savings.

[24] As discussed below, the insurance industry assumes that there are approximately three people in a family for purposes of determining how much larger the premium for family coverage should be than that for single coverage.

of $163.[25] Quinn further testified that he believed that Blue Cross premiums were not deducted from employees' vacation checks; consequently an employee with family coverage who took 5 weeks of vacation would pay less in Blue Cross premiums than an employee with the same coverage who took 2 weeks of vacation.

The complaint, as amended, alleges that Respondent's unilateral change from a group premium insurance plan to a cost-plus premium plan violated Section 8(a)(5) and (1) of the Act. Respondent contends that because the change in the type of funding had no impact on the health insurance benefits received by the employees, the change was not one over which it was obligated to bargain. In support of this contention, Respondent cites, inter alia, *Meharry Medical College*, 236 NLRB 1396, 1407–08 (1978).

In *Meharry Medical College*, the collective-bargaining agreement specified the amounts which employees paid toward their insurance premiums. The administrative law judge, affirmed without comment by the Board, found that respondent's change from a "premium" insurance policy to a "cost-plus" policy was not a unilateral change in employees' terms and conditions of employment, on grounds that "[t]here was no evidence that there was any change in benefits or change in carrier. Thus there has been no change relative to insurance benefits that would warrant an 8(a)(5) finding."[26]

In the instant case, unlike *Meharry*, supra, the General Counsel has adduced evidence that the change to a cost-plus plan had an impact on the employees' terms and conditions of employment. I recognize, of course, that there was no change in the insurance carrier, the benefits employees received, or the procedures they used for submitting claims. However, the change to a cost-plus program did result in a change in the manner in which employees' share of the premium was calculated: In 1981, the first year employees paid any part of the insurance premiums, the premium was calculated by Blue Cross and Respondent passed on to the unit employees the increase over the previous year. However, in 1982 Respondent itself determined the probable total cost of claims, the aggregate stop-loss limit over which Blue Cross would be responsible for paying claims, and the multiplier by which the single rate would be multiplied to determine the family rate,[27] all of which affected the amount of the employees' share of the premium.

The foregoing establishes that the facts in this case are significantly distinguishable from those in *Meharry Medical College*, supra. In *Meharry*, the contract specified the amount the employee would contribute for his insurance and the employer paid the remainder. In the instant case, however, Respondent determined the amount that it would pay toward insurance and the employees were required to pay the rest. Consequently, in this case, unlike *Meharry*, the method used to determine the amount of the premium, having, as it did, an effect on how much the employees were required to pay, was a term and condition of employment.[28]

Accordingly, I find that in the circumstances of this case the question of whether Respondent would change its insurance program to a cost-plus premium plan was a mandatory subject of bargaining. I therefore conclude that, by failing to notify the Union about the proposed change and by failing to afford the Union an opportunity to bargain about the matter, Respondent violated Section 8(a)(5) and (1) of the Act.[29]

D. *The Alleged Violation of Section 8(a)(3) of the Act*

It is undisputed that Respondent has continued to pay the full amount of insurance premiums for its nonunit employees while requiring unit employees to pay part of those premiums. At the hearing the General Counsel amended the complaint to allege that by treating unit and nonunit employees differently in this regard Respondent violated Section 8(a)(3) as well as Section 8(a)(5) and (1) of the Act.[30] Respondent contends that the allegations regarding the 1981 increases are barred by Section 10(b) of the Act and that, in any event, the record does not show that the passing on of insurance premium increases was discriminatory.

For the reasons discussed above with respect to the alleged Section 8(a)(5) violations, I find no merit to Respondent's defense premised on Section 10(b) of the Act.

---

[25] Although it is not entirely clear, it appears that Quinn then either multiplied the monthly rates by 12 and divided by 52 to obtain the weekly rate, or divided the monthly rate by 4-1/3 to accomplish the same purpose.

[26] 236 NLRB at 1408.

[27] Although Robbins testified that the family rate is normally three times the individual rate, he conceded that that ratio may vary from two and one half to three, which, of course, would have an impact on the premium required for family coverage. Robbins also testified that Blue Cross would only permit a $15,000 individual stop-loss limit but also said that Respondent could have taken a higher aggregate stop loss of 125 percent, which again would reduce the premium to some extent.

[28] It is undisputed that in calculating the amount of the premiums Quinn used the total number of family and single units in the entire group and not merely those in the bargaining unit. The record does not indicate how many single and family units were in the bargaining unit as opposed to the entire group nor what percentage of the total claims Respondent's experience had shown to be applicable to the bargaining unit. It is possible, of course, that the bargaining unit's claims experience differed from that of the group as a whole. Whether, in such circumstances, the premiums attributable to bargaining unit employees should have been calculated on the basis of their experience rather than that of the entire group is another subject about which the Union was entitled to bargain.

[29] In *Keystone Consolidated Industries*, 237 NLRB 763, 767 (1978), enforcement denied as to other issues 606 F.2d 171 (7th Cir. 1979), also cited by Respondent, the Board found that a unilateral change in the administrator/processor of a dental insurance program did not violate Sec. 8(a)(5) because of a failure to prove that the identity of that administrator had any effect on the employees' terms and conditions of employment. Having found that in the instant case the change to a cost-plus program did have an effect on the employees' terms and conditions of employment, I find *Keystone*, as well as *Meharry Medical College*, supra, inapposite.

[30] I note that the original charge in Case 1–CA–20350, filed October 18, 1982, alleged that Respondent's requirement in 1982 that employees pay a portion of the health insurance premiums violated Sec. 8(a)(3) as well as Sec. 8(a)(5) and (1) of the Act, and that "The employer made these changes in retaliation to [sic] the employees voting to be represented by [the Union]." The amended charge in Case 1–CA–20350, filed December 2, 1982, alleges only that the 1982 deductions violated Sec. 8(a)(5) and (1) of the Act, and there is no indication in the record what disposition was made of the 8(a)(3) allegation, which was not included in the consolidated complaint until it was amended at the hearing. In any event, Respondent has not contended that litigation of this allegation is barred by virtue of the failure to include it in the December 1982 complaint or that this allegation was previously dismissed, and I find it appropriate to consider the allegation on its merits.

With respect to the merits of the allegation, it is well established that an employer's grant of benefits to unrepresented employees which are withheld from represented employees does not violate Section 8(a)(3) of the Act absent proof of a discriminatory motive.[31] In arguing that there is proof of such motive, the General Counsel relies on what he views as Respondent's history of discriminating against its employees because of their union activity,[32] and emphasizes that, although insurance premiums rose significantly in 1977 and 1978, Respondent did not tell the employees in those years that future increases would be passed along to them. The General Counsel further points out that Respondent did not pass along such increases to unit employees until after the Union was certified as their representative and that in its 1980 campaign literature Respondent emphasized to employees that, although their health insurance premiums were paid in full by their employer, many employees covered by union contracts were required to pay a portion of the premiums.

Respondent, in its turn, established that its non-unit employees are salaried as opposed to hourly paid and that they have historically had different wages and fringe benefits than those of the unit production and maintenance employees. Respondent further argues that it is unrebutted that the salaried personnel were not present at the June 1979 meeting where, according to Respondent, the unit employees voted to pay increases in Blue Cross/Blue Shield premiums instead of switching to another carrier.

I find that Respondent has not demonstrated that the employees in the bargaining unit voted in 1979 to pay Blue Cross/Blue Shield increases in the future. I have credited Lewis' testimony that there was no such vote and Swartz and McGee testified only that the employees were told at that meeting that if they stayed with Blue Cross they would pay future increases. Further, although on cross-examination Ross testified that he asked the employees if they wanted to stay with Blue Cross and pay any future increases and they agreed unanimously to do so, I do not credit him on this point, both because he did not appear to testify candidly and because his testimony was not substantiated by other management officials who were present at the meeting.[33]

Notwithstanding this finding, however, I find the evidence persuasive that nonunit employees' wages and fringe benefits have always been determined independently of those of unit personnel and that in 1981 unit employees received an across-the-board wage increase while only 2 or 3 of the some 20 nonunit employees received any raise.[34] Accordingly, I conclude that the General Counsel has not established by a preponderance of the evidence that the decision to pass along insurance premium increases to unit employees while Respondent continued to pay the total premium for nonunit employees was discriminatorily motivated. I shall therefore recommend that this allegation of the complaint be dismissed.

On the basis of the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Harvard Folding Box Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Boston Local No. 600, Graphic Arts International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including truckdrivers, of Respondent employed at its Lynn, Massachusetts, plant, excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union has, since at least September 11, 1980, been the representative for purposes of collective bargaining of the employees in the unit described above.

5. By modifying its policy with respect to vacation pay, by requiring unit employees to pay for a portion of their group health insurance premiums, and by changing its health insurance plan from a premium policy to a "cost-plus" policy, all without notification or affording an opportunity to bargain to the Union, Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

6. By exaggerating to employees the number of persons who might be reinstated pursuant to a Board order and telling current employees that in consequence there might be a layoff, Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

7. A preponderance of the credible evidence does not establish that Respondent has otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action, including the posting of the customary notice, designed to effectuate the purposes of the Act.

Having found that Respondent has unlawfully made unilateral changes in the employees' terms and conditions of employment, I shall recommend that Respondent be ordered to restore the status quo ante by restoring its former vacation payment policy and by ceasing to withhold any amounts from the employees' paychecks to pay

---

[31] *Empire Pacific Industries*, 257 NLRB 1425, 1426 (1981).

[32] I note, however, that, although Administrative Law Judge Maloney has made findings of such discriminatory conduct, the case is pending before the Board.

[33] With respect to this credibility determination and others, it is worth repeating here the often-quoted maxim that "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

[34] I note that Administrative Law Judge Maloney found that across-the-board increase unlawful in Case 1–CA–17917. However, the General Counsel does not contend that Respondent is consequently precluded from relying on the fact that nonunit personnel did not receive such an increase as part of its justification for treating them differently with respect to the insurance premiums.

for insurance premiums. I shall also recommend that Respondent be ordered to reimburse employees for all amounts withheld from their paychecks to pay for insurance premiums and to pay the employees interest on their vacation pay from the time they would have received it under the policy in effect through June 1981 until they actually took their vacations and received their pay. With respect to the unilateral change in the method of funding health insurance, I note that Respondent's current contract with Blue Cross is about to expire and that, in any event, in light of the cease-and-desist and reimbursement remedies I have recommended, the change in the method of funding insurance will not have an impact on the employees' terms and conditions of employment. I therefore deem it unnecessary to require Respondent to bargain retroactively about the insurance policy in effect until August 1983.

As a further measure to remedy Respondent's violations of Section 8(a)(5) and (1) of the Act, I shall recommend that Respondent be ordered to cease and desist from implementing unilateral changes in terms and conditions of employment of unit employees without bargaining with the Union which represents them. Finally, I shall recommend that the amounts paid to employees to make them whole for any loss they may have suffered as a result of Respondent's unlawful unilateral action include interest, to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[35]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Harvard Folding Box Co., Inc., Lynn, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Boston Local No. 600, Graphic Arts International Union, AFL–CIO, CLC as the exclusive representative of its employees in the following unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees, including truckdrivers, of Respondent employed at its Lynn, Massachusetts plant, excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) Requiring employees to contribute to health insurance premiums or increasing the amounts employees contribute to such premiums, or instituting changes in vacation pay policies or health insurance plans or any other terms or conditions of employment of employees in the above-described unit without first notifying the Union and affording it an opportunity to bargain about such changes.

(c) Exaggerating to employees the number of persons who might be reinstated pursuant to a Board order and telling employees that in consequence of such reinstatements there might be a layoff.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make unit employees whole for any losses they may have suffered as a result of Respondent's unlawful unilateral action, including interest thereon, computed in the manner set forth in the section of this Decision entitled "The Remedy."

(b) On request, bargain with the Union with respect to the wages, hours, and other terms and conditions of employment of the employees in the unit set forth above.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Lynn, Massachusetts facility copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein are dismissed.

[35] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[37] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the

National Labor Relations Act, as amended, and has ordered us to post this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Boston Local No. 600, Graphic Arts International Union, AFL–CIO, CLC as the exclusive representative of our employees in the following unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees, including truckdrivers, employed at our Lynn, Massachusetts plant, excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT require employees to contribute to health insurance premiums or increase the amounts employees contribute to such premiums, or institute changes in vacation pay policies or health insurance plans or any other terms or conditions of employment of employees in the above-described unit without first notifying the Union and affording it an opportunity to bargain about such changes.

WE WILL NOT exaggerate to employees the number of persons who might be reinstated pursuant to order of the National Labor Relations Board and indicate that as a result some current employees may be laid off.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make employees whole, with interest, for any losses they may have suffered as a result of our deducting money from employees' paychecks for health insurance premiums and as a result of our change in the vacation pay policy.

WE WILL, upon request, bargain with the Union with respect to the wages, hours, and other terms and conditions of employment of the employees in the unit set forth above.

HARVARD FOLDING BOX CO., INC.

Kansas Van and Storage Co., Inc. *and* Truck Drivers and Helpers, Local No. 696 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 17-CA-10086

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 May 1982 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent herewith and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(5) by refusing to bargain about health insurance. We disagree.

The Respondent and the Union have had a collective-bargaining relationship for several years, and the issue of health insurance arose in the context of negotiations for a new contract. The Union's initial contract proposals included an item: "Discuss a Health & Welfare cost program." At the first bargaining session the Union went through its proposals and stated that instead of a first-year wage increase it wanted an insurance program. It said it knew of a better plan than the one employees were carrying at their own expense and thought they could get into that plan for approximately 70 cents an hour. The Union did not name the plan. The Respondent said it would study the Union's proposals. Later the Respondent submitted counterproposals, including economic provisions covering rates for hourly wages, mileage, loading, daily expenses, and pension fund. At the next bargaining session the parties discussed the counterproposals. The Union took the position they were inadequate and asserted that the Respondent had ignored the insurance request. The Union named the insurance plan it had in mind, a state building trades program which would require a special agreement to cover the Respondent which was outside the building trades. The Union said the plan would cost 70 cents per hour the first year, 15 cents additionally the second year, and 10 cents additionally the third year. It suggested that any excess of that amount could be deducted from the employees' wages as agreed to by the employees. The Union did not submit the complete insurance plan or any written materials about the plan. The Respondent replied that its counterproposals covered its economic offer.

The Respondent prepared a second proposal and the parties met for a third time. The Union asserted that the Respondent's whole proposal was less than the employees could live with and did not include an insurance provision. The Respondent stated a willingness to make some changes in the hourly rate and an addition to the pension payments. When the Union complained that the Respondent had not addressed the insurance issue, the Respondent declared that was its economic offer, that was what it was prepared to offer. The following day the employees voted to strike.

We conclude that the facts do not establish that the Respondent refused to bargain about health insurance. We conclude, rather, that health insurance was considered as part of negotiations covering a total contract. The parties met several times, made counterproposals, and reached agreement on some items. The Union never presented a complete insurance plan for consideration or specific details of a plan. The absence of an insurance program in the Respondent's economic proposals does not demonstrate a refusal to bargain about the subject of insurance.

2. We agree with the judge that the Respondent violated Section 8(a)(5) by refusing to meet and bargain with the Union, but we disagree with his finding that the refusal occurred on 18 August 1980, the day the strike began. On that day the union representative telephoned the Respondent's vice president who had conducted contract negotiations and said he wanted to discuss matters that separated them. The vice president referred the Union to the Respondent's attorney. The union representative called the attorney and left a message when he was told that the attorney was not in. We consider the Respondent's conduct on this date to fall far short of a refusal to meet and negotiate. Without question an employer may bargain through an agent and it was reasonable for the Respondent's vice president to decide to bargain through a professional negotiator after he had failed to reach agreement with the Union and the employees had gone on strike. There is no evidence that he made the decision to evade or delay negotiations. Although the selection of an attorney to handle negotiations did not relieve the Respondent of its statutory obligation to bargain, the evidence does not establish that on 18 August it was failing to discharge that obligation through an attorney.

However, the Union was unable to speak with the attorney despite several telephone calls to his office and a second call to the Respondent on 16 October when the vice president again referred the Union to the attorney. On 29 October the union representative explained to the Respondent's vice president that the Union had tried unsuccessfully to talk to the attorney who did not return its telephone calls and if matters continued in that way he could only assume that the Respondent was refusing to bargain. The vice president replied, "You will have to take it however you want it." We think that this response by the Respondent when confronted with information that clearly raised a question why the Union had been unable to deal with Respondent's attorney for a period of at least 2 months shows a failure to exercise responsibility for the conduct of its bargaining representative and a disregard of the bargaining obligation. Accordingly, we find that the Respondent refused to meet and bargain on 29 October 1980.[1]

3. The judge found that one of the reasons for the strike was the Respondent's refusal to bargain about health insurance. Because we do not accept his finding that the Respondent unlawfully refused to bargain about health insurance, we reject the related finding that the strike was caused by unfair labor practices. We find, however, that the strike became an unfair labor practice strike on 29 October when the Respondent violated Section 8(a)(5) by refusing to meet and negotiate further with the Union. Consequently, we consider the strikers to be unfair labor practice strikers as of 29 October 1980.[2]

[1] Member Zimmerman dissents from this finding. He agrees with the judge that the Respondent's unlawful failure to meet with the Union commenced on 18 August, rather than on 29 October. Contrary to his colleagues, he finds that the Union's unsuccessful attempts to arrange a meeting with the Respondent through calls to the Respondent's vice president (twice) and the Respondent's attorney (four times), starting on 18 August, suffice to establish that the Respondent's refusal to bargain occurred on that date. Perhaps no single one of these prior failures by the Respondent to cooperate with the Union in this regard would per se be an unlawful refusal to bargain. But the inescapable *pattern* of circumvention, avoidance, and lack of cooperation evidenced by the Respondent's repeated evasions of its bargaining obligation to the Union colors each of those single instances with the broad brush strokes of unlawful activity ab initio—from the Union's first such request on 18 August for continued negotiations. Thus, the Respondent's subsequent failures and refusals in this regard, culminating in Vice President Morford's virtual concession, in his 29 October conversation with union representative Moore, that the Respondent was indeed refusing to negotiate (i.e., Morford's remark, "You will have to take it however you want it," in response to Moore's charge that the Respondent was refusing to negotiate), establish, in Member Zimmerman's view, that the Respondent set out on its course of unlawful refusal to bargain as early as 18 August, and not, as his colleagues would have it, as late as 29 October.

[2] For a discussion of the reinstatement rights of employees who participate in a strike that is converted from an economic strike to an unfair labor practice strike see *Charles D. Bonanno Linen Service*, 268, NLRB 552 (1984).

AMENDED CONCLUSIONS OF LAW

Substitute the following paragraphs for the judge's Conclusions of Law 3 and 4.

"3. By failing and refusing to meet with the Union for the purpose of collective bargaining on and after 29 October 1980 as the exclusive representative of its employees in the above-described appropriate bargaining unit the Respondent violated Section 8(a)(5) and (1) of the Act.

"4. The strike which began on 18 August 1980 was converted to an unfair labor practice strike by the Respondent's violation of Section 8(a)(5) on 29 October 1980."

ORDER

The National Labor Relations Board orders that the Respondent, Kansas Van and Storage Co., Inc., Topeka, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate unfair labor practice strikers on their unconditional offer to return to work.

(b) Refusing to meet and bargain in good faith with Truck Drivers and Helpers, Local No. 696, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of the employees in the bargaining unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer James H. Hendricks, Robert A. Nocolay, Frank E. Bath, Jr., Sharon L. Coulter, Daniel P. Jones, Reuben Wabnum, and Basil Gibbs immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired in their former jobs on or after 29 October 1980. Place any of these employees for whom employment is not immediately available on a preferential hiring list in accordance with seniority or other nondiscriminatory practice used by the Respondent. Make whole these employees for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copy-

ing, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All truck drivers, helpers and shop employees employed at the facility located at 220 North Quincy, Topeka, Kansas, but excluding the master mechanic, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(d) Post at its facility in Topeka, Kansas, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to reinstate unfair labor practice strikers on their unconditional offer to return to work.

WE WILL NOT fail or refuse to meet and bargain in good faith with Truck Drivers and Helpers, Local No. 696, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America as the exclusive bargaining representative of our employees in the appropriate bargaining unit set forth below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer James H. Hendricks, Robert A. Nocolay, Frank E. Bath, Jr., Sharon L. Coulter, Daniel P. Jones, Reuben Wabnum, and Basil Gibbs immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired in their former jobs on or after 29 October 1980.

WE WILL place any of these employees for whom employment is not immediately available on a preferential hiring list in accordance with seniority or other nondiscriminatory practice that we use.

WE WILL make them whole for any loss of earnings and other benefits resulting from our denial to them of reinstatement, less any net interim earnings, plus interest.

WE WILL, on request, meet and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All truck drivers, helpers and shop employees employed at the facility located at 220 North Quincy, Topeka, Kansas, but excluding the master mechanic, office clerical employees, professional employees, guards and supervisors as defined in the Act.

KANSAS VAN AND STORAGE CO., INC.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This case was heard on July 28 and 29, 1981, in Topeka, Kansas. The complaint issued on January 28, 1981, pursuant to a charge filed on December 19, 1980, and amended on January 20, 1981. The complaint alleges the Respondent violated Section 8(a)(5) and (1) by refusing to negotiate a health insurance contribution plan and be failing and refusing to meet with the Union, and Section 8(a)(3) by refusing to reinstate unfair labor practice strikers. The Respondent denies it has either refused to meet with or bargain with the Union, and contend the strikers, whom it has placed on a preferential hiring list, were economic strikers whom it permanently replaced. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine wit-

nesses. Both the General Counsel and Respondent filed posthearing briefs which have been carefully considered.

On the entire record[1] in the case, including the demeanor of the witnesses, and the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the moving and storage of furniture and other household goods in Topeka, Kansas. It is admitted and found that Respondent annually derives gross revenues in excess of $50,000 for the transportation of furniture and other household goods in interstate commerce pursuant to arrangements with and as agent for various common carriers, including Mayflower Moving Service which operates between and among various States of the United States, that it operates as an essential link in the transporation of furniture and other household goods in interstate commerce, and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUE

1. Whether the Respondent failed and refused to negotiate with the Union about a health insurance contribution plan.

2. Whether, since or about August 15, 1980, the Respondent failed and refused to meet with the Union for the purpose of collective bargaining.

3. Whether the strike which commenced on or about August 18, 1980, was caused by the Respondent's refusal to negotiate a health insurance contribution plan and/or prolonged by its refusal to meet for the purpose of collective bargaining.

4. Whether the Respondent unlawfully refused to reinstate striking employees.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

For a number of years, the Respondent has had a collective-bargaining relationship with the Union as the representative of all truck drivers, helpers and shop employees employed by the Respondent, at its facility located at 220 North Quincy, Topeka, Kansas, but excluding the master mechanic, office clerical employees, professional employees, guards and supervisors as defined in the Act, a unit alleged, admitted, and found to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The most recent agreement covered the period from August 15, 1977, to August 15, 1980.[2] Pursuant to its terms, on June 4, the Union advised the Respondent of its desire to reopen the contract. Arthur W. Morford is Respondent's president, James L. Morford is Respondent's vice president, and William G. Haynes is Respondent's attorney and principal negotiator. LaRue Moore is the Union's president and Bill Moore, his son, is a union business representative and its representative in bargaining with Respondent during times material herein. James H. Hendricks, James E. Bath, Jr., Daniel P. Jones, and Robert A. Nicolay were employed by Respondent in the unit represented by the Union. Basil Gibbs, Sharon L. Coulter, and Reuben Wabnum were also employed by Respondent. While there was testimony to the effect that the latter three were not strikers, it is clear they performed no work for Respondent during the strike which commenced August 18. The complaint alleges, and the answer admits, however, that on December 18 the Union made an unconditional offer to return to work on behalf of all seven of the above-named "employees."

B. *Prestrike Events*

On July 3 Business Representative Bill Moore (Moore) called Jim Morford (Morford), advised him of a negotiation meeting with Topeka Transfer and Storage Company, and asked if he planned to attend. Morford responded that Respondent desired to negotiate separately. On July 8, Moore mailed a copy of the Union's proposed contract changes to Morford.[3] Item 13 of the proposal reads, "Discuss a Health & Welfare cost program." On July 16, Moore called Morford again regarding a meeting and one was arranged for July 22 at the union hall.

1. First negotiation meeting

The first negotiation meeting took place at 7 p.m. on July 22 at the union hall. Present for the Union in addition to Bill Moore were Ted Sumner, an employee of Topeka Transfer and Storage, Hendricks, Bath, Nicolay, and Jones. Present for the Respondent were Art and Jim Morford. The testimony shows that Moore went through the Union's list of proposed changes, stating the Union wanted an increase in vacations; an additional holiday; a pension increase; a different method of computing call-in pay; an hourly pay increase of 75 cents the first year and 60 cents each for the second and third years; a mileage rate increase of 2 cents for the first year and 1 cent for each of the next 2 years; an increase in the loading rate of 10 cents the first year and 5 cents for each of the next 2 years; and in lieu of a first-year wage increase, a health and welfare plan paid for by the employer.[4] Moore stated that the Blue Cross plan which was available to, and paid for by, employees was costing too much and that he knew of a better plan that the Company could get into at a cost of approximately 70 cents per hour.[5]

[1] The General Counsel moved to correct the transcript in accordance with an appendix attached to his brief. The Respondent has not opposed the motion. Accordingly, with the exception of the changes requested on pp. 51 and 257, the motion is granted. The appendix has been marked and is received in evidence as G.C. Exh. 20.

[2] All dates are in 1980 unless otherwise stated.

[3] G.C. Exh. 7.

[4] The Union withdrew two of its proposals which Moore acknowledged did not affect Respondent's employees.

[5] Moore did not have a copy of the plan nor did he mention its name. His knowledge of the plan was limited to hearsay.

Jim Morford responded that he and the Company would study the Union's proposal and get back to Moore. Morford asked if the Union intended "to keep economic equality between" Respondent and Topeka Transfer, and Moore responded affirmatively.

The Respondent's written contract proposal was received by the Union on July 26.[6] On July 27, Moore met with Respondent's employees and reviewed the Respondent's proposal. Moore noted that the proposal did "not even address our proposal of insurance, that they had completely ignored it." A vote was taken and the proposal was rejected by the employees. On July 28, Moore called Morford and informed him the Company's proposal was inadequate and another meeting was needed. They agree to meet again July 31.

2. Second negotiation meeting

On July 31, Morford met with Moore, four of Respondent's employees and two employees from Topeka Transfer. Moore stated Respondent's proposal was insufficient and explained why. Respondent's first proposal was to amend article IV, section 4, of the old agreement to provide for a 90-day probationary period instead of 30 days. The second proposal was to amend article VIII, section 1, which provided that drivers were not to be held responsible for damage caused by improper loading or handling of merchandise by others, to add a provision that drivers would "be responsible for carriers charges for violations of ICC rules and company policies and the carriers claim liability charge for improperly prepared inventories." Proposal three sought to change article XV, section 1, by providing for overtime after 40 hours per week instead of after 8 hours per day. With respect to its fourth proposal covering wages, Respondent proposed an hourly increase of 40 cents per hour the first year and 30 cents per hour over each of the 2 succeeding years; a mileage rate increase of 1 cent the first year and 1 cent for the second year with no additional increase for the third year; a load and unload (per cwt) increase of 5 cents for each of the 3 years; an increase of $1 per day for expenses in each of the 3 years;[7] and 50 cents per hour difference between helpers and drivers wages. Its fifth proposal was to change article XV, section 5, to provide that drivers be paid the same hourly rate for breakdowns as layovers. Its sixth proposal was to increase pension fund payments $1 per week the first year and $3 per week for each of the 2 succeeding years. With the exception of proposal five covering breakdowns, which it was agreed should be included in a contract since the Company was already abiding by it, the Union rejected all of the Respondent's proposals as inadequate. Moore testified that after going through, and rejecting, the Respondent's proposals, he told Morford that "you have completely ignored the fact that we requested a health and welfare program," and that Morford replied "that is my economic offer. That is what I am prepared to discuss, and that is all that I have."[8] Moore responded that he did not see any sense in continuing the meeting, which then broke up. On cross-examination, Moore testified that he told Morford that the insurance plan he proposed would cost the Employer "70 cents [per hour per employee] the first year, 15 cents additional the second year, and 10 cents additional the third year; and if it went over that, that it would be deducted from the employee's wages as agreed to by the employees."

On cross-examination, Moore testified he made the following counterproposals at the meeting:[9]

> Vacation: 2 weeks after 3 years. (Initial proposal was 2 weeks after 2 years. Contract provided for 2 weeks after 4 years.)
>
> Pension: Increase of $4 per week the first year and $3 per week for the 2 succeeding years. (Initial proposal was $3 per year.)
>
> Hourly pay on Multiple Metro Pickup (no discussion).
>
> Room expense and meals: $22 the first year, $23.50 the second and $25 the third year. (Initial proposal was for a minimum of $30 per night. Contract provided for $19 per day.)
>
> Hourly rate:
>
> 1st year: Insurance plan at rate of 70 cents per hour in lieu of hourly increase, mileage increase and load and unload increase.
>
> 2nd year: 50 cent hourly increase; and !6 cent mileage rate (down 1 cent from initial proposal).
>
> 3rd year: 50 cent hourly increase; and 16-1/2 cent mileage rate (down 1-1/2 cents from initial proposal).[10]
>
> "Helpers: 50 cents less than drivers on all new hires present employees with 45 days not restricted."
>
> Double time Sunday.
>
> 4 hour call in.

The Company's response to the proposal, according to Moore, was, "[W]ell, we will look at it."

On August 13, Moore called Morford, informed him that time was running out, that the Union had reached "a summary of a contract with his competition," and that they needed to meet again. Later in the day, Morford called Moore, advised him the Respondent had another written proposal and agreed to meet the afternoon of August 15 at the union hall. A union representative picked up a copy of Respondent's second proposal[11] the afternoon of August 13.

---

[6] G.C. Exh. 8.

[7] The contract provided for expenses of $19 per day. The Union's proposal called for "room to $16 or if none available, close to that rate. Actual expense with receipt or paid by the hour to hunt cheaper hotel." In addition, the Union sought a meal allowance of $3 for breakfast, $4 for lunch, and $7 for supper.

[8] Nicolay testified Morford's response was, "[y]ou have my offer right now. I an not prepared to discuss that. I am talking cash only. You have my economic proposal."

[9] R. Exh. 1 contains the notes made by Moore during negotiations.

[10] Moore testified on direct examination that the cost of the proposed insurance plan entailed an additional 13 cents per hour the second year and 10 cents the third year. His notes do not reflect these amounts.

[11] G.C. Exh. 9.

3. Third negotiation meeting

On August 15, Morford called Moore early in the afternoon and stated he and his father could not get away from the office to negotiate. Moore responded that the contract expired at midnight, that they had to meet and proposed a meeting in Morford's office that afternoon, to which Morford agreed. Accordingly, about 3 p.m. Moore and an employee of Topeka Transfer met with the two Morfords in the latter's office. The Respondent's second written proposal[12] proposed hourly wage increases of 50 cents for each of the 3 years;[13] a mileage rate increase of 1 cent the first year, another cent the second year and a half cent the third year;[14] a load and unload (per cwt) increase of 10 cents the first year and 5 cents for each of the two succeeding years;[15] 50 cents per hour difference between helpers and drivers on all new hires;[16] change article XV, section 5, to provide the drivers be paid the same hourly rate for breakdowns as layovers;[17] and an increase in pension fund payments of $1 per week for the first year and $3 per week for each of the 2 succeeding years.[18] During the meeting, Morford amended his proposal by increasing pension fund payments by $3 in each year and by decreasing the hourly increase for the second and third years from 50 cents each to 45 cents and 40 cents per hour respectively. Moore's testimony regarding the meeting was a follows:

> Q. Starting from the beginning of this meeting and taking us through to the end, tell us as best you recall what was said and by whom.
>
> A. I told Jim that we had completed the other contracts, as I told him before, and we needed to get his resolved, that his last proposal had not met the economic equality that he had asked for, and that we felt that his whole proposal was less than what the drivers could live with. I told him he had no[t] offered us any insurance proposal. He had not even responded to it, and he at that time—we told him that he had not made any changes in the pension. He said, "Well, I am willing to make this change." He added $3, $3 per week to the pension per year, and changed the monetary, the hourly rate by a nickel in the last two years and said that he was willing to make those changes, and I said, "Well, you still have not made any changes or made any address to the insurance policy."
>
> He said, "That is my economic offer. That is what I am prepared to offer," and I said, "Well, I do not really have any choice, Jim, other than to take this back to the employees," and he said, "Well, we all have to do whatever we have to do," and I said, "Well, I thank you," and I left.

C. *The Strike*

On August 16, Moore met with Bath, Hendricks, Jones, and Nicolay. He reported the changes in the company proposal which had been made during the meeting the previous day, and "that they had not addressed the insurance and were not willing to apparently institute a program because all they had addressed was an economic proposal, and they apparently weren't prepared to meet the economic quality of the other company that they had requested." He expressed his feeling that the Respondent had failed to negotiate, but had instead presented its proposals on a "take it or leave it" basis. After the employees voted to strike Respondent, Moore expressed the opinion that the Respondent may have committed an unfair labor practice. The first picket signs were prepared at that time.

Picketing commenced on August 18 at approximately 7:30 a.m. and continued until noon on August 22 with signs reading:

> Notice to the public: Employees of Kansas Van and Storage Co., Inc. are on strike. Members of Teamsters Local 696, Topeka, Kansas, 232-3866.

Commencing about noon on August 22, and continuing through the dates of the hearing herein, the signs have read:

> Employees of Kansas Van and Storage Co., Inc., unfair labor practice, on strike, members of Teamsters Local 696, Topeka, Kansas, 232-3866.

About midmorning on August 18, Moore called Morford to discuss, inter alia, "the things that we are apart on these negotiations." Morford referred Moore to Bill Haynes, his attorney.

D. *Attempts to Contact Respondent's Attorney*

According to Moore, he immediately called Haynes' office, was advised he was not in and left the following message with Haynes' secretary: "This is Bill Moore. My phone number is 232-3866. and I am calling about Kansas Van and Storage."

On August 19, LaRue Moore (Bill Moore's father and the union president) called Respondent's office in an attempt to reach Art Morford (Respondent's president), but in his absence talked to Jim Morford, and asked if there was some way they could "sit down and work this whole mess out," that he "understood we had had now not only a strike problem, we also had a pension problem."[19] Morford referred him to Haynes. According to

[12] G.C. Exh. 9.

[13] This is an increase of 10 cents per hour for the first year over its initial proposal, and 20 cents per hour in each of the next 2 years over the initial proposal.

[14] An increase of a half cent in the third year over the initial proposal.

[15] An increase of 5 cents in each of the years over the initial proposal.

[16] The same as in original proposal.

[17] Same as in original proposal.

[18] The Respondent had dropped the first three proposed changes in its initial proposal, to which the Union objected, which covered probationary period, drivers responsibility for violations of ICC rules and improperly prepared inventories, and a change in the method of computing overtime.

[19] While acknowledging that he does not normally get involved in negotiations, which are left to his son to handle, LaRue Moore testified that on August 19 he had called "to talk to Art [Morford] who I have know for many years and see if he and I possibly couldn't sit down and maybe clear up the whole ball of wax, strike, pension problem, whatever there was to be done."

LaRue Moore, he then called Haynes' office, and on learning that Haynes was not available, left his name and asked that Haynes call him. Also on August 19, the Union filed a charge against Respondent in Case 17–CA–9862, alleging that Respondent had made unilateral changes in working conditions in violation of Section 8(a)(1), (3), and (5), and had threatened and interrogated employees in violation of Section 8(a)(1). The charge was later withdrawn.

About September 3, LaRue Moore called Haynes' office again, again learned Haynes was not in, and again left his name with a request that Haynes call him. He assumed Haynes did not return his call because his secretary did not leave him a message to that effect.

On October 16, Moore called Morford and stated, "We still need to get together and talk about negotiations." Morford's response was, "[D]on't talk to me; talk to my attorney." According to Moore, he then called Haynes' office, and on learning he was not in, left his name and phone number, and stated he was "calling about Kansas Van and Storage." The secretary to whom he spoke responded that she would "see he gets the message."

On October 29, Moore called Morford again, using a "speaker phone" so that the employees who were with him could hear the conversation. His account of the conversation with Morford is:

> "Jim, we need to renew negotiations. We need to sit down with you." He said, "Don't talk to me; talk to my attorney," and I said, "Jim, I have tried to talk to your attorney. He is stonewalling me. He will not return my call," and he says, "That is not my fault," and I said, "It may not be your fault, but it is your responsibility. You have an obligation." I said, "If you continue this and he continues not to respond, I can only assume that you are refusing to bargain and negotiate," and he said, "You will have to take it however you want it," and I said, "Well, O.K. I will try to make the attempt of calling Mr. Haynes."

Moore then placed a call on the "speaker phone" for Haynes in the presence of the same employees, and since Haynes was apparently not there, left his name and phone number.[20] Moore claimed that on October 29, he had in his possession a copy of a "plan document" with another company, "a private situation, but it was for my reference, and I also had a 3 year quote on the amount of its cost and the method by which we would compute the mileage rate into the hourly rate for the sake of contributions." He did not forward the "plan document" to either Morford or Haynes, and when asked to produce one later on, was unable to furnish Haynes with a copy.

On November 12, Moore met with several of the strikers and again placed a "speaker phone" call for Haynes. On learning Haynes was out, he left his name, the fact he was with the Union, and asked that Haynes call him.[21] Moore next called a Federal mediator and asked that he assist in establishing contact with Morford and Haynes.

On November 19, Morford called Haynes' office again, was told he was "out on a trial," and again left his name and phone number and asked that he return the call.

On December 18, Moore called Morford from his attorney's office in Kansas City. He asked Morford if he was ready to meet and negotiate, and was again told to call Haynes, which he apparently failed to do. That afternoon Moore returned to Topeka, met with two of the strikers and suggested he make an unconditional offer to return to work. As neither of the strikers objected, he contacted Morford personally and made an unconditional offer to return on behalf of the four strikers and three other employees who had not been called to work during the strike. By letter dated December 23, Art Morford informed Moore that the seven strikers had been permanently replaced and would be placed on a preferential hiring list in the event their jobs became vacant in the future.

E. Events Following Refusal-to-Bargain Charge

On December 19, the Union filed a charge initiating this case, wherein it was alleged that the Respondent had failed to bargain since about August 15. On January 20, 1981, the charge was amended to allege that (1) since July 22, the Respondent refused to bargain by refusing to discuss the Union's insurance proposal; (2) since August 15, the Respondent refused to meet; and (3) since December 23, Respondent failed to reinstate unfair labor practice strikers after an unconditional offer to return to work. On January 26, 1981, Morford wrote the following letter to Moore:

> Dear Mr. Moore:
>
> You have alleged in your unfair labor practice charge that our company has refused to meet to negotiate and has refused to negotiate the union's insurance proposal.
>
> During our last meeting our response to the increase for health and welfare was we proposed a fifty cents per hour increase instead, which you rejected. We explained to you that we believed monies available for improvements should be applied for employees wages. We did not refuse to discuss your proposal.
>
> We have never refused to meet to negotiate. We have always been willing to meet with the union and continue to be willing to meet at a mutually agreeable time and place.
>
> As we told you previously Mr. William Haynes has been retained by our company to represent us in negotiations following our last meeting in August of 1980. To this date Mr. Haynes' office has no record of any attempts by you to arrange for a meeting.
>
> If you now desire a meeting please contact Mr. Haynes in writing with a carbon copy to us and suggest several dates you will be available to meet.

[20] The substance of the October 29 calls to Morford and Haynes' office was corroborated by Nicolay.

[21] Corroborated by Nicolay.

> We assure you that a mutually agreeable date and time will then be arranged with Mr. Haynes.
>
> Your immediate response to this letter will be appreciated.
>
> Yours very truly,
> /s/James L. Morford
> James L. Morford
> Vice President

On January 30, 1981, Moore wrote Haynes[22] proposing several dates in February to negotiate. Haynes responded by letter dated February 3, 1981,[23] and the parties met on February 11, 1981. Present for the Respondent were Morford and Haynes. Moore, Jones, Bath, and Hendricks were present for the Union. The proposals by both sides were reviewed. Moore stated the items he felt they were apart on, among which was "they had not responded to a request that we have an insurance program in lieu of the first year's wages." Haynes expressed the view that he did not think the parties were "that far apart," caucused in private with Morford, and informed Moore that "we will draw something up for you." Agreement was made to meet again on February 21.

The parties met again on February 21, at which time Haynes presented the Union with a written proposal.[24] The proposal, General Counsel's Exhibit 15, provides for a 3-year term commencing February 21, 1981, through February 20, 1984. After reviewing it, Moore stated that it appeared to be less than what the Respondent had previously offered and that "there seemed to be no element of negotiations." Haynes responded "[W]ell, you can see that I finally made a proposal on your insurance." The proposed health and welfare provision in Respondent's proposal reads:

> Effective February 21, 1983, the Employer shall contribute $70.000 per month to the monthly medical and hospitalization premiums for each regular full-time employee following their 90th day of employment, provided said employee makes application for coverage through the Employer and authorizes a payroll deduction for any additional monthly premiums due.[25]

Moore stated that Respondent's proposal did not state who the insurance carrier would be, its cost, or what it would cover, and requested the Respondent furnish more information. Haynes agreed to so and Moore, at Haynes request, agreed to furnish Respondent with a copy of the Builders Health and Welfare Fund "plan document" the Union was proposing.

By letter dated February 24, 1981, Moore reiterated his request to Haynes for more information, and by covering letter dated February 27, 1981, Morford transmitted information which he had obtained from Kansas Blue Cross-Blue Shield, Prudential Insurance, and Mayflower Warehousemen's Association Group Insurance Plan, to Moore. On the same day, Haynes wrote Moore the following letter:

> Dear Mr. Moore:
>
> This is to acknowledge reciept of your letter dated February 24, 1981. You apparently have misunderstood our discussion concerning Kansas Van's proposal in regard to health and welfare or hospitalization during our meeting on Saturday, February 21, 1981.
>
> The Company offered to pay $70 per month towards a hospitalization premium effective the third year of the contract. We stated that the coverage of the plan at the time could be the same as the present Blue Cross Blue Shield coverage or something different than the present plan. We stated that the Company would prefer to remain with Blue Cross Blue Shield but that it was open to suggestion from the Union. You stated that the Kansas Builders Health and Welfare plan was available and that the trust fund would accept payments directly from the Company deducted from the employee's pay. You further stated that the present premium for coverage in that fund was 70 cents per hour worked. I asked you if you would provide me with the trust agreement which allowed for drivers paid on a mileage basis to pay premiums on a flat rate basis and you said that you would do so.
>
> Mr. Morford is requesting that Blue Cross Blue Shield provide you with the present coverage provided by them and an estimate of what the anticipated premiums would be for the next three years. If you do not hear from them within the next ten days, please let me know. Mr. Morford has comparison bids from other companies which he is sending you today.
>
> We will be available at 7:30 PM on March 3, 1981, for another meeting, provided my secretary is able to reach you today to confirm that meeting. I suggest that we meet again in our conference room.

The parties met for the last time on March 24, 1981.[26] Haynes and Morford were present for the Respondent and Moore, Hendricks, Jones, and Bath for the Union. Moore stated he had reviewed the information which Respondent had furnished but that he could not find anything to indicate what any of the plans would cost at the time the Respondent's offer to contribute to a health and welfare plan would go into effect, and that agreeing to anything like that "would be like buying a pig in a poke." Haynes asked Moore for a copy of the "plan document" which the Union proposed. Moore responded that he had been unable to obtain a copy from the plan administrator, but that the Union "could offer a three-year quote as far as the insurance cost; and that if it went over that, we were agreeable to put the language in to take anything that went above that our of the employee's

[22] G.C. Exh. 12.

[23] G.C. Exh. 13.

[24] Present for the Respondent were Haynes and Morford. Moore, Jones, and Hendricks were present for the Union.

[25] Based on a 4-week month and 40-hour week, $70 per month per employee is the equivalent of 43-3/4 cents per hour per employee.

[26] As of the date of the hearing, neither party had requested another meeting.

wages." After the Respondent refused to change its outstanding offer, the meeting ended with Haynes stating he would be available to talk to Moore.

Positions of the Parties

The General Counsel argues the Union's health insurance proposal, which was contained in the Union's written proposal and explained by Moore at the first negotiating meeting of July 22, was a mandatory subject of bargaining, and that the Respondent's failure to address it in either of its two written proposals and its refusal to discuss it during bargaining sessions constituted a refusal to bargain in violation of Section 8(a)(5) of the Act. Consequently, it is argued, the strike which commenced on August 18 was an unfair labor practice strike, which was prolonged thereafter by the failure of Respondent's attorney to meet at reasonable times with the Union, also violating Section 8(a)(5). It is argued that the refusal to reinstate the unfair labor practice strikers on the December 18 unconditional offer to return made by Moore violated Section 8(a)(3).

The Respondent contends the strike was not caused by its refusal to negotiate the subject of the health insurance contribution plan, but rather by its "refusal to *agree* to contribute 70 cents per hour for each hour worked for each employee to the health and welfare program which Moore claimed was available commencing the first year of the contract," a copy of which the Union was unable to make available to Respondent. It is argued that the Respondent insisted that all moneys available for economic improvement be used to improve employee's wages, and therefore the evidence established that the parties disagreed on the economic package prior to the strike, culminating in an impasse over economic issues. Therefore, in light of the long amicable relationship between the parties, the good-faith bargaining which preceded impasse and the strike, as well as the Union's failure to furnish Respondent with a copy of its proposed health and welfare plan, it is argued that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent refused to negotiate the subject of health insurance and that the strike was economic in nature. Respondent argues further that, since the Union has at all times been unable to furnish it with a copy of its proposed health and welfare plan, it would not have been able to engage in an intelligent discussion of the health and welfare program proposed by the Union, which was one of the primary economic issues which caused the strike and continued to be a stumbling block to settlement. Accordingly, no settlement could have been achieved during the period after the strike commenced and, therefore, the strike was not prolonged because of Respondent's refusal to bargain or meet between August 18, 1980, and February 11, 1981, when negotiations resumed.

Conclusions

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." The obligation "to bargain collectively" is defined in Section 8(d) as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement." The law requires no party to make concessions or to yield any positions fairly maintained. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970). However, there exists a duty to enter into negotiations with "a spirit of sincerity and cooperation in a genuine effort to find a basis of accord" and "to refuse to do so is an unfair labor practice proscribed by Section 8(a)(5)." *NLRB v. F. Strauss & Son, Inc.*, 536 F.2d 60, 63 (5th Cir. 1976), and cases cited therein. "[T]he ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence." *NLRB v. A.W. Thompson, Inc.*, 449 F.2d 1333, 1335 (5th Cir. 1971). "It is well settled that group medical benefits and insurance plans providing for these benefits are encompassed within the terms 'wages,' or 'conditions of employment' and, as such, are matters about which an employer is mandatorily required to bargain." *Connecticut Light Co.*, 196 NLRB 967, 968 (1972), and cases cited therein. It is also settled that a strike caused by unfair labor practices is an unfair labor practice strike even if it also has economic objectives. *NLRB v. Borg-Warner Corp.*, 236 F.2d 898, 907 (6th Cir. 1956), modified on other grounds 356 U.S. 342; *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 929 (6th Cir. 1967), cert. denied 390 U.S. 1013 (1968); *NLRB v. Sea-Land Service*, 356 F.2d 955, 966 (1st Cir. 1966), cert. denied 385 U.S. 900 (1966). An employer who hires a negotiator-attorney is not excused from the statutory requirement "to meet at reasonable times and confer in good faith." *Lawrence Textile Shrinking Co.*, 235 NLRB 1178, 1179 (1978), and cases cited therein. "There remains on the employer the positive legal duty to meet and confer with the Union at reasonable times and places." *NLRB v. Exchange Parts Co.*, 339 F.2d 829, 832 (5th Cir. 1965). Further, the law is settled that employees who strike in protest over their employer's unfair labor practices are entitled to reinstatement to their jobs on their unconditional offer to return to work, displacing if necessary any replacements hired during the strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Daisy's Originals. Inc. of Miami*, 187 NLRB 251 (1970), enfd. 468 F.2d 493 (5th Cir. 1972). Moreover, a strike is treated as an unfair labor practice strike if the employer's unfair labor practices were a contributing cause of the strike. *Southern Pipe v. NLRB*, 444 F.2d 340, 352 (5th Cir. 1971). And, a refusal to reinstate all unfair labor practice strikers, displacing replacements to the extent necessary, is itself discriminatory and violates Section 8(a)(3) and (1) of the Act. *NLRB v. Mooney Aircraft Co.*, 366 F.2d 809, 812 (5th cir. 1966); *NLRB v. Southland Cork Co.*, 342 F.2d 702, 708 (4th Cir. 1965),

Application of the above principles to the facts of this case convinces me that the Respondent has violated the Act substantially as alleged in the complaint.[27]

[27] Respondent rested at the conclusion of the General Counsel's case in Chief without offering any additional evidence.

Paragraph 10 of the complaint alleges that since about July 22, 1980, the Respondent failed and refused to negotiate with the Union over a health insurance contribution plan, a mandatory subject of collective bargaining. It is abundantly clear from the facts that Moore informed Jim Morford prior to entering into negotiations, that the Union wanted, inter alia, to "discuss a health and welfare cost program." At the first bargaining session on July 22, Moore reiterated the Union's interest in such a plan, proposing that an employer paid plan be negotiated in lieu of a first year wage increase. Morford's only response was to the effect that Respondent would study the Union's proposal and "get back." The Respondent's July 26 proposal makes no mention of a health and welfare program, and when Morford brought up the fact and stated at the second bargaining session on July 31 that the Respondent had ignored the Union's request, Morford responded that the proposal contained his "economic offer . . . and that is all that I have." The Union made several counterproposals, including, in lieu of first year hourly, mileage and load and unload increases, the Kansas State Building Trades, Construction Open End and Health and Welfare Program. While Moore did not have a copy of the plan (indeed none was available) it is significant that Morford did not request a copy, and his only response to Moore's counterproposal was, "[W]ell, we will look at it." The third and last meeting preceding the strike took place on August 15. In the meantime, the Union had received Respondent's second proposal which again lacks any response to the Union's proposal of a health and welfare plan. While Morford modified the proposal by increasing the weekly pension fund payments by $3 per week for each of the 3 years, and by decreasing his hourly wage proposal for the second year by 5 cents and the third year by 10 cents, he still failed to include anything covering health and welfare, and when reminded of it, responded "that is my economic offer. That is what I am prepared to offer." That a health and welfare plan was primary on the Union's list of negotiable items is clear. That it was not on the Respondent's list and the Respondent refused to discuss the subject is equally clear. Nor is there any substance to the Respondent's argument that Respondent insisted that all moneys available for economic improvement be used to improve employee's wages, and that therefore the parties disagreed on the "economic package," culminating in an impasse over economic issues. Respondent did indeed attempt to establish this theory, albeit unsuccessfully, through the cross-examination of Nicolay, regarding the bargaining session of July 31. The testimony cited in the Respondent's brief to support the position is on page 253 of the transcript:

> Q. Do you recall Mr. Morford saying anything about the company was concerned about the economic situation in the company generally, inflation, about the employee take-home pay?
>
> A. I recall that there was some discussion about how the economy had slowed down, but as to whether there was any concern over the employee take-home pay, I dont recall that Kansas Van expressed anything.
>
> Q. Do you recall them expressing or stating any thing with regard to why they were continuing to propose an hourly increase to the employee for the first year, and not a contribution for a health and welfare program?
>
> A. There was no justification given for that.
>
> Q. You said they said this was their economic package, their proposal included their economic package, is that right?
>
> A. Jim said, "you have my economic proposal."
>
> Q. Economic proposal, and that was in response to Mr. Moore's statement that their counterproposal included nothing for health and welfare?
>
> A. Yes. He said, "You haven't even addressed the issue." Jim said, "I am not prepared to discuss that right now. You have my economic proposal."

Thus, the record does not establish that Respondent insisted on an hourly wage increase the first year as a quid pro quo for a health and welfare plan. The Respondent was not disposed to either make an offer or discuss health and welfare insurance prior to the inception of the strike. I find therefore that even though the Union had other economic objectives when it struck on August 18, one of the reasons was the Respondent's failure to discuss and/or negotiate over a health insurance contribution plan in violation of Section 8(a)(5), and that the strike was caused by the Respondent's unfair labor practice as alleged in paragraphs 10 and 14 of the complaint.[28]

Paragraph 12 of the complaint alleges that since August 15, 1980, the Respondent has failed and refused to meet for the purpose of collective bargaining, which conduct prolonged the strike. The record shows that Moore attempted to set up bargaining sessions with Morford on August 18 and October 16 and 29 and that LaRue Moore called Morford on August 19 regarding a meeting to "work this whole mess out." On each occasion, Morford referred them to his attorney. During his October 29 conversation with Jim Morford, Moore informed Morford that he had "tried to call your attorney. He keeps stonewalling me. He will not return my telephone calls." As Moore went on to explain to Morford, it may not have been his fault that Haynes did not return the calls, but the ultimate responsibility for bargaining lay with Morford. Such is the law. *NLRB v. Exchange Parts Co.*, supra; *Lawrence Textile Shrinking Co.*, supra. By failing to either personally respond to the Union's request to meet, and/or by failing to arrange for its negotiator-attorney to respond to the request, the Respondent refused to bargain with the Union as alleged in paragraph 12 of the complaint, which conduct prolonged the unfair labor practice strike as alleged in paragraph 14.[29]

---

[28] The fact Respondent may have bargained in good faith with the Union commencing in February 1981, in no way excuses its unlawful conduct prior thereto.

[29] I do not conclude, as the General Counsel argues, that Moore's phone calls to Haynes' office constituted a request to bargain. In none of the calls did Moore request a meeting, and it was not shown at what point in time Haynes was actually engaged to negotiate on Respondent's behalf. As the aforementioned cases point out, the responsibility to respond to the Union's request to bargain lay in the Respondent.

The complaint alleges and the Respondent admits that, on December 18, the following employees who engaged in the strike made an unconditional offer to return to their former positions of employment:

James H. Hendricks	Basil Gibbs
Frank E. Bath, Jr.	Robert A. Nicolay
Daniel P. Jones	Sharon L. Coulter
Reuben Wabnum	

It is alleged and admitted that on December 23 Respondent refused to reinstate them. Respondent contends they were economic strikers and had been permanently replaced prior to December 23. The law is clear that unfair labor practice strikers are entitled to reintstatement on their unconditional offer to return to work, displacing if necessary any replacements during the strike. The Respondent's refusal to reinstate them is discriminatory and violates Section 8(a)(3) and (1) of the Act.[30]

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act, and at all material times herein has been, and it now is, the exclusive collective-bargaining representative of Respondent's employees in the following unit which is appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All truck drivers, helpers and shop employees employed by Respondent, at its facility located at 220 North Quincy, Topeka, Kansas, but excluding the master mechanic, office clerical employees, professional employees, guards and supervisors as defined in the Act.

3. By failing and refusing to negotiate with the Union on the subject of a health contribution plan; and by failing and refusing to meet with the Union for the purpose of collective bargaining on or after August 15, 1980, as the exclusive representative of its employees in the above-described appropriate bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The strike which commenced on August 18, 1980 was an unfair labor practice strike which was caused by, and prolonged by, Respondent's unfair labor practices.

5. About December 18, 1980, the following unfair labor practice strikers made an unconditional offer to return to work:

James H. Hendricks	Basil Gibbs
Frank E. Bath, Jr.	Robert A. Nicolay
Daniel P. Jones	Sharon L. Coulter
Reuben Wabnum	

6. By failing and refusing to reinstate the above-named unfair labor practice strikers to their former positions of employment, Respondent violated Section 8(a)(3) and (1) of the Act.

7. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. My recommended Order will require Respondent to bargain in good faith with the Union on request, including the subject of a health insurance contribution plan. I shall also recommend that the Respondent be required to offer the unfair labor practice strikers named above immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority rights and privileges previously enjoyed, discharging, if necessary, any replacements hired in their former jobs, and make whole such employees for any loss of earnings suffered by reason of their unlawful denials of reinstatement, from the date of their unlawful denials of reinstatement to the date on which they are fully reinstated or declined reinstatement, less their respective net earnings during such period, with backpay computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]

[30] I have reconsidered my ruling rejecting G.C. Exh. 19(a), as requested in the General Counsel's brief, and reaffirm my ruling. It is clear that Respondent considered Gibbs, Coulter, and Wabnum to be strikers even though Moore's testimony leaves some doubt. However, their status, whether as temporary, part-time or full-time employees, can best be determined at the compliance stage. See *Marlene Industries Corp.*, 255 NLRB (1981); *United Maintenance Co.*, 214 NLRB 529 fn. 22 (1974).

Motor Rim & Wheel Service, Inc. *and* **Freight Checkers, Clerical Employees and Helpers, Local 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 32–CA–3470

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 31 March 1982 Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified.

The dissent disagrees with the judge's interpretation of *Arizona Electric Power Cooperative*, 250 NLRB 1132, 1134 fn. 10 (1980), with respect to the Respondent's duty to bargain over the continued inclusion in the unit of Lisa White as confidential secretary. The Board noted there that the respondent's duty to bargain concerning managerial employees, "would terminate on the expiration of the current contract, provided that the Respondent took appropriate steps at that time to contest their continued inclusion in the unit." Ibid. at 1134.

We agree with the judge that the Respondent simply did not take the requisite appropriate steps to remove the position from the unit prior to executing the next collective-bargaining agreement. The record discloses that the Respondent, at most, proposed a meeting to discuss removing White from the unit. At that meeting the Respondent argued that White was performing the duties of a confidential employee and therefore fell within the "confidential" exclusion in the contract. The Union took the position that White was not a confidential employee and that it would be improper for any confidential employee hired by the Respondent to perform unit work. The meeting ended without any resolution of the matter. The matter was discussed briefly once again during negotiations without any resolution of the matter. Thereafter the Respondent did nothing toward removing White's position from the unit until after it had executed a new collective-bargaining agreement on 20 December, except to inform White on 17 December (but not the Union) that it planned such a move.

Neither the bare proposal to remove the position from the unit nor informing an employee that it plans in the future to effectuate the removal constitutes the "appropriate steps" necessary to free the Respondent of its obligation to bargain over the unit position. It would have been a simple matter for the Respondent to announce to the Union that White was confidential and state unequivocally that she was being moved from the unit prior to signing the new agreement. The duty to bargain would have expired at that time.

The Respondent contends in its exceptions that the make-whole remedy ordered as to employees Sutton is inappropriate. The Respondent relies, inter alia, upon a stipulation entered into during the unfair labor practice hearing regarding Sutton's employment history. In regard to the stipulation, the Respondent's attorney sought and obtained from the General Counsel agreement that the General Counsel was not contending that any liability should be imposed on the Respondent by virtue of Sutton's *quitting* her employment in September 1981. In light of that agreement, we grant the Respondent's exception to the make-whole remedy ordered for Sutton to the extent that it provides for Sutton's reinstatement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Motor Rim & Wheel Service, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Make Kathleen Sutton whole for any loss of pay, benefits, or other rights and privileges occasioned by her being bumped, which was a direct consequence of the Respondent's unlawful treatment of the position of confidential secretary as outside the unit, with backpay as provided in footnote 10 of the judge's decision."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HUNTER, dissenting.

Contrary to my colleagues, I would reverse the judge and find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by removing White, the confidential secretary, from the bargaining unit.

My disagreement with my colleagues lies primarily with their interpretation, consistent with that of the judge, of *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1980), and its application to the facts

of the instant case. In *Arizona Electic Power*, the Board found that the respondent employer violated Section 8(a)(5) and (1) by, inter alia, withdrawing recognition from the union for the load dispatcher categories, which were covered by an existing collective-bargaining agreement. Agreeing with the judge that the load dispatchers were not supervisors or managerial employees, but also noting that the lead load dispatcher was stipulated to be a supervisor, the Board based its finding on the ground that no party is privileged to alter unilaterally the scope of an established bargaining unit during the term of a collective-bargaining agreement. However, regarding the duty to bargain about an otherwise excluded classification once the collective-bargaining agreement has expired, the Board stated at fn. 10:

> Of course, were the load dispatchers found to be supervisors or managerial employees, Respondent's duty to bargain concerning them would terminate on the expiration of the current contract, provided that Respondent took appropriate steps at that time to contest their continued inclusion in the unit. In that regard, because Respondent's duty to bargain concerning the lead load dispatcher is based entirely on his voluntary inclusion in the unit, *this duty will not extend past the expiration of the current contract unless the parties again voluntarily agree at the time to include him in the unit.* [Emphasis added.]

In the instant case, the judge found that under *Arizona Electric Power* the Respondent could have removed White—whom the judge found to be a confidential employee—from the unit at the time the preceding collective-bargaining agreement expired on 31 May 1980,[1] or during the subsequent hiatus until execution of a successor collective-bargaining agreement on 20 December. The judge further found, however, that although the Respondent expressed its desire to remove White from the unit prior to 20 December, it did not take unilateral action to that effect until after the new agreement was in place, i.e., when employee Halla assumed White's duties on 1 January 1981. Regarding footnote 10 of *Arizona Electric Power*, which he viewed as having "elements . . . in conflict," the judge interpreted it to mean that, on the expiration of a collective-bargaining agreement, the status quo inclusion of otherwise excluded classifications continues "absent the taking of 'appropriate steps' to the contrary." Presumably, the Respondent's conduct after 31 May and prior to 20 December did not, in the jduge's view, constitute appropriate steps to the contrary. My colleagues now agree with that interpretation and expressly find that the Respondent's pre-20 December conduct did not free the Respondent of its obligation to bargain over White's position.

I read footnote 10 of *Arizona Electric Power* differently than my colleagues do, and I would come to an opposite conclusion in this case. In my view, footnote 10 means that an employer's duty to bargain concerning an otherwise excluded classification extends past the expiration of a collective-bargaining agreement only if the parties voluntarily agree to again include that classification in the unit. Thus, given the judge's finding that White was a confidential employee, the Respondent's duty to bargain concerning White's position ceased on the expiration of the collective-bargaining agreement on 31 May. Although the Respondent concededly did not remove White's position from the unit until 17 December—i.e., when the Respondent told White that her "position was being taken out of the Union" and that Halla would become a "personal confidential secretary"—there is no direct evidence that the parties voluntarily agreed to include White's position in the unit during the term of the next collective-bargaining agreement.

Further, even assuming that the majority's interpretation of footnote 10 is correct that the status quo continues past the expiration of a collective-bargaining agreement unless the party seeking a departure from the status quo takes appropriate steps to the contrary, I would find that here the Respondent did take appropriate steps to change the status quo before the execution of the successor agreement on 20 December. Thus, as found by the judge, the Respondent expressed to the Union its desire to remove White from the unit in a telephone conversation on 31 July, at a meeting on that subject on 18 August, and possibly also at a bargaining session on 1 October. Such conduct, together with the Respondent's conduct in informing White on 17 December that her position was being removed from the unit, evidences both the intent to take unilateral action, as well as the unilateral action itself, before the execution of the successor agreement. Under the circumstances, I would find that the Respondent had no duty to bargain about White's position on 17 December, and that it therefore did not act unlawfully in removing her from the bargaining unit at that time.

[1] All dates hereafter are in 1980 unless otherwise indicated.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Freight Checkers, Clerical Employees and Helpers, Local 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of all employees in the appropriate office clerical unit, which includes the confidential secretary, and WE WILL NOT refuse to apply the current collective-bargaining agreement with the Union, which is effective through 31 May 1983 to all of those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively with the above-named Union as the exclusive bargaining representative of all employees in the aforesaid unit by restoring Lisa White to the position she formerly occupied, now titled confidential secretary, should the Union so request and she be willing; by restoring that position to the unit; and by applying the terms of the collective-bargaining agreement to her or whomever occupies that position.

WE WILL make whole Lisa White for any loss of pay, benefits, or other rights and privileges occasioned by our failure to restore her to the position she formerly occupied on her return from leave.

WE WILL make whole Nancy Halla, and anyone else who has occupied the position of confidential secretary, for any loss of pay, benefits, or other rights and privileges occasioned by our unlawful treatment of that position as outside the unit.

WE WILL make Kathleen Sutton whole for any loss of pay, benefits, or other rights and privileges occasioned by her being bumped, which was a direct consequence of our unlawful treatment of the position of confidential secretary as outside the unit.

WE WILL make the Union whole, with interest, for any loss of dues and fees occasioned by our unlawful treatment of the position of confidential secretary as outside the unit.

MOTOR RIM & WHEEL SERVICE, INC.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried before me in Oakland, California, on December 14, 1981, and January 18, 1982.

The charge was filed March 12, 1981, and amended April 29, by Freight Checkers, Clerical Employees and Helpers, Local 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union). The complaint issued April 30, and alleges in essence that Motor Rim & Wheel Service, Inc. (Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) since January 1, 1981, by unilaterally removing a position from the bargaining unit.

I. JURISDICTION

Respondent, a California corporation with headquarters in Montebello and a branch in San Leandro, is engaged in the nonretail sale of automotive wheels and related items. It annually sells to and purchases from outside California goods and materials of a value exceeding $50,000, and thus is an employer engaged in commerce within Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within Section 2(5) of the Act.

IV. THE ALLEGED MISCONDUCT

A. *Facts*

The Union has represented the office clerical employees at Respondent's San Leandro branch since 1962. The current bargaining agreement covering those employees was executed December 20, 1980, went into effect the preceding June 1, and runs through May 31, 1983.[1] That agreement, in common with each of seven predecessors since 1962, contains this clause:

> The following classifications of employees are specifically excluded from the coverage of this Agreement:
> (a) Confidential employees, supervisory and professional employees . . . .

Lisa White was the secretary for the San Leandro branch manager from March 1978 through December 17, 1980, when she took maternity leave. She was classified as a stenographer and considered in the bargaining unit. On January 1, 1981, Nancy Halla succeeded to White's exact duties. Halla, however, was given the title of "con-

[1] The agreement defines the unit as "all employees covered by this agreement." It thereafter lists three groups of classifications: group I, consisting of telephone operator, general clerk, accounts payable clerk, accounts receivable clerk, and card inventory clerk; group II, consisting of comptometer operator, stenographer, assistant price clerk, commission report payroll clerk, and purchasing clerk; and group III, consisting of lead office clerk. It is concluded that this is an appropriate unit for purposes of the Act.

fidential secretary" and deemed by Respondent to fall within the above clause excluding confidential employees from the coverage of the agreement—and, by implication, from the unit. Respondent never before had so titled or treated any of the clerical employees at the San Leandro branch.

The parties have stipulated that, as a matter of law, Halla indeed did become a confidential employee upon assuming White's duties. Although a parallel stipulation concerning White is not in the record, it would be anomalous—given the Halla stipulation and the unquestioned coincidence of their duties—not to regard her as likewise having been a confidemtial employee before her leave. White therefore shall be so regarded for purposes of this decision.[2]

San Leandro Branch Manager Stan De Lima, informed White by memorandum dated October 14 that her request for maternity leave had been approved. He assured her, in the same memorandum that she would be replaced "in [her] position as secretary on a temporary basis only, pending [her] return to work." But then, December 17—the day before White took leave—De Lima told her that her "position was being taken out of the union"; that Halla, as her replacement, had agreed to become his "personal confidential secretary"; and that, when White returned, she would be an inventory clerk. Halla was then an inventory clerk. That is a bargaining-unit classification.

White consequently was not restored to her former duties upon returning to work in March 1981, instead "bumping" Kathleen Sutton, an inventory clerk. As an inventory clerk, White received 12 cents per hour less than she would have received had she been restored to her pre-leave position. Halla meanwhile continued under the title of confidential secretary, performing White's former duties. Sutton, hired in May 1978, was more senior than Halla, who was hired in April 1979. White, as earlier noted, began in March 1978. The agreement provides:

> In the event of a layoff, . . . regular employees shall be . . . laid off based upon their seniority and qualifications to perform the work.

When White was hired in 1978, the branch manager at that time, W. E. Wall, asked her to be his confidential secretary and leave the unit. She agreed, and requested that the Union remove her from membership. The Union opposed the idea, however, and it was dropped. De Lima made the same proposal to White when he succeeded Wall. She squelched it, saying that "the Union benefitted [her] better."

Nothing further happened in that regard until July 31, 1980, when Respondent's attorney Robert Kristoff telephoned Union President Ben Leal proposing that they "get together to discuss removing White from the bargaining unit, because she [is] a confidential employee." Leal agreed to a meeting, but said it was the "Union's position" that all work of a confidential nature was done at Respondent's headquarters in Montebello, and that White therefore "was not a confidential employee and would have to stay in the bargaining unit."

The agreed-upon meeting was held August 18 between Kristoff and Kathi Leal, a business representative for the Union and Ben's daughter. Kristoff stated to her, much as he had to Ben, that Respondent wanted one of its clerical positions to be accorded confidential status, outside the unit. Leal asked what the duties of the position would be. Kristoff answered,"The same as Lisa White's." He elaborated that:

> [White] was performing confidential duties, and that, as such, she could be removed from the bargaining unit, because confidential employees were excluded from the bargaining unit under the present contract.

Leal, first disagreeing with Kristoff, interrupted the meeting to telephone the shop steward at the San Leandro branch, obtaining a list of White's duties. Returning to Kristoff, she recited the various things White did besides typing, including payroll, stock records, billing, and catalog sheets. Leal claims to have declared that while it perhaps would be acceptable for the proposed position to embody typing, it would not be "right" that it entail "all these other items" of unit work. Kristoff testified, on the other hand, that Leal objected to the performance of any unit work by a nonunit confidential secretary.[3] In any case, Kristoff countered that "nothing in the contract . . . said she could not do bargaining unit work." Leal held firm, and the meeting ended with Kristoff saying he would be "getting back in touch."

The immediate past agreement expired May 31, 1980. Bargaining leading to the current agreement took place September 16, October 1, and November 4. Agreement in principle was reached October 1, the November 4 meeting being for resolution of nonsubstantive technical details. As previously mentioned, the agreement was executed December 20, retroactive to June 1. According to Kathi Leal, the subject of the confidential secretary came up in none of these meetings, nor in any other conversations during the negotiation and execution of the new agreement. Kristoff and Kenneth Ballard, Respondent's chief spokesperson, testified, however, that Ballard broached the matter during the October 1 meeting, that the resulting discussion consumed about 5 minutes in an all day session, and that the exchange was the same as it had been August 18 between Kristoff and Leal.[4]

Upon succeeding to White's duties, Halla wrote the Union, "requesting a withdrawal from [membership] effective 1/1/81, in order to take another position at my employment." The current agreement contains a conventional 31-day union-security clause. This prompted Kathi Leal to telephone Halla, ascertaining that, apart from the change in title, her job was identical to White's. Leal then called De Lima, obtaining confirmation that Halla

[2] Respondent, in its brief, urges White's confidential status. White credibly testified that about 20 percent of her day, before going on leave, consisted of "typing and whatever the demands were from" the branch manager, the balance being taken up with bargaining unit functions of a plainly nonconfidential character.

[3] The result herein does not require resolution of this conflict.

[4] See fn. 3.

had been made his confidential secretary. De Lima added that because of this development White would not be restored to her former duties, but instead would "bump" someone other than Halla when she returned. This was the Union's first intimation that the position had been removed from the unit.

On January 9, in the aftermath of the conversation just described, the Union filed a grievance, "protest[ing] the change of status for Halla from collective bargaining [unit] to management." A grievance meeting followed on February 6. Kathi Leal asked where Respondent "got the right to come in and change someone's title and [thereby] remove them from the bargaining unit." Kristoff countered that Respondent had "every right to have a confidential secretary," and that she could "continue to perform the same amount of unit work that she had previously performed." Leal assertedly said that she could consent to the confidential secretary's "tak[ing] the typing" and doing payroll without losing nonunit status, whereas Kristoff testified that Leal insisted that the position embrace no unit work.[5] Regardless, the meeting failed to bring a resolution.

On March 20, White having bumped Sutton rather than Halla, the Union filed another grievance, this time protesting that Respondent had breached the seniority clause of the agreement. The parties presently agreed to hold that grievance "in abeyance" pending disposition of the present unfair labor practice charge, which, as earlier mentioned, had been filed March 12.

Nothing further having happened with regard to either grievance, the Union informed Respondent by letter dated December 10, 1981, that it "is withdrawing the two grievances," instead "pursu[ing] its remedies through" the present case.

B. *Conclusion*

Summary

(a) All of Respondent's agreements with the Union have contained a clause excluding confidential employees from their coverage and, by implication, from the unit.

(b) Although White was a confidential employee during the approximately 2-1/2 years she was on the payroll before her leave, Respondent never regarded her or anyone else as a confidential employee until Halla assumed her duties on January 1, 1981.

(c) Respondent's removal of the White/Halla position from the unit happened without union consent, or even prior knowledge, some 11 days after execution of the current agreement and 7 months into its retroactively defined term.

It is concluded in these circumstances, because of compelling Board concern for the stability of bargaining relationships, that Respondent violated Section 8(a)(5) and (1) substantially as alleged. *Carolina Telephone Co.*, 258 NLRB 1387 (1981); *Arizona Electric Power Cooperative*, 250 NLRB 1132 (1980).

Given the exclusionary clause in the expired agreement and White's confidential status, Respondent properly could have removed her from the unit, without union consent, at the time of expiration; or, apparently, during the subsequent hiatus until execution of the current agreement. *Arizona Electric Power Cooperative*, 250 NLRB at 1133, 1134 fn. 10.[6] But, while such a desire was expressed to Ben Leal on July 31, to Kathi Lenl on August 18, and possibly during the October 1 bargaining session, Respondent, seemingly deterred by a belief that union consent was a necessary precondition, even between agreements, neither evinced an intent to take unilateral action nor took such action until after the current agreement was in place.

Rejected is Respondent's argument, based on *Boeing Co.*, 212 NLRB 116 (1974), that the removal of Halla from the unit was a permissible rectification of a mistake in classification. Wall's and De Lima's overtures to White to be a confidential secretary, outside the unit; Kristoff's July and August appeals to Ben and Kathi Leal; and Ballard's professed remarks to the Union on October 1, all belie a mistake of fact licensing such conduct as a corrective measure.

Rejected, as well, are Respondent's contentions that its conduct was sanctioned by an impasse in bargaining over the issue, by waiver based on Kathi Leal's posture as concerns the issue, and by waiver implicit in assorted clauses in the current agreement. The questions of impasse and of Kathi Leal's conduct are irrelevant to the bedrock issue whether Respondent took appropriate action at the right time, i.e., before the current agreement was executed. And, regarding the argument of waiver based on contract language, what could be more enabling than the literal exclusion of confidential employees from the unit? Yet, as the cited authorities show, even that does not permit unconsented alteration of the unit during the term of an agreement.

Conclusion of Law

By removing the confidential secretary from the bargaining unit, as found herein, Respondent violated Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[7]

[5] See fn. 3, supra.

[6] Fn. 10 states at one point that an employer's duty to bargain concerning people in excluded classifications who nonetheless have been treated as in the unit "would terminate on the expiration of the current contract, provided that [the employer] took appropriate steps at that time to contest their continued inclusion in the unit." The same footnote later states that the duty to bargain concerning such people "will not extend past the expiration of the current contract unless the parties again voluntarily agree at that time to include [them] in the unit." The question thus arises whether the burden is on the party seeking departure from the status quo to take positive action, or on the party seeking its continuation to procure express agreement to that effect. If the latter is so, the requirement was not satisfied in this case, and White, not to mention Halla, was outside the unit covered by the current agreement. To read the elements of fn. 10 as in conflict is to be avoided, however, if those elements plausibly can be reconciled by an alternative reading. Applying this basic tenet of construction, it is concluded that the intended meaning of fn. 10 is that agreement to continuation of the status quo is to be inferred absent the taking of "appropriate steps" to the contrary.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Motor Rim & Wheel Service, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Freight Checkers, Clerical Employees and Helpers, Local 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) as the exclusive representative of all employees in the appropriate office clerical unit, which includes the confidential secretary, and from refusing to apply the current collective-bargaining agreement with the Union, which is effective through May 31, 1983, to all of those employees.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take this affirmative action to effectuate the policies of the Act.

(a) Bargain collectively with the Union as the exclusive bargaining representative of all employees in the aforesaid unit by restoring Lisa White to the position she formerly occupied, now titled confidential secretary, should the Union so request and she be willing; by restoring that position to the unit; and by applying the terms of the collective-bargaining agreement to her or whomever occupies that position.

(b) Make whole Lisa White for any loss of pay, benefits or other rights and privileges occasioned by Respondent's failure to restore her to the position she formerly occupied upon her return from leave.[8]

(c) Make whole Nancy Halla, and anyone else who has occupied the position of confidential secretary, for any loss of pay, benefits, or other rights and privileges occasioned by Respondent's unlawful treatment of that position as outside the unit.[9]

(d) Offer to Kathleen Sutton immediate and full reinstatement to the position she occupied before being bumped by Lisa White, or, if that position no longer exists, to a substantially equivalent one, and make her whole for any loss of pay, benefits, or other rights and privileges occasioned by her being bumped, which was a direct consequence of Respondent's unlawful treatment of the confidential secretary as outside the unit.[10]

(e) Make the Union whole, with interest, for any loss of dues and fees occasioned by Respondent's unlawful treatment of the position of confidential secretary as outside the unit.[11]

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its San Leandro, California facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[8] Backpay shall be computed with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[9] See fn. 8, supra.

[10] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed as set forth in the fn. 8, supra.

[11] *Dura-Vent Corp.*, 257 NLRB 430, 433 (1981). Interest shall be computed as prescribed in fn. 8, supra.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Omsco, Inc. *and* Ricky Taylor *and* Albert Smith.
Cases 23–CA–8185 and 23–CA–8300

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 24 February 1982 Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Weaver and by threatening employee Ricky Taylor with discharge if he should engage in union activity.[2] We also agree with his recommended dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act when it laid off seven night-shift trepanning employees 6 October 1981. For the reasons set forth below, however, we do not adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off an eighth night-shift trepanning employee, Ricky Taylor, on the same date.

The Respondent is engaged in the manufacture and sale of equipment utilized in the exploration of oil and natural gas. Eighty percent of the Respondent's business involves the production of tubular steel collars used as drilling weights. Part of the drilling collar production process involves passing steel bars through a trepanning machine which drills a hole lengthwise through each bar. A trepanning operator and helper team to staff each machine.

At the time of the alleged unfair labor practices, the Respondent's manufacturing operations entailed two 12-hour shifts. In the trepanning department, 10 employees operated 5 machines during the first shift (5 a.m. through 5 p.m.) and 8 employees worked 4 machines during the second shift.

In mid-September 1980[3] discussions concerning union organization began among trepanning employees. Although the day shift was involved, the majority of union discussions occurred during the night shift. On 26 September a group of seven to nine of the Respondent's second-shift employees met during the first shift in the office of a union representative. Thereafter, second-shift trepan operator Ricky Taylor and helper Alfred Garrison distributed authorization cards on nonworktime either in the plant parking lot or on a public street in the vicinity of the Respondent's facility. When soliciting signatures, Taylor asked low-level supervisor Sholar to sign an authorization card. Subsequently, Sholar told Taylor that Taylor could be "fired for union activity" and that he had been talking too much about the union on company time. There is no credible evidence that the Respondent's officials observed or suspected any other second-shift employees of engaging in union activities.

Between 26 September and 6 October the Union received 14 authorization cards from second-shift employees, including all but helper William Galloway among the 8 trepanning department employees. In the same period, 15 first-shift employees signed cards.

On 6 October Respondent's president Kess Verhuel announced the layoff of six second-shift trepanning employees and two yard hands. Verhuel told the employees that the reasons for the layoff were low production and low supply of steel. Additionally, Verhuel told the employees that all of them had performed good work and that he would give each of them a good job recommendation.

The judge correctly found that the General Counsel had failed to establish as part of his prima facie case that the Respondent had knowledge or suspicion of union activities by any alleged discriminatee other than Taylor. In addition, the judge found that the Respondent had actually relied on its asserted reason for the layoff of the night shift, which reason was economically based and justified.

[1] The judge failed to provide in his recommended Order that the Respondent shall cease and desist from engaging in such conduct "in any like or related manner." We shall modify the Order accordingly.

[2] Supervisor Sholar's statement to employee Taylor that he "could be fired for union activity . . . [and that] employees had been talking too much about the union . . . on company time" was a classic threat within the meaning of Sec. 8(a)(1). Our dissenting colleague's attempt to put a more venial gloss on Sholar's conduct is unavailing. There is no justification for distinguishing between a threat to discharge an employee for engaging in union activity and a threat to discharge an employee for violating an unlawful overly broad no-solicitation rule. The latter threat encompasses the former. There is also no justification for our colleague's evaluation of Sholar's statement by any standard other than the Board's traditional objective test of whether the conduct reasonably tended to interfere with an employee's exercise of Sec. 7 rights. By this test, Taylor's mistaken subjective belief that Sholar was not a statutory supervisor has no relevance in determining the legality of Sholar's conduct.

Member Hunter also would dismiss the 8(a)(1) allegation that Supervisor Taylor interrogated employee Weaver because, in his view, the interrogation was de minimis. Since we find that the Respondent threatened employee Taylor, we do not need to decide whether the interrogation of employee Weaver, standing alone, would be de minimis.

[3] All dates are in 1980 unless otherwise stated.

In so finding, the judge specifically credited Respondent's witness D. C. Ogden, who testified that the layoff was due to the depletion of the Respondent's on-hand stock of steel bars along with a dearth of incoming steel in the immediate future.

As to Taylor, however, the judge determined that the General Counsel had established a prima facie case. The judge relied on the Respondent's actual knowledge of Taylor's union activity from the date of his card solicitation of Supervisor Sholar and on Sholar's subsequent threat of discharge that violated Section 8(a)(1) of the Act. Although the judge found the Respondent's defense of business justification for the layoff to be legitimate he nevertheless found it to be insufficient to rebut the inference of discrimination in Taylor's layoff. Specifically, the judge found that in the absence of any evidence about the factors considered in selecting Taylor for layoff, the Respondent had failed to meet its burden of proof that Taylor would have been laid off notwithstanding his union activities.

Contrary to the judge, we find that the Respondent did not discharge Taylor for engaging in union activity because we disagree with the judge's determination that the record fails to establish what factors were considered in selecting Taylor for layoff. Notwithstanding the Respondent's unlawful threat to Taylor of discharge for engaging in union activity, the credible and uncontradicted evidence shows that the layoff of the night-shift trepanners was due to the Respondent's shortage of on-hand and incoming steel bars. In addition, contrary to the judge's finding, there is evidence that the Respondent utilized a basic seniority system in the layoff of the night-shift trepanners. In this context, the judge failed to consider additional testimony by Ogden wherein he stated that when he informed Verhuel of the Respondent's inventory problem, Verhuel specifically requested a list of the names and dates of hire of the night-shift trepanners. It is undisputed that the Respondent laid off all but the most senior shift trepanning operator and his helper, both of whom had signed union cards.[4]

Based on the foregoing, we find that the Respondent has rebutted whatever prima facie inference of unlawful motivation might be drawn from timing, the Respondent's knowledge of Taylor's union activity, and the threat based on that activity. In sum, (1) the Respondent had a justifiable business reason for laying off its night shift; (2) the Respondent followed a basic seniority system in implementing the layoff; and, (3) although Taylor was laid off with the other night-shift employees, there is no evidence that an employee junior to him in his position on the shift was retained. Consequently, there is no showing that the Respondent treated Taylor disparately. Accordingly, we hereby dismiss the complaint allegation that the Respondent violated Section 8(a)(3) and (1) when it laid off employee Ricky Taylor.

[4] Having found that the decision to restrict the layoff to the second-shift trepanners was lawful, we find comparisons of first- and second-shift seniority irrelevant. In any event Taylor was senior to only one first-shift operator, Joe Weaver.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Omsco, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(a) and 2(a) and (b) and reletter the subsequent paragraphs.

2. Insert the following as paragraph 1(c).

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HUNTER, dissenting.

My colleagues have adopted two 8(a)(1) violations found by the judge. They agree with the judge's findings that Foreman Sholar threatened employee R. Taylor with discharge for his union activities, and that Supervisor J. Taylor unlawfully interrogated employee Weaver. I cannot join in these findings. I would find no 8(a)(1) violation in Sholar's comments and, in all the circumstances, I would find Supervisor Taylor's comments de minimis. Thus, I would dismiss the complaint in its entirety and I dissent from my colleagues' failure to do so.

Regarding Sholar's comments to employee Taylor, I note that Taylor was one of the key employee organizers. He solicited a number of employees to sign cards and he even asked Sholar, who the parties stipulated was a supervisor but who Taylor thought was an employee, to sign a card. Subsequently Sholar called Taylor into his office and told Taylor, "[W]e could be fired for union activity . . . that we had been talking too much about the union . . . on company time." Sholar said Taylor needed to keep everyone quiet about the union on company time. Taylor responded that nobody had talked about the Union on company time and, if *Sholar* wanted to discuss the subject further, *he* would have to meet *Taylor* at the end of the shift. The conversation ended. The

judge found this a "blatant" threat of discharge notwithstanding that Taylor did not think Sholar was a supervisor.

My first problem with the judge's analysis is that I do not see this as a "blatant" threat of discharge for union activity. Such a conclusion reads the statement too broadly.[1] Rather, Sholar's statement must be tied into his admonition about when Taylor could solicit for the Union. I read the statement as a threat of discharge if Taylor solicited at the "wrong" time. So one has to look at Sholar's "time" admonition. Here, Sholar pegged his prohibition to "company time." That term has historically been considered too broad a prohibition on solicitation activity. But Taylor responded to that admonition with a comment that he knew that, off his shift, he could solicit. However, "company time" unless further qualified (and it was not here) could still encompass breaks, when employees can solicit. Therefore, this is not a "blatant" threat, as the judge found, but an overly broad no-solicitation rule backed up by a threat of discharge for violating it. Ordinarily, I would find this an 8(a)(1) statement, except for the unique circumstances that Taylor did not think this statement came from a supervisor. An employee's subjective reaction to an employer's statement is typically not to be considered an element of weighing an 8(a)(1) violation but attention must be paid to particular factual circumstances in our assessment of whether a statement was coercive. Here, comment was made to an employee by a person not thought to be a supervisor by the employee. The employee's retort clearly indicates he discerned no coercive impact in the statement. Coupled with an apparent lack of evidence that Taylor repeated the comment to any other employee, e.g., one who knew Sholar to be a supervisor, I cannot in the circumstances find an 8(a)(1) violation in this statement.

Regarding the second comment found to be in violation of Section 8(a)(1), I note that, at the outset of employee interest in the Union, employee Weaver beckoned to Supervisor Taylor as Taylor walked by Weaver's machine. Weaver asked Taylor, "What was all this bulls—t about" the Union. Taylor said he did not know. At some later point, Taylor went to Weaver's machine and, according to Weaver, asked Weaver "if [he] knew who was behind it. He didn't say behind what or nothing else. And I told him no." According to Weaver, Taylor then went to Plant Superintendent Butler and told him "[Weaver] don't know."

[1] My colleagues claim that the discussion which follows attempts to put "a more venial gloss" on Sholar's statement. Rather, the following discussion attempts to analyze his statement more closely and carefully than either the judge or my colleagues have chosen to do.

The judge found this an 8(a)(1) interrogation. He found so even though he concluded that Weaver initiated the incident and that Taylor did not accompany his question with coercive conduct. Additionally, he found that Taylor left the impression that possible reprisals would be taken against the individuals about whom Taylor sought information.

In excepting, the Respondent, inter alia, argues that Weaver and Taylor were good friends and worked closely together. This point was not touched on by the judge. It also raises the point that there was no reference to the Union in Taylor's question. While there may have been an interrogation here, I do not think this one possible 8(a)(1) violation warrants a remedial order. In so concluding I note that I would dismiss all other allegations against the Respondent; any interrogation here was ultimately sparked by an employee's questions of his own supervisor about union activities; and there is an allegation that the two were friends. In these circumstances, I would dismiss this incident as de minimis.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT warn employees that they could be discharged for engaging in union or other protected concerted activities.

WE WILL NOT interrogate employees as to the union activities, membership, and sympathies of their fellow employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

OMSCO, INC.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. This matter was heard before me in Houston, Texas, on July 28 and 29, 1981. On January 27, 1981, the Regional Director for Region 23 of the National Labor Relations Board (the Board) issued an order consolidating cases, a consolidated complaint, and a notice of hearing, based on an original and amended unfair labor practice charge in

Case 23–CA–8185, filed on October 9, 1980,[1] and January 26, 1981, respectively, by Ricky Taylor, an individual, and on an unfair labor practice charge in Case 23–CA–8300, filed on January 6, 1980, by Albert Smith, an individual, alleging that Omsco, Inc. (Respondent) engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act. Respondent filed an answer denying the commission of any unfair labor practices. At the hearing, counsel for the General Counsel was permitted to amend the consolidated complaint by withdrawing the name of an alleged discriminatee. All parties were afforded full opportunity to offer relevant evidence, to examine and cross-examine witnesses, and to submit posthearing briefs. Therefore, based on the entire record, the posthearing briefs, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Texas corporation with an office and principal place of business located in Houston, Texas, where it is engaged in the manufacture of products utilized in the oil and gas exploration and development industry. During the 12-month period immediately preceding the issuance of the consolidated complaint, a representative period, Respondent purchased and received at its Houston, Texas facility goods, products, and materials valued in excess of $50,000 directly from suppliers located outside the State of Texas.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits, and I find, that United Steelworkers of America, AFL–CIO–CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. About October 6, 1980, did Respondent lay off employees Ricky Taylor, Alfred N. Garrison, Marion Keith Bruce, Albert Smith, David Vitela, William J. Galloway, James Duffy, and Ollie Rogers in violation of Section 8(a)(1) and (3) of the Act?

2. About September 30, 1980, did Respondent tell an employee that he could be fired for engaging in union activities on company time in violation of Section 8(a)(1) of the Act?

3. About September 30, 1980, did Respondent interrogate an employee concerning the identity of Respondent's employees who were engaged in union activities in violation of Section 8(a)(1) of the Act?

[1] Unless otherwise stated, all relevant dates and events occurred in 1980.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record discloses that Respondent, a State of Texas corporation, was established in 1948 as Oil Field Machine and Supply Company; that on July 1, 1975, its assets were sold to, and it became a wholly owned subsidiary of, a Canadian company, Bralorn Resources; and that upon the sale Respondent's name was changed to its present one. At its Houston, Texas plant, Respondent is engaged in the manufacture and sale of equipment utilized in the exploration for oil and natural gas, of which the production and sale of steel weights, called drilling collars, accounts for approximately 80 percent of Respondent's business. The record further discloses that a drilling collar is a round or tubular shaped piece of strengthened steel of various diameters,[2] with a hole through the center,[3] weighing in excess of 1-1/2 tons, and precisely 31.6 feet in length; that while drilling for deep deposits of oil or natural gas, pressure must be constantly exerted upon the drilling bit to force it into the ground; and that to accomplish this, the drilling collars are used as weights, with at least 21 collars "strung" together and placed directly above the bit. In manufacturing these drilling collars and other equipment, Respondent employs approximately 80 workers, who work at its plant in two daily 12-hour shifts. Kess Verhuel is the president of Respondent, and D. C. Ogden is the treasurer.

According to Ogden, once the steel bars which Respondent uses in its manufacturing process are received by the plant, the bars undergo a straightening process to ensure that the steel "runs true." If the steel has been sold, the requisite bars are immediately put through the "trepanning" process wherein the holes, which are cut to specified diameters, are drilled through the bar lengthwise. Next, the bar is placed on a threadmill which threads both ends of the hole. Finally, if ordered by the customer, special machine work may be done on the collars.[4] As are most of the manufacturing procedures,[5] the trepanning process is performed on both the day and night shifts. The record establishes that there are five trepanning machines in this department; that, at least, as of October 1, all were operated during the first shift but just four were run on the second shift; that two employ-

[2] There are 26 different diameters of drilling collars, ranging from 4 to 10 inches. To ensure that its drilling collars are strong enough to withstand the incredible heat and pressure generated during the drilling process, Respondent purchases and uses for its collars specially ordered heat-treated alloy steel. The steel is received by Respondent, shaped by the manufacturer, and precut to the required length and a specified diameter. Eighty-five percent of Respondent's steel supply is purchased from United States Steel Corporation; 10 percent is imported from France; and the remainder comes from other American suppliers.

[3] There are six different hole sizes for the drilling collars.

[4] According to Ogden, if sufficient quantities of unsold steel are in stock, ". . . we will guess at the hole size that we think we will use and trepan them ahead and put them on the rack."

[5] While not entirely clear from the record, it appears that Respondent utilizes more workers on the day shift (5 a.m. to 5 p.m.) than at night (5 p.m. to 5 a.m.). It also appears that fewer manufacturing procedures are performed on the second shift. Finally, the record does disclose that Respondent has been utilizing a second shift since 1978 or 1979.

ees (an operator and a helper) are required for the operation of a machine; and that as of October 1, there were 10 trepan shop employees on the day shift[6] and eight[7] on the night shift. In addition, among other employees on each shift, Respondent employs individuals, classified as yard hands, whose function is to bring the uncut steel bars to the trepanning machines for cutting.[8]

The record reveals that preliminary discussions concerning the seeking of union representation began at the plant in mid-September and that those involved were primarily the trepan shop employees on the night shift. According to Ricky Taylor,[9] who was classified as an operator, these initial organizing discussions resulted from a series of work-related injuries and other safety problems. There is also record evidence that day-shift employees were consulted in this regard. Thus, Marion Bruce, also an operator, testified that, while he held such discussions mainly with other second-shift employees, "I did talk to some first shift when I got the time." In any event, a vote was taken among a group of unidentified night-shift trepan shop employees, and Taylor and Alfred Garrison, a helper, were selected to contact a union. After being directed to do so by representatives of the Teamsters union, Taylor and Garrison telephoned the Steelworkers union and spoke to Robert Clowers, an organizer; a meeting was arranged for the morning of September 26. While there is no evidence that Respondent was aware of these preliminary union discussions or the leaders, there is, however, evidence that Respondent endeavored to discover this information. Thus, Billy Joe Weaver, a day-shift trepan machine operator, testified that early one morning in the second half of September, he beckoned to his foreman, John Taylor,[10] as the latter passed by Weaver's machine. Weaver, who stated that he had heard rumors about a union and who ultimately signed an authorization card for the Union on October 1, asked Taylor "what was all this bullshit about the union. And he said, I don't know. And he turned around and walked off." Weaver further testified that either later that morning or 2 or 3 days later, Taylor walked over to Weaver's machine, and "[he] asked me if I knew who was behind it. He didn't say behind what or nothing else. And I told him no." Next, according to Weaver, Taylor turned and walked outside the shop to where Don Butler, the plant superintendent, was standing; Weaver heard Taylor say to Butler, ". . . Don, Joe don't know."

On the morning of September 26, a group of Respondent's second-shift employees met with Robert Clowers at the Union's office in Houston. The record is not clear, however, as to the number of employees who attended or as to their identities. In this regard, Robert Clowers, whose memory of the meeting was extremely vague, testified that 10 or 11 employees were present; that, while he did not recall any other names, he specifically recalled Taylor, Garrison, and yard hand James Duffy as attending; that also present were "a couple of Spanish people" and that each employee who attended executed a union authorization card.[11] Ricky Taylor testified that nine employees attended including himself, Alfred, Jim, Ollie, Albert, and Vince; he could recall none of the remaining employee participants. Albert Smith, who worked in the trepanning department as a helper, testified that he was present and that the other employees at the meeting were Ricky, Alfred, Jim, Ollie, Jeff, and Archie. Finally, Garrison testified that besides himself, Ricky, Albert, Nat, Archie, Keith, Ollie, Jim, and Philip attended the meeting with Clowers. What is clear about the meeting is that the latter explained the mechanics of union organizing to the employees, explained that a certain percentage of the employees had to indicate support for the Union, and gave union authorization cards to the participants for distribution to other employees.

Pursuant to Clowers' instructions, during the next 2 weeks union authorization cards were distributed among Respondent's plant employees;[12] however, except for Taylor and Garrison, there is no record that any other meeting participant or second-shift trepan shop employee engaged in such distribution. Thus, Garrison testified that, subsequent to September 26, he solicited five or six employees to support the Union, obtained three or four signed authorization cards, and returned the cards to Taylor who, in turn, was to give the signed cards to Clowers and that he engaged in such activities only during nonwork hours either in the plant parking lot or on a street corner near the plant. Likewise, Taylor testi-

[6] The trepanning department employees on the first shift, along with their dates of hire, are as follows: Robert Ehlinger, operator, 4/14/75; Joaquin Herrera, helper, 2/22/80; Jack Craft, helper, 7/23/80; Juan Flores, operator, 10/5/78; Andy Kraska, helper, 7/23/80; Jimmy Neville, operator, 11/15/78; Joe Weaver, operator, 8/24/79; Ronnie Batchelor, helper, 5/12/80; Oliver Jenkins, operator, 6/20/77; and Riley Jackson, helper, 7/23/80.

[7] The trepanning department employees on the night shift, along with their dates of hire, are as follows: J. Santos Coria, operator, 1/20/78; Ricky Taylor, operator, 7/1/79; Alfred Garrison, helper, 5/1/80; Albert Smith, helper, 3/30/80; Keith Bruce, operator, 8/16/79; Albert Terrazas, helper, 2/27/80; Ollie Rogers, operator, 3/16/80; and William Galloway, helper, 7/6/80.

[8] As of October 1, the yard hands on the night shift were Jim Duffy and David Vitela. There is nothing in the record as to how many yard hands are employed during the day shift, nor is there record evidence as to other classifications of employees on either shift.

[9] Although Taylor's hire date is listed as July 1, 1979, he testified that he had worked for Respondent twice before. Thus, he first worked for Respondent for a period of 6 months in 1975 but quit over a dispute concerning a change in the computation of the pay periods. He was hired again 9 months later and was subsequently terminated because of excessive absenteeism resulting from his wife's pregnancy. According to Taylor, after his brother John who is a day-shift foreman for Respondent asked him to return, Taylor did so in July 1979.

[10] Respondent admitted in its answer that John Taylor is a supervisor within the meaning of Sec. 2(11) of the Act.

[11] After examining a series of nine union authorization cards (which bear the signature of employees of Respondent, are all dated September 26, and which were received into the record as G.C. Exhs. 2(a)–2(i)), Clowers identified the signers as the employees who attended the September 26 meeting. However, Clowers admitted that he had no independent recollection of most of the names of the participants and that it was possible that some of the cards were backdated to September 26. The nine signed cards bear the signatures of Bruce, Taylor, Garrison, Nat Vasquez, Archie Mills, Albert Smith, James Duffy, Albert Terrazas, and David Vitela. As to signing such a card, Bruce stated that he did so *later* that day at the home of Ricky Taylor, and he denied being present at this meeting.

[12] The parties stipulated to the following facts: (1) that the union received 15 signed authorization cards, dated between September 26 and October 10, from day-shift plant employees; (2) that the Union received 14 signed authorization cards, dated between September 26 and October 6, from night-shift employees; and (3) that the Union obtained 14 signed cards dated subsequent to October 6 from plant employees.

fied the week following the union meeting, he engaged in authorization card distribution in the mornings after work in the plant parking lot and on a street, a short distance from the plant. The record discloses that Respondent was aware that Ricky Taylor was soliciting and distributing authorization cards on behalf of the Union. Thus, among those whom Taylor solicited to sign an authorization card was David Sholar, who is the night-shift foreman in the trepan shop and who, Respondent admitted in its answer, was a supervisor within the meaning of Section 2(11) of the Act.[13] Subsequently, Sholar passed by Taylor's machine in the trepan shop and said that he wanted to speak to Taylor. Ten minutes later after completing a job, Taylor went into a tool room to meet Sholar. The former closed the door, and Sholar "told me that we could be fired for union activity . . . that we had been talking too much about the union . . . on company time." Taylor responded that no one had spoken about the Union on company time and that if Scholar wanted to discuss the subject further, he would have to meet Taylor after 5 a.m. The conversation ended at that point.

The General Counsel contends that Respondent spied upon the union solicitation activities of Taylor and Garrison on the morning of Friday, October 3. According to Ricky Taylor, while several second-shift employees were in a group talking and drinking beer in the plant parking lot after work that day, he and Garrison were standing a few feet away, soliciting arriving first-shift employees to sign authorization cards and support the Union. Taylor testified that as he "was handing a union card to a gentleman in a car," he observed his brother and Don Butler approximately 50 feet from them, "standing in the shadows of the shop." Moments later, Butler and his brother approached from behind Taylor, and "Mr. Butler called out that there was no drinking allowed on company property, that we would have to leave." At that point, all the second-shift employees, including Taylor[14] and Garrison, left the parking lot. During cross-examination, Taylor admitted that neither his brother nor Butler could have known exactly what he and Garrison were distributing. Further, while maintaining that his brother and Butler must have seen what he and Garrison were doing as "we wasn't hiding the cards," Taylor admitted that rather than looking at them, Butler and John Taylor "was looking directly at the group" and conceded that he just assumed that they observed the card soliciting as such was done openly. Finally in this regard, no other employee witness corroborated this incident and Garrison specifically denied observing any supervisor ever engage in surveillance of *his* union solicitation efforts.

At approximately 5:30 p.m. on October 6, Kess Verhuel walked into the trepan shop, carrying a sheet of paper, and spoke to the foreman, David Sholar. Moments later, the latter walked from machine to machine and announced that Verhuel wanted to speak to the employees in the yard area. Thereupon, all the night-shift trepanning employees,[15] with the exception of Santos Coria, who was the most senior machine operator and who signed a union authorization card on October 1, and Albert Terrazas, who was Coria's helper at the time and who signed an authorization card on September 26, assembled in the yard area where Verhuel was waiting for them. The latter was the only management speaker at this meeting, and while all witnesses agree that he announced that each of the assembled employees would be laid off, they disagree as to Verhuel's stated reason. Thus, both Albert Smith and Alfred Garrison testified that Verhuel gave as a reason for the layoff the fact that the production of steel was low; while Ricky Taylor and Marion Keith Bruce testified that Verhuel attributed the layoff to the fact that Respondent's supply of steel in the yard was too low to continue at the same level of trepanning. In any event, Verhuel also stated that the employees had all performed good work and that he would give each a good job recommendation. The meeting ended with Verhuel giving final checks to the employees. Neither Coria nor Terrazas was laid off, and the record discloses that David Vitela was recalled later that week to his former job as a yard hand.

Conceding all the above-described evidence, Respondent contends that the layoffs of night-shift trepanning employees Taylor, Garrison, Rogers, Bruce, Smith, and Galloway and of night-shift yard hands Duffy and Vitela were economically motivated, necessitated by a severely reduced inventory of uncut steel bars and by an anticipated lack of significant amounts of incoming steel in the near future. At the outset, without regard to Respondent's evidence in this regard, employee witnesses, including Taylor and Garrison, admitted that, as of the date of the layoffs, there were "empty areas" among the various sizes of uncut steel bars in Respondent's inventory and that the trepanning employees were cutting a greater percentage of "unpopular" bar sizes. Further, Marion Keith Bruce testified regarding the height of the various stacks of steel bars on hand on October 6: "the lowest I ever seen them was about like they were on [October 6]."

The record establishes that Respondent's treasurer, D. C. Ogden, is responsible for the ordering and purchasing of steel, for keeping an accurate accounting of both cut and uncut steel bars in stock, for the scheduling of work in the trepanning and other departments, and for all sales orders and the pricing of merchandise. Ogden testified that in October 1979, Respondent was given by Bralorn Resources an $11 million budget for the purchasing of steel inventory in 1980 and that, as a result, he ordered large amounts of steel in November and December 1979 and January 1980.[16] Ogden further testified that in late

[13] Taylor believed that Sholar was merely a leadman at the time and not a supervisor.

[14] Taylor denied that he was one of those employees who consumed beer that morning.

[15] The night-shift trepanning department employees at the meeting were Taylor, Garrison, Bruce, Rogers, Smith, and William Galloway. Also present were yard hands Duffy and Vitela.

[16] According to Ogden, when ordering steel from domestic suppliers, he decides what sizes of bars are required by Respondent and places an oral order with the supplier. His decision "is based on the sales orders that you have, what you have in inventory, what you sold in the past, and just guessing what you think you are going to need three or four months down the road." Seven to ten days after placing his oral order,

Continued

February, he received a telephone call from an official of Bralorn Resources named Scott Grant, who "told us to reduce our dollar volume in our drill collar inventory, that they were in a money crunch or a cash flow problem and needed cash." Having committed Respondent to large steel orders the previous 3 months, for which Respondent would begin paying in January, and unable, at that time, to cancel said orders,[17] Ogden complied with Grant's order and "quit ordering steel as heavy as we had been and started reducing orders." According to Ogden, such was reflected in substantially reduced orders for steel for the period March through June. Thus, whereas in January, Respondent ordered 1737 tons of steel and in February 1235 tons, in March and April 1069 tons were ordered each month; in May 1024 tons and, ultimately in June, only 496 tons of steel bars were ordered.[18]

The effect of this reduction in the amount of steel bars ordered from suppliers, according to Ogden, was a concomitant reduction in Respondent's inventory of steel bars. Thus, analysis of Respondent's Exhibit 6, which is a compilation of Respondent's purchases and sales for 1980, establishes that commencing in June, Respondent's shipments of steel products became greater than its monthly purchases,[19] that this condition existed through September, and that in monetary terms, Respondent's inventory of on-hand steel bars was reduced from $11,136,075 worth of steel in June to $8,300,961 in October.[20] Ogden testified that while inventories had been as low in the past (Jan. 1980, for example), previous steel orders indicated that Respondent's on-hand stock would quickly be replenished; however, noting the small quantity of bars (138) which was paid for and shipped in August and the normal time lag between shipment and delivery, Ogden did not anticipate significant steel deliveries until sometime in November or sufficient on-hand stock in October to justify operations at the same rate. Consequently, on taking inventory in August, Ogden sent Verhuel a memo, dated August 27, in which he alerted Verhuel that Respondent's inventory of uncut steel bars was extremely low in most sizes, that the continued trepanning of bars based on guesswork, absent job orders for specific sizes, was becoming increasingly risky, and that a slowdown was possible. Ogden testified that Verhuel met with him after reading the memo and that he essentially repeated the contents of the memo, stating that the plant was running dangerously low on stock which, in turn, increased the difficulty in guessing on requirements. Also, Ogden informed Verhuel that threading procedures were behind schedule, leaving large numbers of trepanned bars without reguired threading. As to the latter Verhuel said he would attempt to "speed up" threading operations; however, with regard to trepanning, Verhuel said, "We will see," but did essentially nothing.

Ogden testified that through September trepanning continued at the same rate as before, and on October 1, he undertook an exact counting of all stock, because "we are getting low on bars" and little material was coming in. He further testified that analysis of this inventory was not completed until Friday, October 3 but, since he was extremely busy that day, it was not until the following Monday (Oct. 6) that he went to Verhuel with the results: "and I caught Mr. Verhuel and showed him what we had and told him we were in bad shape and he was going to have to do something."[21] Verhuel listened to Ogden, went into the shop, returned a few moments later, and "asked me to give him a list of the names of the night trepanners, which I did." Later that day, according to Ogden, Verhuel asked him for the hire dates of said employees and then instructed Ogden to prepare their final checks. The latter did so, and the employees were laid off.

Other than the foregoing evidence concerning its depleted inventory of uncut steel bars on October 6, Respondent proffered no evidence as to the necessity for a layoff as opposed to other forms of economic action, including operating the plant with shorter work shifts or, most significantly, as to what factors were considered by Verhuel in selecting for layoff the discriminatees herein. As to the former, not only did the discriminatees so testify but also Jack Stamps, who was in charge of personnel matters for Respondent until mid-September, testified that, as a standard procedure when hiring employees, "I would reassure them, based on what had gone before on the history of Omsco, that we were a growing corporation, that we did not anticipate lay-offs." Also, in this

Ogden confirms this in writing and ultimately receives back a promised shipping date from the supplier. Ogden testified that domestic manufacturers require up to 90 days to complete a steel order for Respondent and that subsequent to completion, but prior to shipping, an invoice is sent to Respondent with a shipping date. If Respondent then pays within a specified time, it receives a discounted price for the steel. In any event, according to Ogden, it takes from 4 to 6 weeks, from the date of shipping, for the steel to be delivered to Respondent's plant. Finally, Ogden testified, Respondent does not always receive what it orders as portions are often ruined during manufacture and scrapped.

[17] Bearing in mind the time delay between ordering and paying for its steel, as described in fn. 16, a review of R. Exh. 6 establishes that in the time period January through June, Respondent's steel expenditures ranged from $1.8 million to $2.3 million. As to the cancellations of orders Ogden testified that after 30 days, the customer bears responsibility for the cost of the product.

[18] The reduced steel orders for these months reveals itself further in Respondent's steel payments for the period July, August, and September, when the orders placed in the prior 4 months were ready for shipment. Thus, Respondent paid $1,058,743 in July; $297,587 in August; and $1,026,383 in September for previously ordered steel.

[19] While steel purchases had previously been greater than shipments in 1980, in June, Respondent purchased approximately $1.9 million worth of steel but shipped approximately $2.1 million worth of steel. This imbalance increased so that in September, Respondent purchased slightly more than $1 million worth of steel but sold $2.7 million worth.

[20] Due to increases in the price of steel, the cost of Respondent's steel was approximately 5 percent more in October than in January. Thus, although the dollar amount of inventory was greater in October, the actual number of bars on hand was approximately 5 percent less. Prior to October, the only month for which we have specific figures for the number of steel bars in stock is June. According to R. Exh. 11, as of June 30, there were 2687 uncut drilling collars on hand; 3 months later, September 30, there remained 1345 uncut steel bars in inventory.

[21] Ogden testified that on a normal machine, approximately six bars could be trepanned each shift. If all the steel bars in stock, but not including incoming supplies (which would have been small in October based on the low purchase figure for August), were trepanned, such would have meant approximately 24 days of work for a full complement of workers on the day shift and eight trepan employees at night. However, in view of the paucity of incoming steel bars in October, guessing at hole diameters and drilling every last bar in stock that month would have been extremely risky—especially if portions of the stock were unsold.

regard, Marion Keith Bruce testified that on occasion he and David Sholar spoke concerning the possibility of layoffs, "and he told me, he says, No, we have never had a lay-off, to the best of his knowledge. And he said that they have cut back on hours but never had a lay-off." While testifying that some time in the 1950s Respondent did, indeed, choose to reduce hours rather than lay off employees in a period of business decline, Ogden pointed out that the situation in October was unique in Respondent's history in that never before had depleted inventories been coupled with an anticipated lack of sufficient incoming steel orders, thereby mandating a reduction in operations from previously maintained levels. With regard to the factors involved in the layoff decision-making process, Kess Verhuel, the individual who selected the alleged discriminatees for layoff, did not testify, and no other evidence was offered.

B. *Analysis*

The consolidated complaint alleges that Respondent laid off employees Taylor, Garrison, Duffy, Rogers, Galloway, Smith, Bruce, and Vitela on October 6 in violation of Section 8(a)(1) and (3) of the Act. In support, counsel for the General Counsel contends that the discriminatees were the same people who signed union authorization cards and attended the union meeting on September 26; that by "spying" on the union activities of Taylor and Garrison on October 3, Respondent "placed itself in a position to learn that employees on the night shift were those who were 'pushing for the union'"; that Respondent violated Section 8(a)(1) of the Act by John Taylor's interrogation of employee Billy Joe Weaver and David Sholar's threat of termination to Ricky Taylor; that the layoffs occurred the next working day after the "spying" incident; and that said layoffs were the first in Respondent's history. Contrary to the General Counsel, Respondent denies that the layoffs were unlawfully motivated, arguing that it was without knowledge of the aforementioned employees' union sympathies or activities and that the layoffs were precipitated by a shortage of steel bars and an anticipated lack of sufficient incoming steel to justify trepanning operations at prelayoff levels.

A determination of the legality of the instant layoffs is governed by the traditional precepts of Board law in 8(a)(1) and (3) discharge cases, as modified by the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Thus, in order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish that (1) the individual engaged in union or other protected concerted activities; (2) the employer had knowledge of the activities; (3) the employer's actions were motivated by union animus; and (4) the discharge had the effect of encouraging or discouraging membership in a labor organization. *WMUR-TV*, 253 NLRB 697, 703 (1980). Further, the General Counsel has the burden of proving the aforementioned by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 201, 209 (1963). While the aforementioned analysis was easily applied in cases in which the employer's motivation was straightforward, conceptual problems arose whenever dual motivation was involved—the presence of both a lawful cause and an unlawful cause for discharge. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established the following causation test in all 8(a)(1) and (3) cases involving employer motivation. "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089. Two points are relevant to the foregoing test. First, in concluding that the General Counsel has established a prima facie violation of the Act, the Board will not "quantitatively analyze" the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act. Id. at 1089, fn. 14. Second, while apparently warranting the identical analytical approach, pretextual discharge cases should be viewed as those in which the "defense of business justification is wholly without merit." Id. at 1084 fn. 5.

At the outset, analysis of the posthearing brief of counsel for the General Counsel establishes that he views the alleged discriminatees as a class, with the identical circumstances involved in the layoff of each. Initially, it is contended that each attended the union meeting on September 26 and executed a union authorization card on that occasion. Although unstated, presumably counsel wishes the inference drawn that said individuals, as a group, were the "pushers" or main union adherents in the plant. While the record does establish that two of the discriminatees were, indeed, ardent union adherents, I refuse to draw such a broad inference. In this regard, other than Taylor, Garrison, Bruce, and Smith, there is no evidence as to other employees who participated in the initial organizing discussions at the plant. Also, not all the alleged discriminatees engaged in union activities; there is not a scintilla of record evidence that William Galloway signed a union authorization card, joined in any union discussions, attended any union meetings, solicited any other employee to support the Union, or otherwise indicated support for the organizing campaign. As to the September 26 meeting at the Union's office, the five witnesses who testified concerning the participants and discussions unanimously agreed on only the following alleged discriminatees as attending: Taylor, Garrison, Duffy, Rogers, and Smith. Other alleged participants included presumed second-shift employees Vince, Jeff, Nat, Archie, and Philip,[22] none of whom was laid off on October 6. Further, while it is alleged that Marion Keith Bruce attended, based on the date of his signed authorization card, Bruce himself denied having attended, stating that he executed his card later that afternoon. Also, although General Counsel's Exhibit 2(i), a union authorization card dated September 26, bears the unauthenticated signature of David Vitela, and Clowers, the union organizer, testified that all those present at the meeting of that date signed cards, Vitela did not testify at the hearing, no witness specifically placed him at this meeting,

[22] Nat Vasquez and Archie Mills, who are both classified as machinists, executed union authorization cards dated September 26.

and there is no evidence in the record of either the circumstances surrounding the execution of the above exhibit or what other, if any, union activities in which Vitela may have engaged.

While Respondent has not contested or raised as an issue the matter of the alleged discriminatees' union activities, it does strenuously dispute the General Counsel's contention that it had knowledge of same. At the outset, it cannot be seriously disputed that, prior to the September 26 union meeting, Respondent at least suspected the existence of union organizing activities at the plant and that subsequently it obtained actual knowledge, not only of the union campaign in general, but also of the identity of a leading union adherent. Thus, it was uncontroverted that in mid-September, employee Billy Joe Weaver asked his foreman, John Taylor, "What was all this bullshit about union," that Taylor subsequently asked Weaver "who was behind it," and that Taylor reported on the results of this interrogation to Don Butler, plant superintendent.[23] It was also uncontroverted that, some time after September 26, Ricky Taylor solicited David Sholar, an admitted supervisor, to support the Union by asking him to sign an authorization card. While Sholar may be, as contended by Respondent, a "low level supervisor," he nevertheless remains a supervisor within the meaning of the Act and "information acquired by a supervisor, with respect to the specific employees involved in the union campaign, is ordinarily imputable to the employer" as a matter of law. *Kimball Tire Co.*, 240 NLRB 343, 344 (1979); *Pellegrini Bros. Wines*, 239 NLRB 1220 fn. 2 (1979). However, knowledge that a particular individual was involved in union activities does not itself warrant the conclusion that any other individuals, or group, were known, or suspected, by Respondent to be the organizers of the union movement in the plant or even engaged in union activities at all. Rather, the burden was on the General Counsel to establish this fact. I do not believe counsel for the General Counsel has done so.

In this regard, other than the activities of Taylor and Alfred Garrison, there exists not a scintilla of record evidence that any other employee, including the alleged discriminatees, engaged in any form of overt—or even covert—union activity at or in the vicinity of the plant after September 26 so as to come to the obvious notice of Respondent. In his posthearing brief, counsel for the General Counsel glosses over this fact, pointing to the "spying by John Taylor and Don Butler" in the early morning of October 3. Again, counsel apparently desires that an inference be drawn—that, by placing themselves in a position to learn of employees' union activities, said supervisors did, in fact, discover that the night-shift employees were those "pushing for the union." I can draw no such inference and place no reliance on this incident as establishing knowledge of union activities. Initially, I note that, other than Taylor and Garrison, the record does not even establish the identities of those night-shift workers who were in the parking lot that morning, talking and drinking beer. Next, assuming that the individuals were, in fact, the alleged discriminatees, there is no evidence that they engaged in union activities on that occasion. Finally, the facts that these workers were drinking beer and that Butler and Taylor ordered them to leave the plant parking area for that very reason hardly support the conclusion that Respondent somehow learned of their union activities at this time. As to Garrison, rather than establishing knowledge, the testimony of Ricky Taylor mandates just the opposite conclusion — that Don Butler and John Taylor did not become aware of Garrison's union activities on this occasion. Thus, Ricky Taylor testified that, rather than paying attention to Garrison and himself, the two supervisors were observing the actions of the employees who were talking and drinking beer and that had they, in fact, been looking directly at Taylor and Garrison, Butler and his brother could not have known what they were doing. Thus, Taylor candidly admitted that he just assumed that Butler and John Taylor were aware of their union activities that morning. Also, I note that Garrison did not corroborate the occurrence of such "spying" and specifically denied ever observing supervisors engaging in surveillance of his union activities. Based on the foregoing, I shall not speculate as to what Respondent's supervisors might have learned that morning, and I believe counsel for the General Counsel has failed to prove either that Respondent was generally aware of the union sentiments of second-shift employees or that, except for Ricky Taylor, Respondent knew the identities of union adherents on this shift.

I am not unaware that there are cases in which violations of Section 8(a)(1) and (3) have been sustained based mainly on circumstantial evidence and inferences drawn therefrom, without specifically addressing the issue of knowledge. *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1345 (9th Cir. 1978); *NLRB v. Long Island Airport Limousine Co.*, 468 F.2d 292, 295 (2d Cir. 1972). However, I do not believe the record permits any sort of an inference that Respondent knew, or suspected, that the alleged discriminatees, except Ricky Taylor, were, at most, the main union instigators or, at least, strong union adherents. In support of his assertion that Respondent did know or suspect the foregoing, counsel for the General Counsel initially argues that the timing of the layoffs, occurring the first workday after the parking lot "spying" incident, suggests that Respondent did, indeed, learn that the night-shift workers had fomented the union movement at the plant. Without regard to whether "spying" occurred, D. C. Ogden explained that the layoffs were decided on October 6 inasmuch as he had initiated an inventory of Respondent's on-hand steel stock on October 1, as analysis of the accounting was not completed until October 3 and, as he was extremely busy with other work-related matters on that day, he was unable to confer with Kess Verhuel concerning the inventory until the following Monday (October 6). I found

[23] Counsel for the General Counsel alleges the interrogation of Weaver by Taylor constitutes a violation of Sec. 8(a)(1) of the Act. In the circumstances of this case, I agree. Thus, notwithstanding that the entire incident was initiated by Weaver, and Taylor did not accompany his question with any coercive conduct, there does not appear to have been any necessity or justification for Taylor's question, he was seeking quite specific rather than general information, and rather than being mere innocent conduct, the impression left by such a question is that possible reprisals would be taken against the individuals about whom Taylor sought information. *Colson Equipment*, 257 NLRB 78 (1986).

Ogden to be an honest and forthright witness and shall credit his testimony as to the foregoing. Next, counsel argues that not only had Respondent never experienced a layoff during its employment history but also employees were expressly informed of this fact during employment interviews and that whenever Respondent suffered economic difficulties in the past, its policy vis-a-vis the employees was to reduce their hours. However, while Ogden corroborated the foregoing facts, he testified that the period of reduced work hours occurred sometime in the 1950s—a period, I believe, too remote to bear upon Respondent's decision-making process in the present decade. Moreover, there exists no record evidence regarding the circumstances surrounding prior periods of economic difficulty for Respondent, and I specifically credit Ogden that the situation by which it was confronted in October 1980, depletion of its on-hand stock of steel bars along with a dearth of incoming steel in the immediate future, was one unique in Respondent's history. Further, based on the testimony of various employee witnesses and Ogden and the record as a whole, it cannot be said that Respondent acted unreasonably in concluding that a layoff was necessary to alleviate the aforementioned situation. Put another way, Respondent's decision to lay off employees does not, itself, establish knowledge or suspicion of the identities of the union proponents at the plant. Finally, and with regard to the latter point, it must be borne in mind that, other than Taylor and Garrison, none of the alleged discriminatees engaged in overt union organizing activities at or in the vicinity of the plant; that at the time of the layoffs, approximately 36 percent of the total employee complement, including 15 day-shift employees, had executed authorization cards for the Union; that, at least 7 other night employees had signed cards; that 2 night-shift trepanning employees who signed cards, Coria and Terrazas, were retained; and that the entire night shift was not eliminated. These latter factors are of particular significance for two reasons. First, absent specific knowledge, which, I have concluded, Respondent did not have, they indicate how remote the likelihood was that Respondent could have even suspected that the union activities which were engaged in by the alleged discriminatees, except Taylor, were more extensive than those of other employees. Second, if Respondent knew or suspected that the second shift was the source of the union sentiment, it would have been more expedient to dispose of all employees thereon and, thereby, "nip the nascent union movement in the bud"—rather than lay off the eight trepan shop employees who may or may not have been the union instigators.

Based on the foregoing, I find that counsel for the General Counsel has failed to establish that Respondent possessed knowledge or suspicion of their respective union involvements when it selected for layoff seven of the eight alleged discriminatees—an essential element in proving prima facie violations of Section 8(a)(1) and (3) of the Act.[24] Accordingly, I shall recommend dismissal of those portions of the consolidated complaint regarding Alfred N. Garrison, Marion K. Bruce, Albert Smith, David Vitela, William Galloway, James Duffy, and Ollie Rogers. *Simpson Steel Fabricators*, 249 NLRB 1111 (1980); *Sharkey's Tire & Rubber Co.*, 222 NIRB 261 (1976); *Industrial Products*, 216 NLRB 133 (1975).[25] However, the record does establish that Respondent had actual knowledge of the union activities of employee Ricky Taylor who, it was uncontroverted, distributed union authorization cards to several people, including David Sholar, the night-shift supervisor. The record further establishes, and it was also uncontroverted, that shortly after receiving a card from Taylor, Sholar warned the former that Taylor could be fired for engaging in union activities. Notwithstanding that Taylor did not feel threatened or that he did not believe Sholar was a statutory supervisor, such a specific prediction of adverse consequences for engaging in union activities, coming from a managerial representative, is conduct which goes directly to the heart of that which is protected by the Act and constitutes a blatant threat, violative of Section 8(a)(1) of the Act. *Stewart-Warner Corp.*, 253 NLRB 136 (1980); *Kansas City Power Co.*, 231 NLRB 204, 205 (1977). Irrespective of this, the statement also patently reveals Respondent's resolute attitude to discipline an employee who, it discovered, was engaging in union activities and, therefore, establishes the existence of unlawful animus towards Taylor.[26] Accordingly, not-

[24] Although not argued by the General Counsel, I note that seven of the eight alleged discriminatees engaged in some form of union activities. Thus, while 36 percent of the total employee complement were so engaged, 87.5 percent of those laid off were so. I am aware that such a statistical anomaly has been utilized in determining whether unfair labor practices have been committed; however, such should *only* be considered as a factor. Without more conclusive and factual record evidence, this statistical anomaly does not itself establish that Respondent selected the alleged discriminatees for layoff, with knowledge or suspicion of their union activities.

[25] The General Counsel relies on *Kranco, Inc.*, 228 NLRB 319 (1977), as support for the allegations in the consolidated complaint. However, the decision is readily distinguishable from the facts herein involved. Thus, in *Kranco*, the Board concluded that the Respondent "had reason to conclude that the [union activity] was strong, if not centered, among the night-shift employees." This finding was based on the *fact* that the night supervisor had discussions with several employees on that shift about a union. Consequently, then, the finding of knowledge had a specific factual basis. Such is missing herein. Other than knowledge that Taylor was distributing authorization cards, there is just no factual basis to conclude that Respondent knew the union sentiments of the second-shift employees or that Respondent knew the identities of other union instigators. Emphasis is placed on the alleged "spying" on October 3, but I reiterate my belief that it would be speculative to draw any conclusions from the events of that morning. Likewise, I have found that there is no basis to conclude that Respondent could have even reasonably suspected union activity on the night shift of a magnitude greater than on the day shift. Accordingly, while the layoff of Ricky Taylor makes the layoffs of the other alleged discriminatees highly suspicious, such does not justify a conclusion that such were unlawfully motivated.

[26] It is gainsaid that an employer is bound by the actions of its supervisors. *Glenroy Construction Co.*, 215 NLRB 866, 867 (1974); *GAC Properties*, 205 NLRB 1150 (1973). That Sholar's threat may be considered as representing Respondent's attitude is clear from the fact that Plant Superintendent Butler obviously directed John Taylor to interrogate employee Weaver as to the identity or identities of the union adherents. Such permits the inference that Sholar was reflecting the attitude of, if not directly instructed by, his superiors when he threatened to terminate Taylor because of his union activities. Finally, the fact that Sholar uttered his warning in the guise of a "prediction" does not lessen the consequences thereof.

withstanding the possible necessity for a layoff, I believe that counsel for the General Counsel has established that the selection of Ricky Taylor for such was motivated by his union activities, of which Respondent was aware,[27] in violation of Section 8(a)(1) and (3) of the Act.

Utilizing the standard set forth in *Wright Line*, 251 NLRB at 1089, the burden of proof shifted to Respondent to demonstrate that Taylor would have been selected for layoff notwithstanding his union activities. Respondent's explanation for the necessity for layoffs herein is economic-based. In this regard, I credit the testimony of Treasurer Ogden that, in view of a shortage of both on-hand and incoming steel bars in October, he believed that Respondent ". . . was going to have to do something." Further, while not entirely free from doubt, given what was a "unique" situation, I shall not "second guess" Respondent that a layoff was necessary to alleviate it. However, what Respondent failed[28] to do was to explain what factors were considered by Kess Verhuel, who apparently made the layoff decision and the selections of those employees who were chosen, in selecting Ricky Taylor for layoff. Thus, Verhuel did not testify at the hearing and there is just no record evidence in this regard. Accordingly, I find that Respondent has failed to meet its burden of proof that Taylor would have been laid off notwithstanding his union activities and conclude that, in laying off Taylor, Respondent acted in violation of Section 8(a)(1) and (3) of the Act. *Reeves Southeastern Corp.*, 256 NLRB 574 (1981); *Modesti Bros.*, 255 NLRB 911 (1981).[29]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By laying off employee Ricky Taylor about October 6, 1980, and thereafter not reinstating him because he engaged in union or other protected concerted activities, Respondent committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

3. By interrogating employees as to the union activities, membership, and sympathies of their fellow employees, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act and thereby committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. By warning employees that they could be terminated for engaging in union activities, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act and thereby committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. Unless specifically found, Respondent committed no other unfair labor practices.

REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully laid off Ricky Taylor, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment to him of the amount he normally would have earned from the date of his layoff, October 6, 1980, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest as prescribed in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Omsco, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees because they engaged in union or other protected concerted activities.

(b) Interrogating employees as to the union activities, membership, or sympathies of their fellow employees.

[27] The existence of animus directed at Taylor and a finding that his selection for layoff was unlawfully motivated do not permit the drawing of an inference that the other alleged discriminatees were likewise unlawfully selected for layoff. Thus, the finding that one individual was unlawfully laid off does not, absent record evidence of knowledge as to their union activities, establish that other layoffs are likewise unlawful. *Kimball Tire Co.*, 240 NLRB at 344.

[28] In its posthearing brief, Respondent speculates that selections for layoff were logical and based on the fact that the second shift was recently established. It is sufficient to say that, absent testimony by Verhuel or other record evidence, there is nothing in the record as to why Taylor was laid off.

[29] The fact that Respondent did not explain how and why the remainder of the laid-off employees were selected for layoff is not relevant to my conclusion that counsel for the General Counsel did not establish prima facie violations of Sec. 8(a)(1) and (3) of the Act with regard to the layoffs of Garrison, Bruce, Smith, Vitela, Galloway, Duffy, and Rogers. Thus, in arguing the contrary when he asserts that Respondent picked and chose those who were most active on behalf of the union (itself, a rather dubious claim), counsel seemingly—without explicitly stating—analogizes the failure of Respondent to offer *any* explanation to the offering of a patently *false* explanation for the selection of the employees for layoff. In this regard, counsel relies on such cases as *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966), and *First National Bank of Pueblo*, 240 NLRB 184, 185 (1979). However, even in such circumstances, the Board will draw an inference that the employer sought to conceal an unlawful motive only if the surrounding circumstances so justify. *Superior Forwarding Co.*, 242 NLRB 761, 765 (1979). Herein, where the record is barren as to Respondent's knowledge that the selected employees were strong union adherents or suspicions thereof, I draw no such inference.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Warning employees that they could be discharged because they engage in union or other protected concerted activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Offer Ricky Taylor immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Houston, Texas facility copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint should be dismissed insofar as it alleges that Respondent violated Section 8(a)(1) and (3) of the Act by laying off employees Alfred N. Garrison, Marion K. Bruce, Albert Smith, David Vitela, William Galloway, James Duffy, and Ollie Rogers.

[31] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mid-Continent Spring Company of Kentucky *and* James Stacy Richardson, Petitioner and Local No. 1993, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Case 9–RD–1193

14 December 1985

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 10 May 1984 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 34 for and 85 against the Union, with 16 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and adopts the hearing officer's findings and recommendations[1] only to the extent consistent with this decision.

On 16 May 1984 the Union filed objections to conduct affecting the results of the election contending, inter alia, that the Employer interfered with the election by selecting Kathy Marsh, its "personnel manager," as its observer. The Union had protested at a preelection conference to the use of Marsh as the Employer's observer. Notwithstanding this protest, the Employer decided it would use her as its observer, contending that Marsh was merely a personnel clerk.

Based on the credited testimony, the hearing officer found that Marsh was "closely identified with management."[2] Although acknowledging the established Board policy that supervisors and persons closely identified with management may not act as observers, the hearing officer concluded that the election should not be set aside. According to the hearing officer, an exception to this Board policy was warranted because the Employer, including Marsh, did not campaign or take a position during the election, that it was not the first election for unit employees, and that the Union had represented the employees for a number of years. Under these circumstances, the hearing officer concluded that the employees were "less likely to be swayed by campaign rhetoric or the desires of either the Employer or the Union in making their decisions."

The Union excepts to the hearing officer's recommendation to overrule this objection, contending that the mere presence of an observer closely identified with management is so inherently coercive that it constitutes objectionable conduct without any showing of actual interference. We find merit in the Union's exception. As the hearing officer stated, it is well established that an employer may not select a supervisor or a person closely identified with management to be its election observer. *Worth Food Market Stores*, 103 NLRB 259, 260 (1953); *Watkins Buick Co.*, 107 NLRB 500 (1953); *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980). Indeed, the Board has held that the use of such observers by an employer warrants setting aside the election since it is a fundamental deviation from the Board's established rules for the conduct of an election. *International Stamping Co.*, 97 NLRB 921, 923 (1951). This is true whether or not there is a demonstration of actual interference or, alternatively, a showing that no interference took place. *International Stamping Co.*, 97 NLRB 921, 923 (1951); *Peabody Engineering Co.*, 95 NLRB 952, 954 (1951).

In recommending that the use of Marsh as an observer was not objectionable, the hearing officer enumerated factors which he believed demonstrated that such conduct did not result in any prejudice to the Union. As stated, the Board has held that the fact that an observer closely identified with management "could not have had a coercive effect on the voters is besides the point." *Peabody*, supra at 954. The use of such an observer is a fundamental deviation from the Board's rules which requires the election to be set aside. Accordingly, we find that the Employer's use of Marsh was an objectionable deviation from the Board's rules for the conduct of an election. Therefore, we find that the election must be set aside and a new election held.[3]

[Direction of Second Election omitted from publication.]

MEMBER HUNTER dissenting.

Unlike my colleagues, I agree with the hearing officer that in the particular circumstances of this case no prejudice resulted from the use of Marsh as the Employer's election observer.[1] Hence, I find

[1] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule Objections 2 and 5.

[2] The hearing officer based his finding on the fact that Marsh is considered by the employees to be "personnel manager" and is a member of the management negotiating team. In addition, Marsh attends supervisory meetings and represents the Employer at the first step of the grievance procedure, advises the Union of the hiring and termination of all employees, advises the employees about personnel policy, and receives employee complaints. No exceptions were filed to the finding that Marsh was "closely identified with management."

[3] The Union also excepted to the hearing officer's recommendation to overrule the Union's objection concerning alleged unlawful restrictions placed on the employees' right to solicit union support. In light of our decision, we find it unnecessary to rule on this objection.

[1] Attached is the portion of the hearing officer's report dealing with Objection 6.

no merit in Objection 6. As there is no other objectionable conduct I would issue the appropriate certification.

APPENDIX

OBJECTION NO. 6:

In this Objection, the Union asserts that the Employer interfered with the conduct of the election by selecting Kathy Marsh, its "personnel manager," as its observer. In support of its position, the Union presented evidence through witnesses Jack Crotts, an international representative for the UAW; Lewis Wiley, president of the Union; Linda Cox, vice-president of the Union; Imogene White, a trustee of the Union; Jane Mitchell, financial secretary of the Union and its chief steward; and, former employees William Stanley, Brenda Birdsong, Shirley Walker, and Roxey Hale. The Employer presented evidence through Donald Langhi, its chief executive officer; Herbert Lingenfelter, its plant manager; and Kathy Marsh, whose title according to the company is "personnel."

The undisputed and/or uncontradicted facts in this matter are that on the date of the election May 10, 1984, the Union at the pre-election conference objected to the use of Ms. Marsh as the Employer's observer on the ground that she was the Employer's personnel manager. It appears from the record that the Board Agent conducting the election advised the Employer that observers must be nonsupervisory employees. After a lengthy discussion, the employer apparently asserted that Marsh was merely a personnel clerk and decided it would use her as its observer, notwithstanding the Union's objection. The record fails to reveal any evidence of misconduct by Ms. Marsh during the actual election. Therefore, the only issue to be resolved is whether her mere presence as the Employer's observer is grounds for setting aside the election.

The record reveals that prior to 1980 the Employer did not have a personnel manager. In 1980, the Employer hired Ken Barten, a consultant, for the purpose of setting up a personnel department. Barten admittedly had the title of personnel manager and could hire and fire employees. When Barten's contract expired after 1 year, he was terminated and Marsh, then known as Kathy Houchens, took over Barten's job in the personnel office. At the time, the authority that Barten had to hire and fire was allegedly not granted to Marsh. Marsh, who had previously been Donald Langhi's secretary, did not receive any increase in benefits when she took the personnel position and was paid considerably less than Barten. The record does not reveal any evidence that the Union or the employees were ever advised that Marsh unlike Barten did not possess the right to hire or fire employees or she was not the Employer's "personnel manager." On the contrary, there is considerable evidence that the employees continued to believe Marsh was the "personnel manager." In fact, the Employer's own attorney, Milburn Keith, referred to Marsh (Houchens) as the Employer's personnel manager in a letter to Jack Crotts in late September 1983. (Union Ex. 1) It was uncontradicted that the letter was a confirmation of the composition of the Employer's "negotiating team" for the upcoming 1983 contract negotiations. In light of the fact that Keith is also an officer of the corporation who should be well aware of Marsh's position, and in light of the fact that during the actual contract negotiations the Employer[10] and Union tentatively agreed to make the "personnel manager" the Employer's representative during the first step of the grievance procedure (Union Ex. 2), I find that the reference to Marsh as personnel manager was not mere oversight and that she was known to employees as the "personnel manager."

Marsh testified that upon assuming her job, she was advised by Barten that her duties would consist of doing the payroll, accepting job applications, and processing insurance claims. She denied being given any type of supervisory authority. However, she admitted attending 13 out of 19 of the 1983 contract negotiation sessions, admitted sitting in on a majority of 3rd step grievance meetings and sitting in on a majority of supervisory production meetings. However, she asserted the purpose of her attendance was and is simply to take notes or, in the case of grievance meetings, to answer questions asked by management, to type answers to the grievances, or to obtain employee files if necessary. She denied having any input in employee evaluations and denied attending any meetings involving strategy for negotiations or possible changes in personnel policy. (However, with regard to the latter, there haven't been any substantive changes since Barten left and it is possible no such meetings have been held.)

The record reveals that Marsh is the only person who works in the personnel office and that employees go to her for the purpose of getting safety glasses, filing tax forms, processing insurance claims, filing job applications, asking questions about the Employer's personnel policies and, at least, in some cases, for the purpose of making complaints.[11] In addition, part of Marsh's duties in the past have been to prepare seniority lists, dues check off lists and notifications of hire or termination of employees for the Union. Employees' vacation requests and medical excuses are eventually given to Marsh, and she maintains employee attendance records. With respect to the hiring of employees, Marsh testified that she merely takes job applications and, that if a supervisor in a particular department needs someone, the supervisor reviews the applications and instructs her who to call. She admitted that most persons hired are hired without any pre-job interview. After calling new employees, Marsh advises them how much they will be paid, what benefits they will receive and tells them that they will be on probation. She also instructs employees how to use the time clock and introduces them to their supervisor. Marsh denied any input in the hire of employees and asserted she does not screen or "weed out" any applications. With respect to her other duties, Marsh contended she only follows guidelines set up before she took the job

[10] Langhi and Lingenfelter were also part of the Employer's negotiating team and could have corrected any mistake concerning Marsh's title if they had so desired.

[11] See, for example, the discussion in Objection No. 3 where employees complained to Marsh about allegedly being harassed about joining the Union during working time.

and that her functions do not require the use of any independent judgment. She asserted she takes no independent action with respect to employees with attendance problems.[12]

The record reveals that Marsh's benefits and wages during the critical period[13] were comparable to various expediters and bookkeepers in the Employer's office. Her weekly pay of $300 was less than that of the lowest paid foreman who was paid between $300 and $350 weekly. Her benefits, as well as those of other office personnel, excluding executives, appear to be about the same as for those employees in the bargaining unit. Marsh who was on a weekly salary during the entire period, has not punched the time clock for approximately a year. Rather, she keeps her own time and gives it to Herbert Lingenfelter, the plant manager. Marsh, like other office personnel, is eligible for a bonus based on merit and longevity. She uses the same parking lot, restroom, and break area as other office personnel. Finally, it is undisputed that Marsh delivers paychecks to the foreman in the plant in full view of the unit employees.

Several union witnesses attempted to show that Marsh took an active part in their evaluation meetings, in the 3rd step grievance meetings, and during contract negotiations. However, based upon the entire record, including the demeanor of the witnesses, I conclude that one or more management officials attended such meetings and that Marsh's participation was generally limited to responding to questions concerning information contained in personal records and to obtaining files, if necessary.

Notwithstanding the above, Roxie Hale testified without contradiction that during a job evaluation, Marsh, as well as Hale's immediate supervisor, Theron Blankenship, told her that they were pleased with her work and that Marsh told Hale she would get her raise. Because she appeared to be a very credible witness, I credit Hale's testimony that such statements were made. However, I do not believe they are dispositive as to who actually made the decision to grant Hale's raise. I also credit Hale's uncontradicted testimony that Foreman Blankenship once told her to report an employee she had seen urinating in the parking lot to Marsh.

William Stanley testified that in late June or early July 1984, he called Marsh to find out how the Union "meeting" went. (It was apparent from his testimony that he was referring to the election.) During the conversation Stanley, who had been laid off for about 15 months, asked Marsh if he was still required to send a monthly letter indicating he had a continuing interest in employment. According to Stanley, Marsh told him "no, because after the end of the month he would be [de]terminated." Marsh denied making that statement and testified she merely told Stanley to follow the procedures set forth in the contract. Marsh struck me as the more credible witness. However, even assuming that Marsh made the statement attributed to her, her statement appears to be a simple recitation of the provisions set forth in the collective bargaining agreement concerning employees laid off for more than 15 months. It does not reflect any decision by Marsh.

Finally, union witnesses Crotts and Mitchell both testified that in one of the early contract negotiation sessions, Donald Langhi told them Marsh could hire and fire. Crotts testified that the statement was made after the Union asserted that a Mr. Mike Stanton was hired by mail by Mr. Langhi's brother. According to Crotts, Langhi denied the assertion, claiming that only Marsh (Houchens at the time) did the hiring. Wiley testified that after Crotts raised the issue of Stanton's hire, Langhi replied he did not know anything about it and asked Marsh if she knew anything. She stated Marsh started to reply but was interrupted when the Employer called a recess and went outside. When asked if anything was said as to who had the right to hire during that meeting, Wiley, like Crotts, asserted Langhi said Marsh had such authority. Mitchell[14] when asked about the discussion concerning Stanton's hire could only recall that Langhi disagreed that his brother had hired Stanton and asserted her belief that the Employer had argued that Clifford (Slim) Carroll, the assistant plant manager, had hired Stanton.

Employer witnesses Langhi, Lingenfelter, and Marsh all exhibited poor recollections concerning the conversation about Stanton's hire. Lingenfelter and Marsh could not recall if anything was said about Marsh having the right to hire and fire. Langhi, however, specifically denied saying Marsh had that right.

Of all the conflicts in the evidence, this one is the most difficult for me to resolve. On the one hand, the Employer witnesses do not recall the incident well and only Langhi specifically denied the statement attributed to him. On the other hand, Mitchell's testimony concerning the statement conflicts in part with that of Crotts and Wiley. Moreover, it is particularly troubling that Crotts and Wiley could so clearly recall this conversation but no others in the negotiations in which Marsh participated and allegedly spoke. After due consideration, I must conclude that the Union has failed to establish by a preponderance of the evidence that Langhi stated only Marsh could hire and fire and I credit Langhi's denial of that statement.

It is general Board policy that in the interest of free elections, supervisors and persons closely identified with

[12] I note that the union witnesses are not in a position to know what the actual hiring practices of the Employer are or the extent of Marsh's participation in supervisory meetings or in personal matters. As a result, the Employer's witnesses' testimony was largely uncontradicted. However, I simply cannot believe Marsh's duties are so routine or clerical. If that were the case, I do not believe the Employer would have agreed to make her its representative in the first step of the grievance procedure.

[13] She received a promotion in June 1984.

[14] Mitchell also testified about statements Marsh allegedly made in meetings on September 27, 1983, November 21, 1983, and November 23, 1983. However, Marsh had 3 handwritten sets of notes concerning the September 27, 1983 meeting. She could not remember which of the statements was initially prepared. Moreover, one of the sets of notes contained changes concerning exactly what was said. In addition, I am convinced from the record that Marsh was not even present at the November 21, 1983, meetings at which Marsh, according to Mitchell, allegedly spoke. Considering the duplicative notes, the changes therein, and Mitchell's demeanor on the stand, I do not credit her testimony concerning the alleged statements by Marsh on September 27, 1983, November 21, 1983 or November 23, 1983. Therefore, I have not set them forth herein.

management may not act as observers.[15] Indeed, the Board has held that the use of such observers is such a material and fundamental deviation from the Board's established rules for the conduct of an election, that it will set aside an election without any showing of actual interference in the way the employees voted in the election. In so holding, the Board stated that "[e]lection rules which are designated to guarantee free choice in the election must be strictly enforced against material breaches in every case, or they may as well be abandoned."[16]

Notwithstanding the above, limited exceptions to the prohibition against the use of such observers have developed over the years. Thus the Board has refused to set aside an election contested by two unions wherein the employer used an alleged supervisor as its observer.[17] Similarly, the Board has also refused to set aside an election contested by only one union wherein the petitioner used a supervisor as its observer and majority of its votes cast were for the petitioner.[18] In both cases, the Board noted its prohibition against the use of supervisors as observers was predicated on the likelihood that their presence at the polls might unduly influence voters to cast "no-union" votes and that in the circumstances of those cases the likelihood of such influence was not present. In addition to the above, the Board has also refused to set aside elections where the objecting party failed to object to the use of a supervisor as an observer until after completion of the election rather than during the pre-election conference.[19]

To resolve this issue, it is necessary first to decide whether Marsh is a supervisor or in a position which closely identifies her with management. Section 2(11) of the Act states the term supervisor means:

> "Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

A review of the record and the credited evidence therein reveals little direct evidence that Marsh has any of the aforementioned authority. Marsh has never hired, fired, laid off, disciplined, or transferred any employees and there is no indication in the record that she has the authority to do so. At most, the record establishes she told Roxy Hale that Hale would get a raise and told Stanley that he would be terminated pursuant to the contract after he was laid off more than 15 months. However, those statements do not reflect who made the decision to give Hale her raise and do not establish that Marsh terminated Stanley. Most, if not all, of Marsh's other duties appear to be essentially routine in nature. Finally, while there is some evidence that employees have made complaints to Marsh, there is no evidence that Marsh has actually adjusted any grievance or has the authority to do so. Therefore, I cannot, on the basis of the record before me, find her to be a supervisor within the meaning of the Act.

Notwithstanding the above, however, I do find that Marsh has enhanced responsibilities such that she is in a position which closely identifies her with management. In so holding, I note that Marsh was considered by the employees (and at least by one management official) as the "personnel manager." Marsh attends supervisory meetings, grievance meetings, and was part of the negotiating team for the Employer. She generally is the only person an applicant sees prior to his/her being hired and as such it is reasonable for employees to assume (even erroneously) that she had hired them. In addition, Marsh is the only person in the Employer's personnel office and it is she who advises the Union of the hire and termination of employees—that she is not the one actually making those decisions is of no moment considering the employees do not know that is the case. Marsh advises employees about personnel policy and receives employee complaints. While the record is void of any evidence that she can resolve grievances, it appears employees believe she can or that she will find someone who can (otherwise there would be no purpose in making complaints to her). Finally, I believe the Employer by agreeing, albeit tentatively, that Marsh would be its representative in the first step of the grievance procedure, served notice that Marsh could and did speak on behalf of the Employer. Accordingly, I find her to be closely identified with management.[20]

Considering my findings, at first blush, it would appear that to effectively maintain the Board's rules concerning observers, the election should be set aside. However, there are factors in this case which I have not seen previously addressed by the Board. It is undisputed, for example, that the Employer including Marsh did not campaign or take a position during the election. Moreover, this is not a first election for the employees of the Employer; it is the third. Because of that and because the union has represented them for several years, I believe the employees of this Employer are less likely to be swayed by campaign rhetoric or the desires of either the Employer or the Union in making their decisions as to whether to vote for or against the Union. In my opinion, they would tend to make their decisions based on their perception of the effectiveness of their representation.[21]

Respectful as I am of the Board's necessity to maintain its election rules, I also am of the opinion that the desires of the employees should not be overlooked in these matters and that election results should not be set aside easily. In the particular circumstances of this case, where

[15] *Peabody Engineering Company*, 95 NLRB 952-954; *International Stamping Co., Inc.*, 97 NLRB 921-923; *Worth Food Market Stores, Inc.*, 103 NLRB 259, 260; *Photo-Sonics, Inc.*, 254 NLRB 567, 569.

[16] *International Stamping Co., Inc.*, id. *Sound Refining, Inc.*, 267 NLRB 1301.

[17] *Owens-Park Lumber Co.*, 107 NLRB 131, 132.

[18] *Plant City Welding and Tank Company*, 119 NLRB 131, 132. See also *Howard Cooper Corporation*, 121 NLRB 950, 951.

[19] *Howard Cooper Corporation*, id.

[20] *B-P Custom Building Products, Inc.*, 251 NLRB 1337, 1338.

[21] Assuming there are no unremedied unfair labor practices. The record does not reveal any unlawful conduct by the Employer.

the Employer stayed neutral in a contest between those employees who wanted to retain union representation and those who did not, I do not believe any prejudice to the Union could have resulted from the use of Ms. Marsh as the Employer's election observer.

Accordingly, I recommend that the Union's Objection No. 6 be overruled.

Florida Steel Corporation *and* United Steel Workers of America, AFL–CIO. Cases 11–CA–5324, 11–CA–5326, 11–CA–5347, 11–CA–5366, 11–CA–5405, 11–CA–5429, 11–CA–5444, 11–CA–5455, 11–CA–5776, 11–CA–5943, 11–CA–5946, and 12–CA–6593

14 December 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 10 January 1983 Administrative Law Judge Stephen J. Gross issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, to which the Charging Party and the General Counsel filed answering briefs. The Charging Party also filed exceptions and a supporting brief and the Respondent filed an answering brief. The General Counsel filed exceptions and a supporting brief to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] as modified and to adopt the recommended Order.

Prior to 1974, it was the Respondent's practice to grant scheduled general wage increases based in part on periodic area wage surveys. In the spring of 1973, the Union began its organizing activity at the Respondent's Charlotte and Indiantown plants.[2] In 1974 the Respondent canceled its scheduled wage surveys and withheld annual and quarterly wage increases or TEAM[3] increases at these plants. In a series of cases,[4] the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act when it canceled the surveys and withheld the wage increases. Accordingly, the Board ordered the Respondent to cease its unlawful conduct and to make whole the employees in the appropriate units for losses in pay suffered by reason of the Respondent's discriminatory practices. After the issuance of the Board decisions, the Respondent resumed granting its scheduled increases.[5] However, the General Counsel and the Union maintain that the wages at the Charlotte and Indiantown plants still fell short and have continued to fall short of the wages that would have been paid had the Respondent continued its pre-unfair labor practice wage policies. A controversy arose over how best to determine what the appropriate wage rates would have been at Charlotte and Indiantown but for the Respondent's unfair labor practices. None of the parties have argued that wages be reconstructed by replicating the area wage surveys used by the Respondent before 1974. At the hearing before the judge, experts presented various techniques for arriving at appropriate wage rates. As discussed in more detail in his supplemental decision, the judge found and we agree that the best approach to reconstructing the wage rates is by a "proportional" method.[6]

Another issue raised by the parties concerns the length of the backpay period. Contending that wages at Charlotte and Indiantown continue to fall short, the General Counsel and the Union urge that the backpay period continue until this proceeding is brought to an end by the Board. The Respondent maintains that it has ceased its unlawful conduct and since it has "commenced to bargain in good faith, offered and/or reached agreement with the Union on interim increases, and implemented those increases, the underlying unfair labor practice was no longer being committed" and the backpay period came to an end.[7] In its exceptions, the Respondent maintains that by December 1982–January 1983 it had already complied with the judge's recommended Order and therefore is not liable for backpay during the period that has intervened since the issuance of the judge's supplemental decision.

We do not agree with the judge's recommendation that the Respondent continues "to incur backpay obligations to its hourly employees in the

[1] Member Zimmerman would find that the 22 November 1976 letters to John Wells Jr., James W. Ashcraft, and Loren D. Theodore do not constitute valid offers of reinstatement because these employees were required to take a physical examination. Absent the Respondent's discriminatory discharge, these employees would have continued to be employed without their employee status being jeopardized by such a requirement. He would also find the reinstatement offer to Bruce Lemmond invalid for this reason, as well as the reasons set forth by the judge.

[2] The Union was certified as the bargaining representative in January 1974 at Charlotte and in June 1975 at Indiantown.

[3] TEAM stands for The Economic Adjustment Match, a policy instituted by the Respondent in mid-1974 which involved quarterly rather than annual wage increases.

[4] 220 NLRB 260 (1975), enfd. 543 F.2d 1389 (D.C. Cir. 1976); 220 NLRB 1201 (1975), enfd. 538 F.2d 324 (4th Cir. 1976); 221 NLRB 554 (1975), enfd. 562 F.2d 46 (4th Cir. 1977); 226 NLRB 123 (1976). Member Hunter was not on the Board at the time of the Board's decisions in these cases. He notes, however, that the Board's decisions were enforced in the circuit courts, and he therefore accepts these decisions as the law of the case.

[5] The Respondent began implementing wage increases in August 1976 at Indiantown and in April 1977 at Charlotte.

[6] Insofar as the decision applies the judge's model to wages after the date of the judge's supplemental decision, we reject the Respondent's contention that a "combination index" method is more appropriate.

[7] We note, as did the judge, that although the Respondent and Union reached agreement on interim wages, neither party waived any rights in the backpay proceeding.

Charlotte and Indiantown bargaining units whenever the wage levels of those employees fall short of the levels that would obtain, in light of the then current circumstances, pursuant to the wage policies in force at Charlotte and Indiantown prior to 1974 and that are still in force at [Respondent's] other facilities." In concluding that the backpay period be "open-ended," the judge relied on the underlying Board cases at 220 NLRB 1201 and 226 NLRB 123. In these cases, the Board ordered the Respondent to pay backpay "until such time as [it] institutes and equally applies the TEAM program to the Indiantown employees"[8] and "to notify the bargaining representative of the imminent implementation of scheduled TEAM increases and corporatewide fringe benefits and offer to place said benefits into effect for unit employees at Charlotte unless the Union as bargaining representative objects."[9] We note that the Board's broad orders, especially at 226 NLRB 123, are based in part on what it describes as Respondent's "history of unfair labor practices" and "recent history of other types of flagrant violations," indicating "a course of unlawful conduct taken by Respondent in the service of designs inimical to the collective-bargaining process."[10] Although the General Counsel argues that the Respondent's proclivity to violate the Act has "continued unabated since the underlying orders in these cases," evidence of the Respondent's alleged continuing unfair labor practices is not before us. Further, once the Respondent has met its backpay obligation, it would be inappropriate to hold it liable for backpay whenever wages fell below the judge's model rates. The determination of future wage rates may only be established by good-faith bargaining between the parties and not mandated by orders of the Board.[11] The purpose of this proceeding is to remedy the Respondent's past unfair labor practice, not to police indefinitely the parties' collective bargaining. Once the Respondent has complied with the order set forth in this supplemental decision the backpay period will have ended. Accordingly, we order the Respondent to reimburse employees for wages at the rates and schedules established by the judge, including the period from the date of the judge's supplemental decision on 10 January 1983 to the date of this Supplemental Decision and Order.[12]

[8] 220 NLRB at 1204.

[9] 226 NLRB at 124

[10] 226 NLRB at 124

[11] In finding that the Respondent "incurs backpay obligations so long as its periodic general wage increases at Charlotte and Indiantown fail to at least equal the increases that [Respondent] would have granted had it not changed its wage policies at those two plants," the judge noted that the "parties are free to vary Respondent's general wage increase policies through good-faith collective bargaining."

ORDER

The National Labor Relations Board adopts the recommended Order of the adminstrative law judge and orders that the Respondent, Florida Steel Corporation, Charlotte, North Carolina, and Indiantown, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.[13]

MEMBER HUNTER, concurring and dissenting, in part.

I concur with my colleagues in adopting the judge's decision in all respects, including his formula for determining backpay.[1] In adopting the formula, I note that the General Counsel and the Charging Party took no exception to the formula, and that the Respondent only excepted to the extent it applied to any backpay liability post 1982. In fact, the Respondent states in its brief that it has implemented the judge's model rate and has made a final payout of backpay, "which the Regional Director is now preparing to audit."

While I agree with the adoption of the judge's formula and other findings, I do not agree with my colleagues' decision to cut off the Respondent's backpay liability as of the date of this decision. The Respondent here contends that the backpay period terminates when the Respondent attains rates in conformance with the judge's model since, at that point, the Respondent will have made its employees whole for its past violations. I find merit in the Respondent's contention, and I would cut off the backpay period as of the date the Respondent shows it had attained the wage rates established by the judge's model. At that time, the Respondent will have restored the status quo ante and this proceeding should therefore terminate. After the date, the Respondent should be free to establish rates and other terms of employment after giving the Union an opportunity to bargain in good faith.

[12] In finding that the Respondent is liable for backpay for the period between the date of the judge's decision and this supplemental decision and order, we reject the Respondent's contention that the backpay period ended in December 1982—January 1983 when it allegedly complied with the judge's recommended Order and made a "final payout." The backpay proceeding cannot be closed until a final determination by the Board. Any reimbursement of backpay by the Respondent will be noted at compliance and applied to its backpay liability.

[13] Although we have modified the judge's holding to limit the Respondent's backpay liability to the date of compliance, including the period from 10 January 1983 to the date of this Supplemental Decision and Order, we do not find it necessary to change the judge's order.

[1] Thus, I join Chairman Dotson in adopting the judge's finding, for the reasons stated by the judge, that the Respondent made valid offers of reinstatement to John Wells Jr., James W. Ashcraft, and Loren D. Theodore.

As noted before, the Respondent asserts that it has already made the requisite payout in accordance with the judge's formula and that payout is now being audited by the Regional Director. However, the Respondent's assertion is not sufficient to establish that it has in fact complied with the judge's decision. I therefore leave it to compliance to determine whether the Respondent has already satisfied its backpay obligation, or whether it is still not in compliance in some respects. Accordingly, for the reasons stated above, I respectfully dissent from my colleagues' cutting off of backpay as of the date of this decision.

SUPPLEMENTAL DECISION

STEPHEN J. GROSS, Administrative Law Judge. The purpose of this proceeding is to determine the amount of backpay due various persons employed or previously employed by Respondent Florida Steel Corporation (FSC or the Company) at its Charlotte, North Carolina and Indiantown, Florida facilities. The FSC backpay obligations that are at issue here arise out of a series of Board orders,[1] the impact of which will be discussed in subsequent parts of this decision. Twenty days of hearing have been held (in Charlotte, Atlanta, and Winston-Salem).[2] Briefs have been filed by the General Counsel, by FSC, and by the Charging Party, United Steelworkers of America, AFL–CIO (the Steelworkers or the Union).[3]

While the parties have settled numerous backpay matters, a considerable number of others remain to be resolved here. In terms of dollar amounts at issue, the principal remaining matters concern a change in FSC's practices regarding general wage increases for its hourly paid Charlotte and Indiantown employees. Those general wage increases issues will be considered in parts I through VII of this decision. All other issues will be considered in part VIII.

I. WAGE RECONSTRUCTION—BACKGROUND AND BACKPAY PERIOD

As of early 1973, none of FSC's employees were represented by a union. But in May of that year, the Steelworkers filed a petition with the Board seeking certification as representative of the production and maintenance employees at the Company's Charlotte facility. (An election was held; the Charlotte employees voted to be represented by the Steelworkers; and in January 1974 the Board certified the Steelworkers as the Charlotte employees' exclusive bargaining representative.)

Starting at least as far back as 1966 FSC granted annual general wage increases at each of its facilities. In keeping with that practice FSC had granted a general wage increase to its Charlotte employees in February 1973 and had planned to grant another such increase about the same time in 1974. But FSC officials changed their plans and did not grant the Charlotte employees any general wage increase in 1974. The admitted basis for that change was the Steelworkers representation petition. FSC reacted similarly to another Steelworkers representation petition, filed in September 1973, covering the production and maintenance employees at FSC's Indiantown, Florida plant. Again, FSC refrained from granting a wage increase that it would have granted but for the Union's presence.

(In mid-1974 FSC began a policy of granting general wage increases on a quarterly, rather than annual, basis. FSC called the new policy "TEAM"—an acronym for The Economic Adjustment Match. The first wage increases at Indiantown that the Company would have implemented but for the Union's activity there would have been TEAM increases. At Charlotte, as indicated above the first time FSC refrained from granting a general wage increase the Company was still following a yearly increase policy at nonunion plants. Subsequently, however, FSC withheld quarterly—TEAM—increases from the Charlotte employees that it admittedly would have implemented if there had been no union activity there.)

In a series of four cases the Board concluded that FSC's withholding of annual and TEAM wage increases from the Charlotte and Indiantown employees violated the Act. The Board accordingly ordered FSC to cease its unlawful practices and to make the affected employees whole for the losses of pay they suffered by reason of such practices.

A. *The Parties' Positions About the Backpay Period*

The pages ahead will discuss how best to "reconstruct" the wage rates that FSC would have implemented for its hourly employees at Charlotte and Indiantown had FSC not changed its wage increase policies there. But a preliminary issue must first be decided: What is the length of the period for which FSC wages must be reconstructed.

The problem is this. FSC failed to give any wage increases to employees in its Charlotte and Indiantown bargaining units until after issuance of the Board decisions finding FSC's withholding of wage increases to be violations of the Act. While FSC did resume implementing wage increases, the General Counsel and the Steelworkers contend that FSC's Charlotte and Indiantown wages still fell short, and have continued to fall short, of the wages that FSC would have paid had it continued its pre-unfair labor practice policies. The General Counsel and the Steelworkers accordingly urge that the backpay period continue until this proceeding is finally brought to an end by the Board.

FSC urges otherwise, on three grounds. First, FSC long ago resumed granting wage increases to the Char-

---

[1] 214 NLRB 264 (1974); 220 NLRB 260 (1975), enfd. 543 F.2d 1389 (D.C. Cir. 1976); 220 NLRB 1201 (1975), enfd. 538 F.2d 324 (4th Cir. 1976); 221 NLRB 554 (1975), enfd. 562 F.2d 46 (4th Cir. 1977); 221 NLRB 1008 (1975), enfd. in part 551 F.2d 306 (4th Cir. 1977); 226 NLRB 123 (1976).

[2] Hearings were held as follows: in Charlotte on February 10 through 12, 1981; in Winston-Salem on March 9 through 12; in Atlanta on May 4 through 7; and again in Winston-Salem on May 27 and 28, June 30, July 1 and 2, and August 5, 6, 18, and 19, 1981. In addition, a prehearing conference was held on January 15, 1981, in Washington, D.C. before Judge Joel Harmatz.

[3] FSC also filed a "Limited Reply Brief" and a "Supplemental Limited Reply Brief." The Steelworkers filed a reply to FSC's Supplemental Limited Reply Brief.

lotte and Indiantown employees (April 1977 at Charlotte; August 1976 at Indiantown). And "nothing in the Board's orders suggested that backpay would continue to accrue beyond the time that Respondent actually ceased and desisted from unlawfully withholding wage increases."[4] Second, since as far back as the mid-1970s FSC has been negotiating with the Steelworkers about numerous matters, including wages. In particular, FSC implemented "interim" wage increases at Charlotte and Indiantown on, respectively, January 27, 1980, and December 23, 1979, after concurrence by the Union. According to FSC: "Once Respondent commenced to bargain in good faith, offered and/or reached agreement with the Union on interim increases, and implemented those increases, the underlying unfair labor practice was no longer being committed" and the backpay period came to an end.[5] Third, an "open-ended" backpay period "would mean either that the pay rates established for the future would be highly speculative or that, in order to avoid this, additional back pay proceedings featuring new data, revised models, and more expert testimony would be required."[6]

B. *The Board Orders*

The First Charlotte Wage-Increase Case.[7] The first case concerning FSC's failure to implement general wage increases involved FSC's withholding of an annual increase in early 1974 at Charlotte. Administrative Law Judge Thomas S. Wilson concluded that FSC had thereby violated the Act. After noting that FSC's wage increases at its other facilities "averaged in 1974 about 40 cents per hour" (and for other reasons spelled out in his decision), Judge Wilson ordered FSC to pay to each Charlotte employee "a sum of money equal to that which he would have earned on and after February 1, 1974, at an increase of 40 cents per hour for the hours worked thereafter . . . ."[8]

The Board affirmed Judge Wilson except for the 40-cent-per-hour figure he had selected:

> In view of the record evidence that Respondent does not give the same general wage increases at all its 11 facilities, and its concern for maintaining a competitive position in each labor market, we shall not set a specific hourly sum. Accordingly, we shall order Respondent to make whole all those employees in the appropriate unit at Charlotte for any loss of pay they may have suffered by reason of the discrimination practiced against them by Respondent's refusal to give them a general wage increase for 1974. If Respondent and the Union cannot agree on the amount of the general increase and/or the retroactive date, it shall be left to the compliance stage of these proceedings to determine such amounts and the proper date, or, if agreement cannot there be reached, to a backpay proceeding.[9]

The Indiantown Wage-Increase Case.[10] The Board found that FSC had unlawfully failed "to institute the new quarterly wage review policy [i.e., TEAM] at Indiantown." It accordingly ordered FSC to "make whole all those employees in the appropriate unit at Indiantown for any loss of pay they may have suffered by reason of the discrimination practiced against them by Respondent with respect to wages during 1974 and until such time as Respondent institutes and equally applies the TEAM program to the Indiantown employees."[11]

The Second Charlotte Wage-Increase Case.[12] This case involved, among other things, FSC's refusal to implement TEAM wage increases at Charlotte. The Board ordered FSC to "make whole all those employees in the appropriate unit at Charlotte for any loss of pay they may have suffered by reason of the discrimination practiced against them by refusing to implement the new quarterly wage review policy."[13]

The Third Charlotte Wage-Increase Case.[14] By late 1975 it was thus reasonably clear that the Board intended to require FSC to apply its TEAM policy to its Indiantown facility and that FSC would incur additional backpay obligations to its Indiantown employees, without further proceedings, until it did so, and did so with wage increases that were commensurate with the amounts FSC would have paid had it not stopped its TEAM increases at Indiantown. But the Board's Charlotte orders read differently, apparently referring only to particular past wage increases not implemented by FSC.

That led the General Counsel to seek reconsideration of the Board's second Charlotte order on the ground that the order "limited monetary recovery to the pay raises employees would have received from August 15, 1974 to April 19, 1975, when the complaint issued, without ordering ongoing implementation of the TEAM policy of quarterly wage reviews and increases, if applicable."[15] By the time all the pleadings were in, the Board had explicitly before it the General Counsel's request for an "open-ended remedy" and FSC's contention that "it would be inappropriate to require [FSC] to grant the TEAM wage increases and benefit improvements to the Charlotte employees who are represented by a certified bargaining agent because said increases are mandatory subjects of bargaining."[16]

The entire Board opinion must be read to get its full flavor. But to summarize, the Board, after focusing on "Respondent's history of unfair labor practices" that indicated "a course of conduct inimical to the collective-bargaining process," continued:

[4] FSC Br. at 15.
[5] Id. at 18.
[6] Id. at 22–23.
[7] 220 NLRB 260 (1975), enfd. 543 F.2d 1389 (D.C. Cir. 1976).
[8] 220 NLRB at 268 and 269.
[9] 220 NLRB at 260.
[10] 220 NLRB 1201 (1975), enfd. 538 F.2d 324 (4th Cir. 1976).
[11] 220 NLRB at 1204.
[12] 221 NLRB 554 (1975), enfd. 562 F.2d 46 (4th Cir. 1977).
[13] Id. at 555.
[14] 226 NLRB 123 (1976).
[15] 226 NLRB at 123 (quoting the Board's description of the General Counsel's motion).
[16] 226 NLRB at 123.

> . . . we hereby clarify our order by providing that the Respondent's obligation to . . . implement the TEAM wage policy corporatewide, which obligation was specifically made retroactive, continued during the period that has intervened from the date of the original Decision (November 20, 1975) until the date of this Supplemental Decision. In addition, Respondent in the future is to notify the bargaining representative of the imminent implementation of scheduled TEAM increases and corporatewide fringe benefits and offer to place said benefits into effect for unit employees at Charlotte unless the Union as bargaining representative objects.[17]

C. *Duration of Backpay Period—Conclusion*

As I read the Board's orders in 220 NLRB 1201 (Indiantown) and 226 NLRB 123 (Charlotte), FSC incurs backpay obligations so long as its periodic general wage increases at Charlotte and Indiantown fail to at least equal the increases that FSC would have granted had it not changed its wage policies at those two plants. The only limitation on that obligation is one inherent in the Act: "The parties are free to vary" FSC's general wage increase policies "though good-faith collective bargaining."[18]

To that extent FSC's backpay obligation is indeed "open-ended," as stated by the General Counsel in the pleadings leading to the Order in 226 NLRB 123.

As for the increasingly "speculative" nature of the reconstructed wage rates as the years move past us,[19] that was an argument appropriate for raising in the proceedings leading to the 226 NLRB 123 Order. Given that Order, it is beside the point here. On the other hand, the length of the backpay period is a factor warranting consideration when deciding what kind of formulation to use in reconstructing the wage rates that FSC would have implemented but for its unlawful actions.

Finally, there is the factual question of whether the Steelworkers has agreed that periodic general wage increases at Charlotte or Indiantown should be a product of collective bargaining rather than of FSC's corporatewide policies regarding such increases. The record is clear on this point. FSC and the Union have discussed every general wage increase that FSC has implemented at Charlotte and Indiantown since the Steelworkers was certified at those facilities. And the Steelworkers has agreed to each of the increases. But the Union has always done so—

> . . . with the understanding that such wage increases would be on an interim basis. Interim basis was understood by both parties [i.e., FSC and the Steelworkers] to mean (1) that neither party was foreclosed from bargaining for additional wage increases nor (2) was either party in any way waiving any legal rights that they may have or legal arguments they may have concerning the backpay proceeding which we are currently involved in.[20]

What that adds up to is that the Union has at no time agreed that FSC may at either Charlotte or Indiantown, cease following its companywide policy regarding periodic general wage increases.

In sum, as of the date of this decision FSC's backpay period has not ended. Moreover, absent agreement with the Union to the contrary or further action of the Board that revises the Board's Orders of October 1975 and September 1976 (220 NLRB 1201 and 226 NLRB 123), FSC will continue to incur backpay obligations to its hourly employees in the Charlotte and Indiantown bargaining untis whenever the wage levels of those employees fall short of the levels that would obtain, in light of the then current circumstances, pursuant to the wage policies in force at Charlotte and Indiantown prior to 1974 and that are still in force at FSC's other facilities.

II. FSC'S WAGE SETTING PRACTICES

FSC has plants at Ft. Lauderdale, Ft. Myers, Indiantown, Jacksonville, Miami, Orlando, and Tampa, Florida; Atlanta, Georgia; Charlotte and Raleigh, North Carolina; and Aiken, South Carolina. Since at least the mid 1960s FSC has used the process described below to set wage levels at all of its plants except the two at Charlotte and Indiantown. As to those two: (1) it stopped using that process at Charlotte in 1973; and (2) it used that process at Indiantown only from 1970 (when the Indiantown facility first went into operation) until early 1974.

A. *Wage Structure*

FSC has analyzed each hourly paid job at each of its facilities in terms of various "factors," including the "education," "experience," and "initiative" needed to handle the job; the responsibilities the job entails; and the working conditions associated with the job.[21] Each job is assigned points for each factor. The greater the demands of the job, and the worse the working conditions associated with it, the greater the number of points given. Thus, for example, a job that requires great skill and at the same time confronts the employee with hazardous and disagreeable working conditions is assigned a high total point count. Determination of what grade to assign to any given job is based on the job's point count. The more points, the higher the grade and the better paid the job.

B. *FSC's Wage Surveys*

As touched on earlier, except at those plants where the employees are represented by a union, FSC has granted general wage increases at least annually. FSC starts its wage-setting procedures with surveys of the wages paid by other employers. It does so since—"we're interested in determining the . . . value of our jobs for recruiting and retention purposes relative to what other companies are paying, that we would likely attract employees from, or that we might lose employees to."[22]

---

[17] Id. at 124.
[18] 226 NLRB at 124.
[19] See text at fn. 6, supra.
[20] Stipulation at Tr. 524.

[21] See, e.g., G.C. Exh. 31. Hereafter I will use "GCX," "RX," and "CPX" when citing exhibits introduced by, respectively, the General Counsel, FSC, and the Steelworkers.
[22] Tr. 1805 (FSC witness Hogue).

Since FSC sets wages on a plant-by-plant basis, each survey focuses on employers in the locality of the plant in question. Generally that means companies within normal commuting distance of the FSC plant.

The process for conducting the initial survey in an area is different from the process associated with subsequent surveys in that same area. If the survey is the initial one, company officials select a "representative group" of "significant" companies that are likely to attract the same kinds of persons as employees as does FSC.[23] Not all of the selected companies will necessarily agree to participate in the survey. As to those employers which do participate, one of FSC's officials will visit each of them to do the following:

(1) Obtain information on such matters as overall pay practices, fringe benefits, and the like.

(2) Learn what kinds of jobs the employer utilizes and "select from those jobs representative jobs."

(3) Determine the point count of each type of "representative" job in the same way that FSC evaluates jobs in its own facilities.

(4) For each separate type of job (at each employer in the "representative" group), determine (a) the number of employees holding that job and (b) their average wage.

FSC updates its surveys on a more or less annual basis. If a new employer enters the area, FSC may add it to the survey. If a participant in the previous year's survey pulls out of the survey, a replacement company may be selected. And if an employer in the previous year's survey creates a new kind of job, that may be added. In all of those cases one of FSC's officials will visit the plant to get the necessary information. Otherwise updates are conducted by telephone, with the surveyor asking about changes in wages; about changes, if any, in working conditions associated with previously surveyed jobs; and about changes in the number of employees in each kind of job.

C. *Wage Practice Lines*

FSC focuses on three kinds of data obtained from the surveyed employers: the point count of the various jobs; the wage of each of those jobs (using the average wage for each kind of job at each participating employer); and the number of employees in each type of job. But those data are not useful in their raw form. As Graph I [omitted from publication] indicates, there will inevitably be a broad range of wage levels for jobs having similar point counts.[24] Moreover while a higher point count is often associated with a higher wage, jobs of a particular point count at one employer may pay more than the jobs of a higher point count at another employer (as Graph I also shows).

FSC accordingly processes the data to determine their "central tendency." To do that FSC uses a statistical technique called "linear regression analysis."[25] In graphic terms, the output of linear regression analysis is a straight line that is placed so that, relative to any other straight line, it minimizes the total distance between it and all of the various "observations."[26] Graph II [omitted from publication] shows the regression line superimposed on the observations plotted in Graph I. As so used by FSC, the regression line may be referred to as an "area wage curve" (in the Company's terminology), or, more generally, a "wage practice line."[27]

Where regression analysis is appropriate for use, the technique can provide a wealth of precise data. That will be more fully discussed in part IV, below. For purposes of FSC's wage-setting purposes it need only be noted that, subject to various exceptions, if the observations used to plot the wage practice line were drawn from a representative sample any further observations are as likely to be above the line as below it. In that respect, a wage practice line represents the "average" wage at any given point count.

Once the regression line is drawn FSC can readily determine how the wage rate for each of its grade levels at its facility compares to the average wage in the community for comparable jobs (assuming the validity of the sample and of the assumptions underlying the regression formula). All that need be done is: First, determine the dollar equivalents of the intersections of the regression line and the job point counts that represent the midpoint of each grade at the facility (see Graph III [omitted from publication]); and second, compare those dollar figures with existing wages at the facility.

D. *How FSC Determines the Amount of Its General Wage Increase*

Testimony of FSC Witnesses. FSC grants wage increases as soon as possible after completion of the survey, generally within a few weeks. As for the amount of the increase, FSC witnesses testified that it is company policy to set wages at a level equal to 104 percent of the level implied by the wage practice line. But that 104-percent standard is adopted only where there are no countervailing considerations. Such considerations generally are related to employee recruiting or retention problems being experienced by the facility in question. Depending on the nature of the problem, FSC may set wages for its lowest grade employees at levels substantially higher than those indicated by the wage practice line, and the wages for its highest level employees at

[23] Tr. 1806–07 (witness Hogue).

[24] Graph I is taken from a 1980 survey of 16 employers located in or near Indiantown, Florida. See part V,B, below.

[25] "[R]egression analysis is a statistical technique for trying to quantify the relationship between a variable that you are interested in predicting and one or more variables that you would hope to use in making the prediction." Tr. 971–972 (GC witness Clapper). "Regression analysis can be used to find the equation of a line which best describes the relationship between two variables:" GCX-76 at 3. (In this case job point count would be the variable used to "predict" the wage level of a job. Thus point count would be the "independent" or "predictor" variable; wage rate would be the "dependent" or "criterion" variable. See Tr. 974.)

[26] Graphically an observation here is a point representing the job point count and wage of one employee. Actually the regression equation minimizes the total of the *squares* of the distance, measured vertically, between each observation and the regression line. (A statistician would speak of minimizing the "errors" or the "residuals" or of "minimizing the sum of the squared deviations from the regression line.") Thus regression analysis is also termed "least squares" analysis.

[27] See GCX 39 and Tr. 2225. (On that latter page FSC witness Haworth defines a wage practice line as "the linear regression estimated formula for wages as a function of the points involved in the jobs that are included in the sample.")

levels below the wage practice line; or FSC may adopt exactly the reverse course; or wages at both the upper and lower ends of its structure may be set well above the wage practice line, with middle level jobs at the wage practice line levels.

Under any of these approaches FSC may increase wages on a percentage basis (i.e., each employee's wage being increased by, say, 8 percent), or by a fixed dollar amount (i.e., each employee's wage increased by, for example 50 cents an hour).

Finally, wage setting at a newly established plant involves still other considerations. According to FSC's witnesses, and as will be more fully considered below in connection with Indiantown wages, the initial set of wages at a new plant are pegged at 108 percent to 112 percent of wage practice line levels and then gradually decreased until the 104 percent standard is reached.

As for the organizational steps by which a general wage increase is determined, the procedure starts with several alternative recommendations from FSC's compensation manager; thence to discussions between the compensation manager and the managers of the local facility; then on to several headquarters offices. "[B]ut the final approval is an upper management decision."[28]

In sum, according to the testimony of FSC's witnesses the wage survey and resulting wage practice line serve "as a guide" in FSC's wage-setting process.[29] And while there are company standards, the choice of the wage increase for a facility's various grades is a "judgmental" decision:[30] "in the final analysis, it [comes] down to a discretionary decision by corporate management."[31]

Graphic Displays of Actual Relationships Between FSC Wage Rates and Wage Practice Lines. The record in this proceeding includes wage data for only 3 of FSC's 11 facilities: Charlotte, Indiantown, and Tampa.[32] A number of graphs are in evidence showing the relationship between the wage rates at those three facilities and the respective wage practice lines developed from FSC's area surveys. Those graphs are set out in Appendices A, B, and C to this decision [omitted from publication]. As can be seen from the graphs, at those three facilities FSC wages often did maintain a close relationship with the respective wage practice lines. On the other hand FSC wage rates sometimes departed substantially from the respective wage practice line levels, and wholly parallel relationships were rare.

III. WAGE RECONSTRUCTION—SUMMARY OF FINDINGS AND CONCLUSIONS

No one suggests that past years' wage levels at Charlotte and Indiantown could or should be reconstructed by attempting to replicate the procedures that FSC would have followed had it continued its pre-1974 approach to wage setting at those two facilities. Rather, the parties agree that the best way to reconstruct the wage levels that FSC would have implemented at Charlotte and Indiantown but for its unfair labor practices is to follow a four-step procedure:

1. Compare, on the one hand, wage levels at FSC's Charlotte and Indiantown facilities during a pre-1974 period with, on the other hand, the wage levels of other employers during that same period.

2. Determine what relationship existed between the FSC wage levels during the pre-1974 period and the average wages paid during that same period by the other employers. Express that relationship in mathematical terms.

3. Find out what those other employers' wage levels were in the years since 1973.

4. Apply the mathematical expression determined in step two to the other companies' wage levels in the post-1973 years.

Notwithstanding the parties' general agreement on the process to use in reconstructing wages, the General Counsel and the Charging Party, on the one hand, and FSC, on the other, sharply disagree on what those reconstructed wage levels ought to be. (While the Steelworkers activity participated in this proceeding, the Union wholly supports the General Counsel's backpay formulations. Accordingly further reference in this decision to the position of the General Counsel should be read as also including the Steelworkers position, unless specified otherwise.)

The General Counsel's Position on How to Reconstruct Wages. The Bureau of Labor Statistics, United States Department of Labor (BLS) publishes figures on the average hourly earnings of employees working for manufacturers. (BLS's average hourly earnings statistics will henceforth be referred to as AHE.) The General Counsel concludes from a comparison of FSC wages and AHE that during the pre-1974 "base period" FSC wage levels at Charlotte and Indiantown increased faster than did AHE levels. For example, during the base period on the average FSC's Indiantown wages increased $1.57 for each $1 increase in AHE. According to the General Counsel, that base period trend should be reflected in the Board's reconstruction of FSC's post-1973 wages. Thus the Board's reconstruction of FSC's Indiantown wages should be based on the assumption that those wages would have continued to increase $1.57 for every $1 increase in AHE.

FSC's Position on How to Reconstruct Wage Levels. FSC focuses on the average difference between, on the one hand, FSC wages during the pre-1974 base period and, on the other, the wages paid by other companies during the base period. FSC does that several different ways, using both BLS's AHE data and data derived from private surveys of employers in the Charlotte and Indiantown areas. In each of its proposed wage reconstruction approaches, FSC claims that the proper way to reconstruct FSC wages is to assume that throughout the post-1973 period the difference between the AHE or wage survey data, on the one hand, and FSC wages on the other, would have been the same as the average pre-1974 difference between the wage data and FSC wages. For

[28] Tr. 1867 (witness Hogue).
[29] Tr. 1908 (quoting from an FSC brief in an earlier stage of the FSC litigation).
[30] Tr. 1870 (witness Hogue).
[31] Tr. 1908, quoting an earlier FSC statement.
[32] The exception: two graphs showing the wage rates and related wage practice lines for FSC's Fort Lauderdale and Miami facilities for 1974: GCX-40d.

example, FSC claims that during a 1971–1973 the base period, the average wage that FSC paid to its Charlotte employees was 23 cents higher than the average wage paid by other companies in the Charlotte area. FSC goes on to argue that the proper way to reconstruct Charlotte wages during the backpay period is to determine what wage rates those other companies paid, on the average, during the post-1973 period and to assume that FSC would have paid its employees 23 cents per hour more than that.

The Wage Reconstruction Method Adopted by this Decision. For reasons detailed in parts IV and V of this decision, my conclusion is that none of the wage reconstruction methods proposed by the parties are satisfactory. The General Counsel's methodology results in substantially overestimated wages for employees in the middle and lower grades. FSC's proposals substantially underestimate wages for employees at all levels.

As discussed in part VI of this decision, I have concluded that trends in FSC's wages during the pre-1974 years, the circumstances at FSC's Charlotte and Indiantown plants in the post-1973 period, and the inherent relationship between AHE and any employer's wages, together point toward one wage reconstruction method: Reconstruct FSC wages based on the relationship that existed between FSC wage levels and AHE as of the date of the last wage increase at FSC's Charlotte and Indiantown plants prior to FSC's unlawful change in wage policy.

The table [see Appendix G, Table 1] below lists an example of the effect of my recommendation for the reconstructed hourly wage rate of one middle level grade of employees at Charlotte and at Indiantown for one recent year. The principal wage proposals of the General Counsel and FSC are included in the table for comparison.

IV. THE PARTIES' CHARLOTTE MODELS[33]

To sum up, at Charlotte and Indiantown prior to 1974, and at all times at FSC's other locations, FSC set wage levels for its hourly employees based on a combination of (a) wage survey data obtained from employers located near the facility in question and (b) managerial judgment. As noted earlier, no one suggests that Charlotte and Indiantown wage levels be reconstructed for the post-1973 period by attempting to replicate precisely the process that FSC would have used but for its unlawfully changed wage policy at Charlotte and Indiantown. Rather, all parties propose focusing on the relationship between, on the one hand, Charlotte and Indiantown wages during the pre-1974 "base period," and, on the other, some set of statistical time-series data covering both the base period and the years since then. This part of the decision will consider the way the General Counsel and FSC use that technique to reconstruct the wages of the Charlotte bargaining unit hourly paid employees.

A. *The General Counsel's Charlotte Models*

The General Counsel retained a statistician, Dr. James M. Clapper, to devise a means of reconstructing FSC's wages at Charlotte and Indiantown during the post-1973 period. In a report of his wage reconstruction efforts, Dr. Clapper first briefly noted that during the base period FSC took into consideration area wage levels determined through annual surveys. The report then continues:

> To attempt reconstruction of the wage rates, it became necessary to identify a measure of wage levels in each labor market which could serve as a surrogate for the no longer available Florida Steel survey of area employers. Once such a measure was identified, it would be possible to use the statistical technique of regression analysis to determine the pre-1974 relationship between Florida Steel wage rates and the measure of area wage rates. Once established, this relationship could be used to reconstruct what Florida Steel wage rates would have been during the [post-1973] period had the historical relationship held, that is, if the company had continued . . . [its] pre-1974 pattern of wage increases vis-a-vis area wage rates.[34]

Dr. Clapper and representatives of the General Counsel jointly determined to use, as the "surrogate" for FSC's surveys, BLS's AHE figures. More specifically, Dr. Clapper and the General Counsel determined to use AHE figures that BLS compiles covering employers that are in the "primary metals and fabricated metal products" business and that are located in the Charlotte standard metropolitan statistical area (SMSA). BLS publishes such figures on a monthly basis, and Dr. Clapper concluded that FSC's base period Charlotte wages should be compared to 12-month AHE figure for the 12 months ended on the date of each FSC general wage increase. (AHE matters will be discussed in greater detail below.)

The simplest way of using regression techniques to determine the pre-1974 relationship between FSC's Charlotte wages and AHE figures is to do so one labor grade at a time. All that takes is a regression correlating (1) wage level at each point in time during the base period when FSC granted a wage increase, and (2) the AHE figures for the months in which FSC granted those increases.

The results of regressions of that type are set out in Table 2 [see Appendix G]. "Slope," as used in Table 2 and elsewhere in this decision, refers to the degree of tilt of the regression line. In the regressions under consideration here, it indicates how much wages increased for every unit change in AHE. For example a slope of 1.110 for Labor Grade 3 means that during the base period Grade 3 wages increased an average of $1.11 for every $1 increase in AHE. Note that a slope of 1.110 does *not* mean that during the base period Grade 3 wages could be approximated by multiplying AHE by 1.110. Rather,

[33] "Model" is used here in the sense of "a theoretical projection in detail of a possible system of human relationships (as in economics)": *Webster's Third New International Dictionary.*

[34] GCX-76, p. 1.

according to the regression on the average, one could approximate the amount of the *increase* in Grade 3 wages from any one base period wage increase to the next by multiplying the *increase* in AHE over the same time period by 1.110.[25]

The data on which Table 2 is based were provided by the General Counsel. But they do not represent any part of the General Counsel's wage reconstruction proposal. The problem, said Dr. Clapper, is scarcity of data.

The Charlote base period ended in February 1973 (the date of the last general wage increase before FSC's unlawful change in policy). And Dr. Clapper determined that the earliest usable wage rates were those that FSC put into effect in May 1969. (Thus references to the General Counsel's Charlotte "base period" will be to the period May 1969 through February 1973.)[36] During that 1969–1973 period FSC granted five increases, as indicated in Table 3 [see Appendix G].[37] That means only five base period "observations." And five observations, said Dr. Clapper, "will not yield very reliable results."[38] Dr. Clapper accordingly first determined to include all the Charlotte labor grades in one "multiple regression" model.[39] That potentially enabled him to treat each of the five wage increases for all Charlotte labor grades as separate observations for one regression equation (for a total of 90 observations.)[40] But to do that, Dr. Clapper had to assume, for purposes of the regression, that the wage rates of all of the various Charlotte labor grades moved in parallel; and to assume that, for wage reconstruction purposes, the average difference between one labor grade and the next during the base period would be maintained during the post-1973 period.

That did not work. The technique does not require that the labor grade wage rates actually have moved in parallel. But it does require that the movement of the various labor grades not have varied too much from a parallel relationship. And the movements of the upper grades at Charlotte during the base period were too disparate from the lower grade movements. After some trial and error, however, Dr. Clapper found that the multigrade approach would work if the Charlotte grades were divided into two sets: lower nine and upper nine.[41] And that has led the General Counsel to propose a two-model forecast for Charlotte.

The result of each of the models is a regression-determined equation that, in effect, shows the trend in the average relationship during the 1969–1973 base period between, on the one hand, wage rates for the labor grades covered by the model, and, on the other, AHE. The resulting slope for the nine lower grades is 1.03. That is, according to the regression for every increase of one unit in AHE during a wage-increase-to-wage-increase time span in the base period, the wages of the nine lower Charlotte grades increased by 1.03 units. (Note that that is a kind of double average: average movement across the five base period wage increases and average as among the various labor grades.)

The slope produced by the General Counsel's model for the upper Charlotte grades was 1.47.

The following table [see Appendix G, Table 4] shows, for a few illustrative years and grades, the Charlotte wage rates produced by applying those slopes to AHE figures for the post-1973 period. (The figures in the right-hand column are intended to provide some sense of the relative increase in the reconstructed wage rates generated by the General Counsel's models. 1973 wages are actual, not reconstructed.)[42]

Why the General Counsel's Models Are an Inappropriate Means of Reconstructing Charlotte Wage Rates. The General Counsel's Charlotte models are clearly the product of considerable effort and statistical sophistication. Nonetheless they are not an acceptable means of reconstructing Charlotte wage rates. While numerous considerations point to that conclusion, two are particularly noteworthy. One has to do with "autocorrelation"—statistical term that will be defined below. The other concerns the connection between, on the one hand, base period patterns and, on the other, reconstructed wages: The record fails to support the General Counsel's assumption that the trend in the base period relationship between wages and AHE would have continued into 1974 and beyond but for FSC's unfair labor practices.

Autocorrelation. Statisticians call the vertical distance between an observation and a regression line a "residual." The mathematics underlying regression analysis are predicated on the assumption that the residuals in a regression model display little if any relationship to one another. To the extent that the residuals in a regression model form a pattern, that assumption is not met. Statisticians call a departure from the no-relationship-among-residuals requirement "serial correlation of the residuals," or "autocorrelation."

[35] Data are from GCX-121. For reconstructed wage levels inherent in those regressions see RX-141.

[36] Data for a wage increase granted in 1968 were also available to the General Counsel. Dr. Clapper could not recall the reasoning that led him to reject the 1968 data.

[37] Table 3 is identical to the first page of RX-72 through 77.

[38] Tr. 1012.

[39] Previous examples of regression analysis—FSC's technique for determining "wage practice lines" and the grade-by-grade regressions discussed above—involve "simple" regression. Each use only one "predictor" variable (e.g., AHE level) and one "criterion" variable (e.g., wage level for one grade). "Multiple" regression means that the model includes two or more predictor variables.

[40] Due to the mathematics of multiple regression, the effective difference in number of observations, as between the grade-by-grade model and the all-grades model, is something less than 90 minus 5. Nonetheless the increase is substantial.

[41] The upper 9 did not include grade 16 (which was unpopulated during the base period) or grade 17 (which was populated only sporadically during the base period). See Exh. 144 and Tr. 710.

[42] Table 4 and the other computations in this decision that use Charlotte primary metals AHE are based on the following AHE levels:

12 mos. ended Feb.	*Avg. monthly AHE level*
1973	3.20
1974	3.50
1976	4.16
1979	5.23
1980	5.60
1981	6.26

A moderate amount of autocorrelation is not a problem. But a high level of autocorrelation in a regression model spells trouble: "When you have a serious autocorrelation problem . . . you want to find out what was left out of the model or mis-specified. . . . There is probably something that should have been put in the model that isn't there."[43] As the quotation indicates, a high level of autocorrelation suggests a "specification error." "And specification error . . . in . . . a regression analysis sense, means that the model that you have hypothesized is not an accurate model."[44]

What that adds up to is that a high level of autocorrelation indicates that the regression model may be improperly constructed. And autocorrelation has a further aspect of importance here. Ordinarily regression analysis provides not only a set of predictions, but also—via "confidence interval" statements—detailed information about the probable accuracy of those predictions.[45] But the information about the predictions' accuracy is not reliable where there are high levels of autocorrelation.

As it turns out, the General Counsel's regression models present serious autocorrelation problems. In fact, the requirement of lack of pattern among the residuals is "grossly violated" by those models.[46] As a result of this autocorrelation Dr. Clapper was "not professionally willing to make confidence interval statements."[47] Thus, if one looks no further than the statistical standards for evaluating regression models, the General Counsel's Charlotte models are a failure. Dr. Clapper recognized that and argued that additional statistical studies (of FSC's Tampa facility) provide evidence that counterbalance the Charlotte models' autocorrelation problem.[48]

The import of General Counsel's Tampa studies will be considered below. But before getting there it is necessary to focus on the question of why one should accept the General Counsel's assumption that the trend in the base period (1969–1973) relationship between increases in FSC wages and increases in AHE would have continued into the post-1973 years had FSC not violated the Act.

The Lack of Any Economic Rationale Supporting the General Counsel's Wage Reconstruction. As just discussed, according to the General Counsel's Charlotte models, during the 1969–1973 base period on the average the wages of the Charlotte lower grades increased by $1.03 for every $1 increase in AHE, while the upper Charlotte grades increased by $1.47 for every $1 increase in AHE. Thus as Table 4 indicates, most of the reconstructed wages produced by the General Counsel's models keep increasing, relative to AHE, throughout the backpay period.[49] The question is whether FSC wages would in fact have followed those same trends in the middle and late 1970s and into the 1980s if FSC had not unlawfully stopped granted wage increases in 1974. (Note that the question would remain even if the General Counsel's models presented no autocorrelation problems.)

One kind of consideration raised by that question relates to the duration of the base period and wage reconstruction period. Assume, for the moment, that: (1) the base period had been a lengthy one—say 15 or 20 years; (2) the slopes of 1.03 and 1.47 produced by the General Counsel's models accurately described the wage-to-AHE relationships throughout that base period; and (3) the length of the wage reconstruction period was short—just a few years. Under those circumstances it would be reasonable to assume, without more, that these same wage-AHE relationships would continue during the wage reconstruction period—unless FSC could prove otherwise (as by showing that determinative factors present for the 20 years to 1973 had thereafter abruptly changed). But the Charlotte base period used by the General Counsel is a short one, as all parties agree: 5 years and five wage increases. It is so short, in fact, that the trend in the wage-to-AHE relationship developed by the General Counsel could readily be a function of a series of isolated factors. And the wage reconstruction period is a long one (at least 9 years). In these circumstances it seems to me that it is incumbent on the General Counsel to point to evidence that supports the assumption that a wage trend that existed during the base period would have continued in the post-1973 period but for FSC's unfair labor practice.

I have been unable to find any such evidence.

The General Counsel's Assumption of a Nonparallel Relationship Between AHE and FSC Wages. Both AHE and FSC's wages tend to reflect the same kinds of economic forces.[50] As a result, absent information about FSC's operations suggesting otherwise, one can assume a parallel relationship between changes in AHE and changes in FSC's wage levels. Over any appreciable period of time

[43] Tr. 2151 and 2150 (witness Haworth).

[44] Tr. 3506 (witness Clapper).

[45] "If the explanatory variables in the regression equation account for all major forces acting on the dependent variable, so that the unexplained variation is the product of many small forces, statistical theory makes it possible to compute . . . confidence intervals. These permit the assertion, within a specified level of confidence, that the true value of a . . . dependent variable lies within a certain range of the value estimated by the regression equation." M. Finkelstin, "Regression Models in Administrative Proceedings," 76 *Harv. L. Rev.* 1442, 1450–51 (1973) (footnotes omitted).

[46] Tr. 1468 (witness Clapper). See also Tr. 1316 (agreement by Dr. Clapper that the models' autocorrelation levels are "very substantially above the threshold level").

[47] Tr. 1098. See also Tr. 1467–68 and 3651.

[48] As may be recalled, the record contains evidence of the result of grade-by-grade regressions that correlated AHE with the base period wages of the various individual labor grades at Charlotte: See Table 2 [Appendix G]. The General Counsel suggests that the results of those grade-by-grade regressions, which show no evidence of autocorrelation, lend statistical support to the General Counsel's models. That does not appear to me to be the case. The grade-by-grade regressions are dependent on but five observations each. And that is too few to produce reliable results: See Tr. 1012 (witness Clapper) and 2141 (witness Haworth). I cannot conclude that the results of the statistically unreliable grade-by-grade regressions validate the General Counsel's statistically unreliable multigrade regressions.

[49] Under the General Counsel's principal models, the wages of the lower grades in each of the Charlotte models increase faster, on a percentage basis, than do the upper grades. (That is discussed further in part VI, below.) The General Counsel provided evidence on how his model could be used to increase the reconstructed wages of all Charlotte grades proportionally: GCX–125. Under that approach: Charlotte grade 1 would increase from 81 percent of AHE in 1973 to 88 percent in 1981; grade 6 (Mill) would increase from 94 percent to 100 percent; grade 7 would increase from 99 percent to 114 percent; and grade 15 from 147 percent of AHE in 1973 to 157 percent in 1981.

[50] See, e.g., Steelworkers witness Roomkin: AHE "captures the supply and demand forces that influence wages" (Tr. 3468).

(all other things held equal) the wages of FSC's employees ought to increase in proportion to increases in AHE. And while FSC's wages may move in a pattern different from AHE for a few years at a time, decreases in FSC's wages relative to AHE ought to be as likely as increases (again, all other things held equal). These considerations run counter to the General Counsel's reconstructed Charlotte wages, of course, since with limited exception those reconstructed wages increase proportionally faster than AHE throughout the backpay period.

That, however, does not end the matter since there are a variety of economic factors that could, in theory, cause FSC's wages to depart from a parallel relationship with AHE, even on a relatively long-term basis. For example: a worsening of working conditions at FSC's plants relative to those at other facilities; faster expansion by FSC than by other employers; increasing skill requirements at FSC's facilities relative to the skills required by the jobs of other employers; and community-wide changes in factors other than wages that would affect AHE levels but not wage rates.[51] If one or more of those factors persisted (and steadily increased in impact) throughout the 1970s at FSC's Charlotte plant, one could reasonably conclude that the General Counsel's model captured the impact of these factors during the base period and that it would make sense to project the model-determined slope forward. But there is no evidence at all that any of those factors persisted throughout the 1970s, much less increased steadily in scope.[52]

In sum, the record provides no explanation of why FSC's wages would have increased relative to AHE throughout the 1970s and early 1980s had FSC not violated the Act.[53]

Reconstructing wages in analogous circumstances. FSC operates nine facilities in addition to Indiantown and Charlotte. One of those nine facilities is located in Tampa, Florida. Dr. Clapper accordingly "hypothetically reconstructed" Tampa Wage rates "using the same methodology employed in the Indiantown and Charlotte reconstructions."[54] He then compared the wage rates produced by his model to Tampa's actual wage rates.[55] FSC has never changed its wage-setting procedures at Tampa—FSC still uses wage surveys, wage practice lines, and the like. As Dr. Clapper saw it, if he developed a model for Tampa similar to his Charlotte and Indiantown models, and if that model then produced "reconstructed" wages close to the wages FSC actually paid its Tampa employees, his Charlotte and Indiantown models would thereby be validated. The General Counsel contends that the results of the Tampa regression model make up for the Charlotte models' problems of autocorrelation and lack of an underlying economic rationale for assuming post-1973 continuation of a base period trend in wage-AHE relationships.

As indicated by Dr. Clapper, the General Counsel's Tampa model is methodologically similar to the General Counsel's Charlotte models. The main differences are: (1) the Tampa model uses as a base period April 1973-October 1975 (as contrasted to May 1969-February 1973 for Charlotte);[56] (2) during that base period there were six wage increases (not five, as in the Charlotte base period); (3) the Tampa model uses one regression equation for all Tampa labor grades (unlike Charlotte, which uses two).

The slope produced by the Tampa model is 1.32 (compared to 1.03 and 1.47 for Charlotte).

A comparison of the "reconstructed" and actual wage rates for the period April 1976–April 1980 is set out in Table 5A [see Appendix G]. (The listed months are all those during the 1976–1980 period in which Tampa mill employees received general wage increases.) As can be seen: (1) The model starts off (in 1976) with minor overpredictions and ends (in 1980) with somewhat larger underpredictions; and (2) in general the model accurately reconstructs Tampa wages.

Despite that accuracy, however, I cannot conclude that the Tampa model provides the necessary proof that the General Counsel's Charlotte regression models are designed soundly or that the trend in the base period relationship between wages and AHE shown by the General Counsel's models would have continued but for FSC's unlawful wage policy changes. The question, again, is how much the General Counsel has to prove before FSC comes under the burden of showing why what may be an analogous situation is not in fact analogous. Clearly if the General Counsel had introduced similar to the Tampa model covering all nine of the facilities at which FSC continued its wage increase policies one could thereby accept the General Counsel's Charlotte wage reconstructions absent compelling evidence from FSC showing why those models did not support the General Counsel's Charlotte contentions. But in fact the General Counsel's evidence covers only one of two sets of wages at 1 of FSC's 11 facilities. That, in my

[51] Such as amount of overtime worked. See the discussion of AHE, below.

[52] Another possibility I considered is that FSC, for policy reasons of its own—such as a possible desire to avoid the unionization of its plants—deliberately increased its employees' wages faster than other employers. ("[A] company under the feeling that it was under the threat of a union organizing campaign might seek to install a wage premium to move to the upper area of wages in the community as a means of forestalling unionization": Tr. 3277 (witness Roomkin).) But again, the record is barren of evidence indicating the adoption by FSC, for that reason, of a policy whereby FSC wages would keep increasing relative to community wages.

[53] Two commentators on the use of regression analysis in administrative proceedings suggest that absent such an explanation an agency ought not accept a regression-determined forecast: M. Finkelstein, "Regression Models in Administrative Proceedings," 76 *Harv. L. Rev.* 1442, 1446 (1973) ("there must be some underlying theory which supports" the use of the regression-determined correlation); F. Fisher, "Multiple Regression in Legal Proceedings," 80 *Colum. L. Rev.* 702, 714, 735 (1980) ("The measurement provided by least squares regression is a way of making theoretical assumptions precise or of the testing them; it is not a substitute for thought . . . . one should make sure that the model used is constructed on sound hypotheses based on theoretical considerations generated from outside the model itself.") Were the Board to adopt that position, consideration of the General Counsel's models could stop right here.

[54] Exh. GC-79, p. 2.

[55] The Tampa facility has two sets of wage rates. Dr. Clapper's Tampa model uses one set—for the Tampa "mill."

[56] Dr. Clapper selected a Tampa base period beginning in April 1973 because that was the first wage increase granted at Tampa after the facility's wage structure was revamped. (". . . in Tampa . . . [prior to 1968] they had a 13 grade system; they compressed it to twelve grades beginning in April of 1968 and in April of 1973 it was compressed to 10 grades": General Counsel witness Yost, Tr. 663.)

judgment, says too little about the probable accuracy or the General Counsel's models.[57]

Questions Regarding the Consistency of AHE Data. One of the assumptions on which the General Counsel's models rests is that the AHE data the models use are consistent at all relevant times—that is, from 1969 to the present. The fact is that those data are not wholly consistent throughout that period of time. The only real question is how substantial are the inconsistencies.

Monthly AHE data are derived by dividing the gross payroll for the month for the various employers included in a particular AHE series by the total hours worked by the employees of those employers. Irregular bonuses and the like are excluded from the gross payroll figures, but overtime payments are included. All such data are obtained on voluntary basis. BLS presents the data by locality (such as for Palm Beach County in Florida and for the Charlotte SMSA in North Carolina), by State and nationally; and by industry groupings (such as "primary metals," "nondurable goods," or "all manufacturing").[58]

The focus in this proceeding is on wage levels in particular geographic areas for particular groupings, over substantial periods of time. Under these circumstances all sorts of inconsistencies are possible. Those inconsistencies include: (1) changes in the definition of the geographical area covered by the AHE data; (2) changes in the definition of the industry grouping; (3) changes in the relative level of overtime (increasing overtime will result in higher AHE figures even if wage rates are not increased); (4) changes in the levels of skills demanded by the employers covered by any AHE series; and (5) changes in the identity of the companies choosing to file reports with BLS.

Overtime Levels, Employee Skill Levels, Identity of Reporting Companies. The record provides no evidence one way or the other on whether there were substantial changes in any of these factors during periods pertinent to this proceeding.[59] It is clear that BLS uses statistical techniques to avoid sudden shifts in AHE data that might be caused by substantial changes in any of these factors. But there remains the possibility that for two periods several years or more apart such factors could mean that apparently comparable AHE figures were not in fact so. And, indeed, one state official involved in the collection of AHE data advised a representative of the General Counsel that he (the official) did not consider AHE data appropriate for the purposes in which it is used in the General Counsel's models.

Definitions of Geographical Areas. The General Counsel's Charlotte models use AHE for the Charlotte SMSA. The General Counsel began his wage reconstruction efforts using the "all manufacturing" series for the Charlotte area. But in 1973 the Charlotte SMSA was redefined to broaden its scope.[60] Upon discovering that change, the General Counsel discarded the Charlotte all manufacturing AHE series on the ground that it was too likely that the SMSA redefinition substantially affected that series. But a BLS official advised a representative of the General Counsel that the "primary metals" AHE series for the Charlotte SMSA was only "minimally affected by the change."[61] It is for that reason that the General Counsel's Charlotte model uses the primary metals AHE series. But that official's statement about the effect of the SMSA change on the primary metals AHE series is untested. No one with any expertise in the matter testified at the hearing in this proceeding.[62]

AHE—Conclusion. Having said all that, the record indicates that whatever flaws Charlotte SMSA primary metals AHE data might have for the purposes such data have been used in this proceeding, they are at least as good as anything else available. Thus, while my conclusion is that the General Counsel's models do not provide an appropriate method of reconstructing FSC's Charlotte wages, that conclusion is not based on those models' use of Charlotte SMSA primary metals AHE data.

B. *FSC's Charlotte Regression Model*

Central Piedmont Industries (CPI) is an employer association in the Charlotte, North Carolina area.[63] CPI conducts annual wage surveys. Employers in the Charlotte area which are willing to do so provide CPI with wage information, by labor grade. (CPI asks employers to categorize the jobs at their facilities on the basis of National Metal Trades Association grades—a 10-grade scale.) FSC retained Dr. Joan Haworth to develop wage reconstruction methodologies, and she concluded that the CPI surveys provided the best times series for purposes of reconstructing FSC's Charlotte wages.[64] As will be discussed below, FSC's model does so by determining: (1) the average wage level in the Charlotte area; (2) the average gap between one labor grade and the next; and (3) the average dollar difference between FSC's Charlotte wages and average area wages during a 1970–1973 base period.

Average Area Wage Level. FSC's regression model determined: (1) the average Charlotte area wage paid in 1970; and (2) the difference between that average 1970

[57] Dr. Clapper used Tampa wage rates, rather than those of some other Florida Steel facility, as a check because the General Counsel happened to have obtained only Tampa—plus Charlotte and Indiantown—wage rates from FSC. There is no indication that the General Counsel could not have obtained access to the wage rates of additional FSC facilities.

[58] BLS (a Federal agency) does not in fact collect local or State AHE data. Rather, state agencies do so under contract with BLS. In Florida, the Florida Department of Commerce does the AHE surveys. In North Carolina, the North Carolina Division of Current Employment Statistics, Employment Security Commission, does the work. In all cases the States operate pursuant to BLS standards.

[59] Of the firms that report AHE data 2 or 3 percent drop out annually: Tr. 2306 (witness Haworth). But the significance of that level of dropouts is unclear.

[60] Gaston County was added to the SMSA at that time.

[61] Tr. 694 (witness Yost).

[62] In FSC's annual wage surveys leading to wage increases, FSC never limited the survey participants to metal products companies. Thus the use of the primary metals AHE series runs contrary to the General Counsel's goal of using a time series as close as possible in nature to the wage surveys FSC previously conducted.

[63] Since 1977 CPI has been known as "Central Piedmont Employers Association, Inc." But the parties all refered to "CPI" throughout the hearing.

[64] The model uses most, but not all, of the wage data produced by the CPI surveys. The selection of CPI data for use in the model was made by Dr. Haworth.

wage and the average area wage in subsequent years.[65] Thus to derive the average Charlotte area wage for 1980, one would take the 1980 figure generated by the model and add it to the model's 1970 figure.

Labor Grade Variables. Using CPI survey data, FSC's model determines the average wage of each labor grade for each year subsequent to 1970. Then it determines the gap between each adjacent labor grade for each such year. Finally the model determines the average of the gaps between all adjacent labor grades. (Assume that there are only three labor grades; that the year is, say, 1979; and that the gap between the average wage for Grade 1 and the average wage for Grade 2 was 50 cents, while the gap between the average wage for Grade 2 and the average wage for Grade 3 was $1. Roughly speaking, the model would use 75 cents as the labor grade variable for 1979.)[66]

FSC Add-On. Doctor Haworth concluded that the relationship between FSC's Charlotte wages and the CPI wages for the same year correlated less well than FSC wages and the previous year's CPI wages. Accordingly the FSC model compares the average FSC Charlotte wage for 1971, 1972, and 1973 with, respectively, the average CPI wage for 1970, 1971, and 1972. (One base period "year" thus includes FSC data from 1971 and CPI data from 1970; or 1972 and 1971; or 1973 and 1972. For ease of reference this decision will accordingly refer to base period years in the form, e.g., 1972–1971.) The average difference over those three years—1971–1970, 1972–1971—between the average FSC wage and the average CPI wage was 23.1 cents.[67] (It may be recalled that the General Counsel's model used the 5 years 1969 through 1973 as a base period. But CPI data for 1968 and 1969 were not available. So the FSC model does not use FSC's Charlotte wages for 1969 or 1970.)

Reconstructing Charlotte Wages with FSC's Regression Model. The following is an example of how one would use the FSC model to arrive at a reconstructed wage—in this case, solely as an example, FSC Grade 5 for 1979.[68]

1. Base year figure (referred to as the "intercept"): $1.965.
2. Year add-on for 1979: $1.232.
3. Average gap between labor grades for 1979: $0.390.
4. FSC add-on: $0.231.
5. $1.965 plus $1.232 plus five times $0.390 plus $0.231 equals $5.378.

Thus the FSC model's reconstructed wage for (transformed) labor grade five for 1979 is $5.38 per hour.

As Table 5B [see Appendix G] indicates, the reconstructed wages produced by FSC's regression models are generally lower than those of the General Counsel's model.[69]

The Major Faults of FSC's Regression Models. FSC's regression model presents three serious problems. The first is the use of a highly abbreviated base period. The second is the use of a constant dollar figure ($.231) as the difference between FSC wages and area wages. And the third is the manner in which the model determines the base period relationship between FSC wages and area wage rates.

Abbreviated Base Period. FSC has operated the Charlotte facility since the mid-1960s. The General Counsel's model uses as a base period the years 1969–1973. As noted earlier, the record is silent about why the General Counsel's model discards data for years prior to 1969. Nonetheless the base period used by the General Counsel's model gives the General Counsel 5 years—and five annual wage increases—of FSC wages to compare with data from the predictor series (the AHE primary metals series for the Charlotte SMSA) covering that same period of time.

Even that 5-year base period is exceedingly brief for purposes for reconstructing backpay period wages, as touched on above. Yet FSC's Charlotte regression model uses a base period of only 3 years. There is nothing suspect about FSC's reasons for using a 3-year base period. FSC did so because adequate CPI data were not available for the years prior to 1970.[70] Nonetheless, the FSC regression model's base period is 40 percent shorter than the base period both of the General Counsel's Charlotte model and of FSC's "index" models. (FSC's index models will be discussed below.) That difference in base periods alone casts considerable doubt on the utility of FSC's regression models.

The Impact of a Constant Dollar FSC Add-On. FSC's Charlotte regression model uses a constant dollar figure ($.231) to determine the difference between the reconstructed FSC wage for any given labor grade and in any given year and the respective CPI wage. Because of the considerable growth in wage levels during the backpay period, the result of that constant dollar approach is that the FSC model forecasts FSC wages as declining substantially, in percentage terms, relative to area wages. For example, according to the FSC regression model, the average wage of a CPI Grade 4 employee in 1974 was $3.48. The model reconstructs the FSC Grade 4 wage for 1974 as $3.71, or 6.6 percent higher. In 1981 the model shows an average CPI Grade 4 wage of $5.94. The reconstructed FSC Grade 4 wage in 1981 is $6.17, or only 3.9 percent higher. Nothing in the record justifies the implicit assumption inherent in FSC's regression

[65] FSC uses a regression model to make these and the other determinations discussed in this part of the Decision. But unlike the General Counsel's model, FSC's model does not correlate FSC wages with any predictor series. Rather FSC uses a regression model as a handy way of determining averages. As that suggests, one could obtain results close to those of the FSC regression model by applying routine arithmetic manipulations to the data used by the FSC model.

[66] See part VI, below, for further consideration of the wage structure aspects of FSC's model.

[67] Dr. Haworth calls it the "weighted average difference between Florida Steel and the CPI for all the labor grades" for the 3-year base period: Tr. 2530.

[68] The figures are from RX–61.

[69] FSC figures are for January of the indicated year. The General Counsel figures are for February.

[70] If FSC's model matched FSC data for a given year to CPI data for that same year, the model would have had a 4-year base period: 1970, 1971, 1972, and 1973. But as noted above, Dr. Haworth found that FSC and CPI data correlated better if FSC data were matched against the prior year's CPI data. Thus a base period of 3 years: 1970–1971; 1971–1972; and 1972–1973.

model that FSC's wages would have declined in percentage terms relative to area wages in that fashion.[71]

Manner in Which FSC's Regression Model Determines the Relationship Between FSC Wages and Area Wage Rates. As discussed earlier, the AHE primary metals series is a reasonably good indicator of trends in wages in the Charlotte area. And throughout the period 1969–1973, FSC's Charlotte wages increased faster than did AHE. One way of seeing that is simply comparing the average FSC wage with AHE figures. Table 6 [see Appendix G] does that.[72]

Another approach is to consider the results of the individual wage rate regression shown in Table 2. The regression-developed slopes indicate that nearly all of FSC's Charlotte wage rates increased proportionally faster than did AHE during the 1969–1973 base period.[73]

The spread between FSC's wage rates and the CPI wage rates used in FSC's regression models is an average of the difference between FSC wage rates and CPI wage rates for the 3 years 1970–1971 through 1972–1973. That approach wholly washes out any trends in the relationship between FSC wage rates and CPI wage rates. (As the General Counsel puts it: "The averaging process obscures any fundamental changes in wage ratios during the base period": Br. 161.)

FSC's only justifications for the use of a 3-year average figure are that no meaningful trends are discernable in the base period in the relationship between FSC wages and CPI wages,[74] and that "the arithmetic average is the one that requires the least justification."[75] But the fact is that FSC's base period Charlotte wages do display a pattern. They increased faster than both AHE and average CPI wages. And the dimensions of that pattern are sufficiently substantial that they must be taken into account in reconstructing post-base period wages.

In discussing the General Counsel's models, I conclude that there is no evidence that would indicate that the ever-widening gap between FSC wages and AHE predicted by the models would continue in the years after 1973. But, similarly, there is no evidence that that trend would reverse itself so that the difference between FSC wages and area wages that existed at the end of the base period would diminish. Yet FSC's regression model implicitly assumes that such a reversal would have occurred. Since that assumption is not supported by the record, FSC's regression model would have to be rejected even if it were otherwise faultless.

CPI Problems

Lack of Representativeness. CPI does not try to use statistically valid sampling methods in obtaining wage rate information. CPI simply sends out questionnaires to employers in the Charlotte area[76] and then compiles without modification the data that are returned by whichever employers care to respond to the questionnaire.[77] Moreover, the CPI data themselves suggest that the CPI survey results do not perfectly reflect the Charlotte area labor market in that the average wage rate of some labor grades for some years, as shown in the CPI surveys, is higher than the average wage rate for more senior labor grades. (For example, the 1970 CPI survey shows the average Grade 3 employee earning more than the average Grade 4 employee. And the 1979 survey shows that, on the average, Grade 2 employees earned more than Grade 3 and Grade 4 employees.)[78] It is unlikely that such inversions would have occurred were the CPI data truly representative of the Charlotte area labor market.[79]

Consistency. The identity of the employers responding to the CPI surveys changes substantially from year to year.[80] While that does not necessarily mean that the CPI data are not reasonably consistent from one year to the next, the data again contain a suggestion of a lack of consistency: The average wage rate for some grades in some years was lower than for that labor grade the previous year. (For example, the survey shows the average Grade 4 wage to be $3.90 in 1973 and $3.37 in 1974.) Given the substantial inflation of the 1970s, that would

[71] If the FSC regression model were otherwise attractive, this particular fault could be easily remedied by switching from a dollar to percentage relationship.

[72] Average wage an AHE data are from RX–73.

[73] That clearly delineated trend does not show up well in the figures used by FSC's Charlotte regression model. For example, based on CPI figures collected in GCX–105 the wages of only one of the nine FSC grades (as transformed for use in FSC's model) steadily increased faster than did the respective CPI wage rates for the full 1970/1971—1972/1973 base period: FSC grade 6. And three wage rates were lower, relative to their CPI counterparts, in 1972–1973 than in 1970–1971: FSC grades 4, 7, and 8. (The remaining FSC wage rates—grades 1, 2, 3, 5, and 9—dipped relative to CPI wages but then increased more than they had dropped.) In part that may be a function of the way the wages of the companies in the CPI survey moved during the base period. But almost surely it is also a function of the very short base period used by FSC (as discussed earlier). Further, apparently by reason of the way that Dr. Haworth transformed FSC's actual Charlotte wages for the base period into a nine-grade system, the transformed base period wages used by the FSC model increase less rapidly than do the actual FSC Charlotte wages. For example, the average FSC wage at Charlotte (based on actual wages) increased by 92 cents, or 35 percent, between 1969 and 1973. (See, e.g., RX–73.) But the average Charlotte wage, as transformed for use in FSC's model, increased only 81 cents, or 30 percent. (Average wage figures derived from the base period FSC wages as transformed for use in FSC's regression model can be found in RX–79, p. 1.) For all that, even the figure used by FSC's model show that FSC's wages were more often than not higher at the end of the base period, relative to CPI wages, than they were at the start of the period.

[74] "[T]here's no point in just looking at historical patterns because we don't have very many. . . . The sequential pattern does not tell me anything": Tr. 2198, 2535 (witness Haworth).

[75] Tr. 3775 (witness Haworth).

[76] CPI tries to send the questionnaire to all area companies with 50 or more employees.

[77] The 1972 survey covered about 7500 employees: RX–45. The 1980 survey covered about 17,000 employees: Tr. 1509 (witness Dowd). (In 1980 there were about 80,000 employees doing "manufacturing and production" work in the Charlotte area: Tr. 2322 (witness Haworth).)

[78] There are over a dozen such inversions in the CPI survey data for the years 1970 through 1980: See GCX–105.

[79] All parties agree that the validity of FSC's model hinges on the extent to which the CPI data are representative of the labor market from which FSC drew its employees: See witness Haworth, Tr. 2253–54 (results of model "dependent upon the survey representing the community that Florida Steel was allegedly trying to meet or match" when setting wages).

[80] For example, 86 companies responded to CPI's 1971 survey. Of those 86, the names of only 48 showed up in the 1972 survey: See CPX–3 and Tr. 3214–15. Some of the remaining 38 companies might have been in the survey, but under changed names (due to merger, etc.). But it is unlikely that name changes represent more than a small proportion of the missing companies.

not have occurred were the CPI surveys wholly consistent from one year to the next.[81]

Problems Regarding Grade Structure Information. The wages for each labor grade as reported by the companies responding to the CPI survey varied enormously. Almost surely that was in part a function of ambiguous grade slotting instructions on the CPI questionnaires and of the fact that CPI left to each responding company's judgment decisions about how to report the labor grade category of each job. As a result, the CPI data do not permit a determination of the spread between one labor grade and the next. (That is why FSC based its wage reconstruction on the average spread between labor grades.)

Infrequency of CPI Surveys. CPI conducts its wage surveys once a year. That is a problem in that, while the wage increases at FSC's Charlotte facility also occurred only annually during the pre-1974 period, they occurred at varying times of the year, as follows.

Wage Increases at FSC's Charlotte Facility

Yr. of increase	Mo. of increase
1971	May
1972	January
1973	February

Yet FSC's regression model makes no adjustment for those variations in its determination of the relationship between FSC wages and CPI survey wages.[82]

CPI Data—Conclusion. Obviously there are a lot of problems with the wage data derived from the CPI series. And all things considered, the AHE primary metals series for the Charlotte SMSA probably more closely reflects area wage level changes than do the CPI data. But I cannot conclude that for purposes of this proceeding the quality of the CPI data is substantially inferior to AHE data.

For one thing, the problems that showed up in the CPI data are in part a result of close examination of the raw CPI data. No comparable scrutiny of the AHE data was possible, partially because of the absence of any witness fully knowledgeable about the raw data that employers submit to BLS. Second, the CPI approach avoids AHE's intermixing of overtime wages with regular wages, and unlike AHE, probably at least partially adjusts for skill mix changes (since some of such changes ought to show up as changes in job grade). Third, the rate of increase of average CPI wages tended to be fairly close to the rate of increase in AHE during the period of 1970–1980. (That is depicted in both graphic and tabular form in RX–109.) And where the rate of growth of CPI survey wages did depart from the AHE rate of growth, more often than not it was because the CPI survey wages grew faster than AHE (which, in FSC's model, would be reflected in higher reconstructed FSC wages). Fourth, it is clear that the CPI staff did not seek to bias the results of the surveys. CPI aimed for wage data that reflected the Charlotte labor market.[83]

Finally, the CPI surveys do provide us with wage structure information. And while that information may not perfectly reflect the actual labor market, it certainly appears to provide at least an approximation of changes in the average gap between labor grades in the Charlotte area. AHE, on the other hand, provides no wage structure information at all.

FSC's Charlotte Model—Other Considerations. From time to time during this proceeding FSC suggested that its regression model should be adopted because it resembled the wage-setting methods that FSC used prior to the Union's arrival at Charlotte. But on several counts that suggestion is incorrect. First, as discussed in part II and as portrayed in Appendices A, B, and C [omitted from publication], it is apparent that FSC wages were much more a function of management discretion than of the results of FSC surveys and wage practice lines. Second, while the model's focus on average CPI wage data to some extent resembles parts of FSC's wage-setting processes, the model does not use (or create) wage practice lines. And third, the FSC models do not represent an attempt to emulate FSC's wage-setting practices. In fact, Dr. Haworth, who was responsible for the design of FSC's models, never even saw any of FSC's wage surveys or wage practice lines until long after she had completed the design of the models.

The General Counsel's Dr. Clapper complained that the wage rates reconstructed by FSC's regression model for any given year did not take account of the previous year's wage structure. To Dr. Clapper that means that "you can have a situation where in one year the labor grades are very close together and the next year the labor grades are spread apart and the next they come back together, and they can oscilliate all over creation": Tr. 2729. But for three reasons that is no real concern: (1) to some extent the base period FSC labor grade structure did oscillate; (2) big swings could occur only if such swings occurred in the labor market (as shown in the CPI data) and such swings accordingly are unlikely; and (3) in fact, the average gap between CPI labor grades behaved in a reasonably orderly fashion throughout the 1970s.

C. *FSC's "Index" Models*

FSC's presentation does not rely solely on its regression model. Rather, FSC also proposed several ways of reconstructing Charlotte wages based on the percentage

[81] FSC determined to use less than all available CPI data (see fn. 64, above) in order to increase the consistency of the data used by the model: "In order to have consistent data bases I did select [from the CPI surveys] those occupations which were present in all of the years": Tr. 2289 (witness Haworth.)

[82] A related problems is that the CPI questionnaires are not necessarily sent out the same time each year.

The CPI questionnaire was sent out in 1973 in the month of February; in 1974, in July; in 1975, October; in 1976, November; in 1977, September; in 1978, August; in 1979, again in August.

The record does not indicate the date of the 1971 survey. Based on the dates of the completion of the surveys, in 1970 and 1972 CPI sent out the questionnaires early in the year; and in 1980, in late summer.

[83] There is no doubt that CPI's president held an antiunion viewpoint. But there is no indication that that viewpoint affected the CPI surveys.

relationship that existed between FSC wages and AHE during the pre-1974 base period.[84]

FSC's "Proportional" Index Approach. Under the most obvious of the index approaches, FSC determined the average percentage relationship during the base period between, on the one hand, the wages of each FSC labor grade and, on the other, AHE. For example, during the period August 1968 through September 1974, the wages of FSC's Grade 3 Charlotte employees averaged 96.3 percent of AHE.[85] Grade 3 wages for the post-1973 period may then be reconstructed by multiplying 96.3 percent times the AHE figure for the desired date. Thus, since AHE was $5.60 in February 1980, the reconstructed wage for the Charlotte Grade 3 employee would be $5.39 ($5.60 times .963).

That approach maintains the same percentage spread between labor grades that existed, on the average, during the base period. It thus assumes that the net impact of all wage increases that FSC would have given in the post-1973 period (but for FSC's unfair labor practice) would have been to maintain a constant percentage relationship between FSC's various labor grades at Charlotte.

The "Across-The-Board" Index Approach. FSC recognized that, alternatively, FSC could have given general wage increases during the post-1973 years by increasing every employee's wage by the same dollar amount. Accordingly, FSC provided an alternative to the first approach. Under the alternative FSC determined the average percentage difference during the base period between the *average* FSC wage and AHE. The Charlotte percentage worked out to be 102.6 percent of AHE.[86] FSC then went through the following steps to reconstruct wages for each relevant postbase period point in time:

> 1. Determine the dollar increase in AHE that occurred since the previous point in time. For example the Charlotte SMSA primary metals AHE increased by 37 cents between February 1979 and February 1980.
>
> 2. Multiply the base-period differential figure times the AHE increase. (E.g., 102.6% times 37 cents.)
>
> 3. The resulting figure (38 cents in our example) constitutes the across-the-board increase.

Uniform dollar across-the-board wage increases compress the percentage difference between one labor grade and another. For example, under this alternative the reconstructed wage rate for 1980 for Charlotte Grade 9 employee (the highest grade in the transformed wage structure) is 40 percent higher than the Grade 1 wage rate. Under the "proportional" increase approach, the 1980 Grade 9 wage rate is 65 percent higher than Grade 1.

The "Combination" Index Approach. The last variation proposed by FSC is a combination of the first two. FSC explains this approach as follows:

> During the 1975–1980 period, there were 50 wage increases at the various plants of Florida Steel. Of these increases, 33 were across the board increases which granted the same dollar increase to employees regardless of grade. The remaining 17 wage increases provided for larger increases *in dollar terms* (though perhaps not in percent terms) to employees in the higher salary grades in order to maintain proportional wage differentials. Our estimates [from the proportional index model] provides for the maintenance of proportional wage differentials. [The across-the-board index model] provides for only across the board wage increases. The above estimates allow for both, with a weight of two attached to the across the board estimates and a weight of one granted to the proportional wage increase estimates. These weights reflect the 33 across the board increases compared to the 17 proportional wage increases which were granted at Florida Steel plants during the 1975–1980 period.[87]

Thus the "combination index" reconstructed wage for, say, Charlotte Grade 1 for February 1980 is determined as follows:

> 1. The reconstructed wage *increase* between February 1973 (the last base period wage increase) and February 1980 for Charlotte Grade 1 employees under the proportional index approach is $1.98; under the across-the-board approach it is $2.47.
>
> 2. $1.98 plus two times $2.47, all divided by 3, equals $2.31. The combination index model's reconstructed 1980 wage for Charlotte Grade 1 accordingly is $2.31 plus the last base period wage ($2.81) or $5.12.

As an example of the impact of the combination approach, it produces a 1980 Charlotte Grade 9 to Grade 1 ratio of 1.47:1. In contrast, the comparable proportional index ratio is 1.65:1. The comparable across-the-board index ratio is 1.40:1.

Table 7 [see Appendix G] lists a sampling of the 1980 reconstructed wages produced by FSC's various index

---

[84] FSC's evidence includes index models that vary by AHE series used, by whether or not AHE monthly data is smoothed by using a moving average, by the weighting given to the various base period wage increases, and by the number of times during the base period that FSC wages are compared to AHE in order to get an average: See RX–72 through 79A–2, revised. I am convinced that the most appropriate index models of all those introduced by FSC are those that use smoothed data from the Charlotte primary metal AHE series; that weight each FSC wage increase during the base period based on the number of months the increase was in effect; and that compare FSC wages to AHE solely at the time of each increase in FSC wages. Accordingly, the following discussion is predicated on RX–79A–2, revised.

[85] See RX–79A–2 revised, Table 2A. The exhibit is based on a 9-grade "transformed" wage structure. Thus grade 3 as used in the exhibit represents a much higher pay scale than grade 3 in the 19-grade structure actually in place during the base period.

[86] That is the base period relationship between AHE and the average wage in a transformed rate structure. The actual average Charlotte FSC base period wage differs from the average wage under FSC's transformation, and thus the actual base period relationship between AHE and the average Charlotte FSC wage would also differ.

[87] E.g., revised RX–79A–2 (emphasis in original).

models and the analogous wages from FSC's regression model.[88]

Advantages of FSC's Index Models

As discussed earlier, changes in AHE levels reflect the net impact of the various forces impinging on the labor market. Over any relatively brief time period changes in any one company's wage levels may be—in fact are likely to be—different from changes at that same point in AHE. But over a period of years those differences, on the average, will diminish absent some long-term set of circumstances unique to that company. Moreover, for comparable reasons changes in any one company's wage levels are no more or less likely to be proportionally smaller than the respective changes in AHE levels than they are to be larger than such AHE changes—again, absent circumstances at the company that push one way or the other. (It bears repeating that the reference is to *changes* in wages versus *changes* in AHE. No one contends that any single employer's wage levels will tend to be the same as AHE.)

Those considerations make FSC's index approach an attractive possible answer to the wage reconstruction problem facing the Board in this proceeding. And there is an additional attraction: From the vantage point of those affected by the reconstruction approach adopted by the Board, the index method is relatively easy to understand. That certainly is not the case with either of the regression approaches offered by the parties.

Problems With FSC's Index Models

Use of Multi-year Average. There is one overriding problem with all of FSC's index models: They all are based on the average difference during the base period years between FSC wages, on the one hand, and AHE levels, on the other. And as discussed in connection with FSC's regression model, that use of multi-year averages to establish the difference between FSC wages and AHE levels is unacceptable. It fails to reflect the growth in the FSC's wages relative to AHE during the course of the base period.

Lack of Statistical Measurements of the Probable Accuracy of the Forecasts. Regression models can provide statistical measures of the probable accuracy of the models' forecasts. (See fn. 45, above, and the accompanying text.) FSC's index models cannot do that, and the General Counsel attacks FSC's index models because of that.

In some settings regression analysis clearly provides the best way to make sense out of numerical data.[89] In this proceeding, for example, regression analysis would have been the ideal method for determining the extent of the accuracy of FSC's claim that in general it seeks to set wages at 104 percent of wage practice line levels. (As it happens, no one used regression analysis for that purpose.)

But for a variety of reasons regression analysis did not turn out to be a useful means for reconstructing FSC wage rates. The subject has already been discussed (connection with the General Counsel's model). But to recapitulate briefly: (1) no party could provide an appropriate basis for assuming the continuation in the backpay period of the nonparallel relationship between FSC wages and AHE levels that the General Counsel's regression found to exist during the base period; and (2) the base period provides insufficient data for regression purposes. That second factor—insufficient data—led the General Counsel to use a model design that presented serious autocorrelation problems. And that, in turn, means that the statistical indicators of accuracy produced by the General Counsel's model are meaningless. As Dr. Clapper, the author of the model, testified, it would be inappropriate to rely on any of such indicators.

As for FSC's regression models, they do not use regression techniques to determine the nature of the relationship between FSC wage rates and area wage levels. Rather, FSC used regression analysis as a way of arriving at averages in sets of data. Thus the statistical measures produced by FSC's regression models are beside the point.

The contention that regression analysis is a superior technique because of the "statistical tests grounded in mathematical proofs of the model's overall correctness"[90] accordingly fails to come to grips with the implications of the autocorrelation inherent in the General Counsel's models and with the topsy turvy way that FSC chose to use regression analysis.

What all that adds up to is that none of the Charlotte wage reconstruction models submitted into evidence by the parties offers a satisfactory way of computing backpay. But the record does suggest a workable alternative. That alternative will be considered in part VI, after discussion of the parties' Indiantown wage reconstruction models.

V. INDIANTOWN

A. *The General Counsel's Indiantown Model*

The General Counsel's Indiantown model, like his Charlotte model, uses a multiple regression approach to find the relationship between FSC wages and AHE during a base period. The Indiantown model replicates the methodology of the Charlotte model except in five respects. First, the AHE figures that Dr. Clapper correlated with FSC's Indiantown wages were taken from the "all manufacturing" AHE series for the State of Florida.[91] Second, the wage rates of all of the Indiantown grades moved in a sufficiently parallel fashion during the base period to enable Dr. Clapper to use one regression equation for all grades (instead of two equations, as in the case of his Charlotte models). Third, the Indiantown model uses a base period of September 1970 through December 1973. (The latter date was the effective date of the last wage increase at Indiantown prior to FSC's un-

[88] The figures in Table 7 [see Appendix G] are taken from RX-79A-2, revised, and RX-62. All figures are as of February 1980 except for the FSC regression figures, which are as of January 1980.

[89] See *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 731-732 (8th Cir. 1982).

[90] Steelworkers Br. 5.

[91] Dr. Clapper originally used the all manufacturing AHE series for Palm Beach County. That will be discussed below.

lawful change in wage policy. As for the September 1970 date, FSC opened the plant in March 1970. But the pre-September wage rates were not included in the model since they were "not developed in the same fashion" as the later rates.)[92] Fourth, instead of reconstructing Indiantown's wage structure based on the average dollar difference between one grade and the next throughout the base period, as in the Charlotte models, Dr. Clapper used the average difference during the last 2 years of the Indiantown base period. Fifth, the Indiantown model includes a "jump shift" adjustment to one of the wage increases granted by FSC during the base period.

In that last respect, Dr. Clapper discovered that the model (without the jump shift) resulted in a disappointing "fit" (relationship between regression equation and data). An investigation into the causes of the problem led Dr. Clapper to ask whether the February 1973 increase at Indiantown was an unusual one. Told that it was, Dr. Clapper made an adjustment to the model based on the assumption that part of the February 1973 increase was an extraordinary, one-time event. (The February 1973 increase will be further considered below.)

The model, as adjusted, produced a slope of 1.57. That is, during the base period, averaging among the various labor grades, for every one dollar increase in AHE, FSC's Indiantown wages increased by $1.57.[93] Table 9 [see Appendix G], shows examples of the resulting reconstructed wages.[94]

The General Counsel's Indiantown model presents the same problems as his Charlotte models. And thus, like his Charlotte models, the Indiantown model is not an acceptable approach to reconstructing the wages of FSC employees for the backpay period. The model is beset by high levels of autocorrelation. And again the record fails to indicate why one should assume, just because Indiantown wages increased faster than AHE between 1970 and 1973, that that trend would have continued thereafter but for FSC's wrongful change in wage policy.[95]

AHE Considerations—Change in the Scope of the Industry Grouping. The General Counsel originally used the "all manufacturing" AHE series for Palm Beach County, Florida, in his Indiantown model. Subsequently, however, the General Counsel learned that in 1972 BLS had changed the scope of all the manufacturing series. The change, which was made on a nationwide basis, had varying impacts on AHE data, depending upon geographical area. For reasons not clear on this record the impact was particularly severe in the case of Palm Beach County data, and BLS accordingly "declared a discontinuity . . . or interruption . . . in the West Palm Beach series."[96] That led the General Counsel to redo the model using all manufacturing data for the "Florida statewide" area.[97]

But again, while the AHE all manufacturing series for the State of Florida has its imperfections, it appears to be at least as good a time series, for purposes of reconstructing Indiantown wages, as any other series suggested by the parties.[98]

---

[92] Tr. 1067 (witness Clapper). All parties concur in the use of September 1970 as the start of the Indiantown base period. Actual base period wage rates for FSC's Indiantown plant are set forth in Table 8 [see Appendix G].

[93] In contrast, grade-by-grade regressions produced the following slopes (Source: GX–122):

Grade	Slope
1	1.52
2	1.44
3	1.50
4	1.53
5	1.57
6	1.59
7	1.68
8	0

[94] The table uses wages as of December since December 1973 was the effective date of the last general wage increase prior to FSC's unlawful change in wage policy. (Thus, the December 1973 wage shown in the table is the actual wage payed by FSC, not a reconstructed wage.) Table 9, and the other computations in this decision that use Florida statewide all manufacturing AHE, are based on the following AHE levels:

12 mos. ended December	*Avg. monthly AHE level*
1973	3.45
1974	3.76
1976	4.36
1979	5.48
1980	5.98

[95] As Table 9 [see Appendix G] indicates, under the General Counsel's principal Indiantown model the wages of the reconstructed lower Indiantown grades increase relatively faster than do the upper grade wages. (That is comparable to the General Counsel's reconstructed Charlotte wages: see fn. 49, above.) Under a revised General Counsel model in which the wages of all grades increase proportionally, the growth of the reconstructed FSC wages relative to AHE would be as follows: grade 1 would increase from 10 percent of AHE in 1973 to 112 percent in 1980; grade 5 would increase from 136 percent of AHE in 1973 to 151 percent in 1980; and grade 9 would increase from 178 percent of AHE in 1973 to 197 percent in 1980: See GCX–126.

[96] Tr. 3728 (witness Haworth). Additional discontinuities were declared in the Palm Beach all manufacturing series again in 1977 and 1978.

[97] The model that used the Palm Beach County data produced much lower projected wage rates than did the model that used Florida statewide data. E.g., the Palm Beach model produced a Grade 1 wage of $4.67 and a Grade 9 wage of $7.32 for December 1978. The comparable figures from the Florida statewide model are $6.01 and $8.66. Thus the General Counsel's switch in the AHE series was understandably upsetting to FSC. (The Company had quickly agreed to pay the backpay amounts resulting from the Palm Beach model's wage reconstructions and in fact put the model's then current wage reconstructions into effect as the wage rates for its Indiantown employees.) But the General Counsel made the change in timely fashion and for the reasons discussed above, not for arbitrary or capricious ones. Accordingly it is the Indiantown model based on Florida statewide data, rather than the model based on Palm Beach County data, that is appropriate for consideration here: *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161 (5th Cir. 1969).

[98] FSC's Tampa facility is in the city limits of Tampa, unquestionably an urban setting. The Indiantown facility is in a rural area. Generally speaking, wage rates in urban areas are higher than wage rates for comparable jobs in rural areas. Nonetheless the Indiantown wage forecast by the General Counsel's model are considerably higher than the wages at the Tampa facility. FSC claims that these circumstances argue against the reasonableness of the General Counsel's forecasts. As indicated above, I agree with FSC that the General Counsel's Indiantown model should not be adopted. But that is not because I think that FSC's Tampa argument has any validity. The location of the Indiantown facility is such that the majority of its employees have to commute relatively long distances (as will be discussed below). No one claims that that is the case at FSC's Tampa facility. And the record is clear that employers must pay a premium to attract workers to jobs necessitating long-distance commuting.

B. *FSC's Indiantown Regression Model*

From 1970 through 1973 FSC conducted wage surveys in the Indiantown area. FSC conducted no such Indiantown wage surveys from 1974 through 1979. But then, in late 1980, FSC conducted another wage survey in the Indiantown area (solely for the purpose of preparing evidence for submission in this proceeding).

FSC's Indiantown regression model is much the same as its Charlotte regression model, but with Indiantown survey data playing the role in FSC's Indiantown model that CPI data played in FSC's Charlotte model. The major difference is that while CPI data are available for all years after 1969, postbase period survey data are available at Indiantown only for 1980.

As in its Charlotte model, FSC Indiantown model generates reconstructed wages by determining: (1) average annual area wage level; (2) base period between the average the FSC wage rate and the average Indiantown survey wage rate.

Thus to use FSC's Indiantown regression model to reconstruct the wages for, say, Indiantown Grade 5 for 1980, one proceeds as follows (using the figures in RX-65):

(1) Intercept (base year figure): $1.659.

(2) Year add-on for 1980: $2.125.

(3) Average gap between labor grades for 1980: $.633. Five times $.633 (since we are here reconstructing grade 5) equals $3.165.

(4) FSC add-on: $.447.

(5) The reconstructed 1980 wage rate for FSC's Indiantown Grade 5 is $7.40. (i.e., $1.659 plus $.447.)

Wage Rates for 1974 Through 1979. As touched on above, FSC's surveys of Indiantown area wages are available for 1970–1973 and 1980. No surveys were conducted in the years 1974 through 1979. One way of handling the absence of survey data for the years 1974 through 1979 would be a simple, straight-line, interpolation. And FSC does provide reconstructed wage rates determined in that manner.[99] But FSC points out that while average area wages increased each year in the period 1974–1979, the rates of growth varied from year to year. To take account of that variance, FSC used AHE data to determine year-to-year rates of growth and then applied those growth rates to the reconstructed wage rates produced by the model. (AHE data show that growth rates were much higher in 1978 and 1979 than in the 1974–1977 period. The impact of that pattern on reconstructed wage rates is to diminish backpay amounts relative to the amounts produced by a straight-line interpolation.)[100] The resulting revised version of the reconstructed wage rates is FSC's proposal for the wage rates the Board should adopt in establishing backpay amounts for Indiantown employees. Those revised rates are set out in RX-68.

Table 10 [see Appendix G] compares FSC's and the General Counsel's proposed reconstructed Indiantown wage rates for illustrative years and labor grades.

The Major Faults of FSC's Indiantown Model

Use of a Differential Between FSC Wages and Survey Wages Based on a Base-Period Average. FSC's Indiantown model computes one average FSC Indiantown wage for the 3 years 1970, 1971, and 1973, and compares that figure to the average wage paid by the surveyed companies in those 3 years. (Actually the mechanics of that computation are different, and more complicated, than that description.) It turns out that FSC's wages averaged 44.7 cents higher than the surveyed companies' wages. Under FSC's approach, wages for the post-1973 period are reconstructed by first reconstructing survey wages for the various labor grades and the various post-1973 years and then adding the 44.7 cents to each such reconstructed wage rate.

The use of a constant dollar figure (44.7 cents) rather than a percentage figure as the FSC difference presents obvious problems. (See the discussion of this point in connection with FSC's Charlotte model.) But that can be put aside as easily curable. The real problem with FSC's approach relates to the changes during the course of the base period in the relationship between, on the one hand, FSC wages and, on the other, the average level of wages paid by other employers. The nature of those changes is most readily seen in a straightforward comparison of average FSC Indiantown wages during the 1970–1973 period with AHE data for that same period. As can be seen [see Appendix G, Table 11], average FSC wages increased faster than AHE both in dollar and percentage terms.[101]

The implicit assumption in FSC's use of multi-year averages to arrive at the FSC differential (44.7 cents) is that the differences between FSC Indiantown wages and the average wages of other employers that existed at the end of the period are likely to have returned to earlier levels (had FSC not changed its wage-setting pattern). But that assumption is contradicted by the substantial increase in FSC wages relative to those paid by other employers.

FSC made no attempt to explain why the differential between its Charlotte wages and average area wages generally was larger at the end of the base period than at the beginning. But as to the Indiantown situation, FSC did go to considerable lengths in an effort to show that, for two reasons, the relatively rapid increase in Indian-

[99] RX-66.

[100] See Tr. 1970–72 and 2597–98 for Dr. Haworth's explanation of her interpolation procedure. Dr. Clapper took issue with that procedure and proposed an alternative: See Tr. 2784–87 and GCX-112. If I had to choose, I would pick Dr. Clapper's interpolation method as being a more logical and straightforward approach.

[101] Average FSC Indiantown wages and AHE levels are taken from RX-71A-1. The General Counsel's grade-by-grade regressions show that practically all of the various FSC Indiantown wage rates grew proportionally much faster over the base period than did AHE (see fn. 93, above). Looking at grade-by-grade comparisons of FSC wages and the wages paid by the companies in the Indiantown-area surveys (see GCX-106), against most of the FSC wage rates increased during the base period relative to their survey counterparts.

town wages during the base period was without long-term significance. The two reasons put forth by FSC: (1) the fact that the Indiantown facility first started operations in 1970; and (2) FSC's response to wage controls.

"Start-up" Wages at Indiantown. FSC claims that its Indiantown facility was in a "start-up" phase throughout the base period. According to the testimony of James Hogue, FSC's vice-president for industrial relations, it is FSC's policy to set initial wages at a new facility at between 108 percent and 112 percent of the relevant wage practice line. The Company then aims to get back to its usual 104-percent standard within 4 or 5 years.

That policy, Hogue said, developed out of its experience at Indiantown. Accordingly, while a start-up wage premium was not implemented immediately at the Indiantown facility, one was put into effect "sometime after the plant started."[102] What that means, argues FSC, is that the large differential that existed at the end of the base period between FSC's Indiantown wages, on the one hand, and, on the other, average area wages, was a function of FSC's start-up needs.

FSC points out that a start-up premium was essential at Indiantown for several reasons. First, as is the case with any new facility, it must be staffed at least partially with employees drawn away from other employers, and some premium is necessary just to overcome inertia. Second, Indiantown is too small a community to have had within it any large proportion of the people that FSC needed to staff the new facility. Thus FSC had to convince prospective employees either to move to the Indiantown area or to commute relatively long distances. And third, the kind of work offered at the FSC plant was different from the types of work potential employees in the area were accustomed to.

But the record as a whole paints a different picture from the one drawn by the Company.

To begin with, based on FSC's description of its wage-setting procedures, it appears that the Company did use a start-up premium in establishing its Indiantown wage rates in September 1970: The Indiantown wage structure in September 1970 was generally parallel to, and about 12 percent higher than, the wage practice line.[103] That closely fits Hogue's description of start-up wages.

Had FSC then followed the start-up procedures portrayed in Hogue's testimony, FSC wage levels would have gradually decreased, relative to the wage practice lines, to a level just slightly higher than area standards. But what in fact happened is that in December 1971 FSC precipitously dropped the middle and upper grade wages to well below the level of the wage practice line. At the same time FSC increased, on a relative basis, entry level wages. Moreover, there was not hint of an overall decline in FSC wages relative to area wages at any time during the rest of the base period. (No one with any knowledge of the employment situation at the Indiantown plant explained that series of relationships between FSC's wage structure and the relevant wage practice lines.)

One could speculate, I suppose, that as late as the end of 1973 FSC was still trying to find a wage level high enough to fill substantial numbers of jobs that had remained vacant from the time the Indiantown plant got underway. That would mean that FSC's management initially badly miscalculated the wage levels necessary to fill the newly created jobs and then continued to miscalculate for the next 3 years, to the point of seeing needed work go undone because of 3-year-long job vacancies.

If that were in fact the case, it would be inappropriate to assign much relevance, as with regard to predicting future wage patterns, to change during the base period in FSC wages relative to area wages. But no FSC witness testified that it took FSC 3 years to find the initial employees for many Indiantown job slots. And the record contains no employment data showing that jobs at the Indiantown plant went unfilled from their creation in 1970 through 1973.

I am willing to assume that FSC found it harder than it expected to retain its Indiantown employees, particularly in the lower grades, and to fill openings when employees left the Indiantown plant.[104] But retaining and replacing employees (as opposed to the extensive recruiting needed to fill new jobs in a new plant) are routine functions in an ongoing plant. Thus, the fact that it was soon after the plant went into operation that these problems may have cropped up has little if any significance when evaluating the meaning of changes in base period FSC wage rates relative to area wage levels.

Wage Controls. Federally imposed limits on wage increases were in effect for much of the base period. In 1972 wage increases of up to 5.5 percent for most workers, and larger increases for the lowest paid workers were permitted without specific governmental authorization. FSC concluded that a 5.5-percent increase would not be sufficient at the Indiantown plant and sought permission to implement a 7-percent increase. Permission for the increase was granted and FSC implemented it in October 1972. Then, in 1973, FSC sought permission for an even larger exception to wage control limitations. Permission again was granted, and FSC implemented wage increases as high as 17 percent.[105]

---

[102] Tr. 1894.

[103] See Appendix B, for a graphic indication of that relationship [omitted from publication].

[104] The difficulties in retaining and replacing employees could be the very same that FSC witness Hogue said made it hard to fill the newly created jobs when the plant opened in 1970. Thus, according to the testimony of FSC's compensation manager in an earlier stage of this case, a sizable wage increase was needed in December 1973—

> . . . because [Indiantown] is a very small community; also, it's . . . way out from any population center, and you need to have something to attract people to drive that far and work out in the boondocks. . . . We have to have some sort of an incentive for people to drive that far, to work out a great distance from the population centers, and also to work in an industry which is foreign to the area, with quite different working conditions, hours, type of work, and everything else concerned with a steel mill, in relation to industry common to the area. We had to have some sort of a premium, in other words: GCX–39, p. 268. See also GCX–38, p. 77.

[105] Indiantown wages increased as follows in February 1973 (compared with October 1972).

Grade, % increase	Increase in cents
1, 13%	.35
2, 13%	.40

Continued

The wage increases received by FSC's Indiantown employees in October 1972 and February 1973 were substantially larger than the increases received during that period by the average worker in the Indiantown area. But that, argues FSC, was merely a function of FSC's ability to obtain special relief from Federal wage controls. Most firms, and in particular small firms, did not have that same capability. For that reason, so the argument goes, the faster-than-average growth in FSC wages in 1972 and 1973 says nothing about the appropriate position of FSC wages relative to average area wages in the period.

But it does not seem to me that that argument holds up under inspection. For one thing, the record suggests that small firms may have been at least as able as large firms to put big pay increases into effect during the wage control era.[106] For another, many employees whose wages were included in surveys against which FSC wages may be compared were employed by companies whose resources do not compare unfavorably to FSC's.[107] But beyond all that, no one forced FSC to obtain special wage increase exceptions. Rather, in late 1972 and early 1973 FSC obviously thought it necessary to increase its pay scale at Indiantown relative to area wages—which, it knew, were being capped by Federal controls. And that is precisely the kind of circumstance that ought to be considered when attempting to determine the appropriate level of FSC wages relative to average wages in the area.

What all that adds up to is that nothing in the record suggests that the relationship between FSC's Indiantown wages and area wages, as that relationship existed at the end of the base period, was a fluke. Similarly, nothing in the record suggests that that end-of-the-base-period relationship was more likely to return to earlier levels than it was to increase still further. Yet FSC's regression model is predicated on the assumption that FSC wages would decline relative to area wages in the years after 1973. Since that assumption is unfounded, FSC's Indiantown regression model is unacceptable.

The 1980 Indiantown Survey. In December 1980 FSC obtained wage rate data from employers in and around Indiantown.[108] Data were sought only from firms that had been included in FSC's 1973 survey.[109] And only data from job categories included in the 1973 survey were used for the 1980 survey.

The 1980 survey is obviously less likely to be representative of area wages than even the base period FSC surveys, given the constraints placed on the firms and jobs to be included in the survey.[110] And no one contends that the base period surveys were in fact representative samples. But for all that, I am not convinced that 1980 AHE figures are necessarily more reflective of the wages that FSC would have paid (absent FSC's unfair labor practices) than the figures derived from the 1980 survey. The point is that during the base period FSC did pay heed—to some undeterminable extent—to its area surveys. And the 1980 survey much more closely approximates the survey that FSC would have conducted in 1980 had it continued its pre-1974 practices than does any AHE series.

The main problem with FSC's use of Indiantown survey data accordingly is not wholly a function of the quality of those data. Rather, the difficulty with using survey data for wage reconstruction purposes is that no surveys were conducted from 1974 through 1979. Thus all of the wage reconstructions for the entire post-1974 period produced by FSC's regression model are dependent on one survey, the one conducted in 1980. Given the substantial possibility that the survey's figures failed to capture the labor market situation in and around Indiantown, that is simply putting too many eggs in one basket.

C. *FSC's Indiantown "Index" Models*

As discussed earlier, FSC proposed several ways of reconstructing its Charlotte wages utilizing the percentage relationships between AHE data and FSC wages that existed during the 1969–1973 base period. FSC submitted evidence reconstructing the wages of its Indiantown facility using precisely the same approaches. Again, FSC provided wage reconstructions based on the assumptions of (1) continuous percentage increase in wages; (2) continuous across-the-board wage increases (i.e. same dollar amount of increase for each wage grade); and (3) a combination of percentage and across-the-board (in a ratio of two across-the-board increases for every percentage increase). Table 12 [see Appendix G] shows the reconstructed wages produced by FSC's index models for the highest and lowest Indiantown grades.[111]

But as is the case with all of FSC's other wage reconstruction efforts, its Indiantown index models are unacceptable in that they reconstruct post-1973 wages on the basis of the average base period relationship between FSC wages and those of other employers.

3, 8%	.28
4, 7%	.27
5, 9%	.35
6, 12%	.50
7, 16%	.75
8, 0	0
9, 17%	.82
average wage, all grades, 11%	.43

[106] See Tr. 1991–92, 2277–78 (witness Haworth).

[107] Included in FSC's area surveys: W. R. Grace; Coca-Cola; Southern Bell; and Florida Power & Light. The largest employer in the Indiantown area is another major corporation, Pratt & Whitney. And while that company was not included in FSC's surveys, its wage levels presumably affected area wages.

[108] FSC contracted with Hotton & Associates, Inc., to conduct the 1980 survey. Robert L. Brintle did the actual surveying. Brintle and George Hotton "calculated the data." Hotton "was responsible for the preparation of the final report" on the survey: Tr. 1634 (witness Hotton). Brintle did not testify. Hotton did.

[109] The 1980 survey included data from 16 companies. There were 18 companies in the 1973 survey. But 1 of the 18 had gone out of business. And with another employer, based on the information obtained by Brintle, "we just could not match jobs as they existed in 1973 with what they purported to have in 1980." Tr. 1641 (witness Hotton).

[110] That is not an attack on FSC's motivation in putting those limits on the survey. Had the survey included companies or jobs not on the 1973 list, the 1980 survey surely would have been criticized for its lack of consistency.

[111] Source: RX-71A-1; RX-68; and GCX-100.

VI. WAGE RECONSTRUCTION—CONCLUSION

The previous two parts of this decision considered the General Counsel's Charlotte and Indiantown regression models, FSC's regression models, and FSC's various index models. Those were the only proposed approaches to wage reconstruction examined in any detail at the hearing. Yet as discussed above at some considerable length, none of them is a satisfactory way of computing backpay. The massive amounts of factual data submitted by the parties and the parties' very thorough analysis of that data do, however, point to a way of reconstructing FSC wages that adopts the most cogent contentions of each of the parties.

A. *Use of End-of-Base-Period Relationships*

Any method of reconstructing FSC's Charlotte and Indiantown wages for the post-1973 years must, it seems to me, take into account these considerations:

(1) A comparison must be made with some set of earnings data available both in the pre-1974 and post-1973 periods; and BLS's AHE is the best such set.

(2) Absent specific circumstances to the contrary, at any given time an employer's wages are no more likely to increase faster than AHE than to decrease faster than AHE (and vice versa); and over a period of years the employer's wage levels will tend to remain in the same proportional relationship with AHE.

(3) During the post-1973 period there were no circumstances at play at FSC's Charlotte or Indiantown plants that would indicate that FSC wages would have proportionally changed either faster or slower than AHE.

(4) During the pre-1974 period, wages at FSC's Charlotte and Indiantown plants increased proportionally faster than did AHE, so that the difference between the average FSC wage and AHE was substantially greater at the end of that period than at any other time in that period.

(5) There is no evidence that the level of FSC's wage rates, relative to AHE, at the end of the base period was a temporary phenomenon and that FSC's wages were thus likely to retreat relative to AHE. Rather, the generally steady upward trend of FSC wages relative to AHE throughout the base period is a positive indication that a further advance in FSC wages relative to AHE was just as probable as a decline (had FSC not changed its wage policies).

While the General Counsel's and FSC's models are each consistent with some of those considerations, none is consistent with all of them. There is, however, one approach—basically a modification of FSC's "index" models—that would be consistent with each of those considerations. That is, reconstruct post-1973 FSC wages based on the relationship between FSC wages and AHE as that relationship existed at the end of the base period. That approach: (1) uses AHE data; (2) takes into account that a company's wage levels are no more likely to increase proportionally faster than AHE than to decrease faster than AHE absent specific circumstances to the contrary; (3) takes into account that no such circumstances were shown to have been present at FSC's Charlotte or Indiantown plants during the backpay period; and (4) reflects the rise in FSC wages relative to AHE during the base period.

The Steelworkers referred on brief to an end-of-the-base-period index model. FSC responded as follows:

> Reliance on the last pre-violation period is erroneous and unreasonable . . . because such reliance assumes that only one point in time accurately reflects long-term Florida Steel policy and that earlier market adjustments are not relevant. Clearly, an accurate reflection of Florida Steel policy would require more than one point in time. . . . It is particularly anomalous that the [end of the base period] . . . was during the lifting of wage and price controls, when Florida Steel was able to change its wage rates significantly. Other firms, reporting earnings to the BLS for the AHE series appear not to have acted as quickly.[112]

FSC's contentions are not persuasive. For one thing, it simply is not "unreasonable" to base a prediction of a company's future wage levels on the relationship between AHE and the company's wage rates at one point in time (absent information showing that that particular relationship was idiosyncratic).

> [U]nless there is reason to believe that you are . . . out of line with the market . . . I would expect that [the percentage relationship between AHE and the Company's wages] would be about the same as it was before. I would assume that we were in equilibrium at that moment, unless I had other information.[113]

An index model based on a number of sets of FSC-AHE relationships would ordinarily be preferable to a model based on only one. But that is only if each such set of relationships was likely to be as good a predictor of future FSC behavior as each of the others. And it is that qualification that points to the use of an end-of-the-base period model. As reiterated throughout parts IV and V of this decision, base period patterns show that the relationships between AHE and FSC wage rates prior to the time of FSC's last base period wage increases are inappropriate for predicting FSC's probable postbase period behavior.

As for FSC's wage control contentions, as noted in part V they are premised on the assumption that the increase, during the wage control period, in FSC's wage rates relative to the wage levels at other firms was the fortuitous result of FSC's efficiency in dealing with government regulation, rather than the product of managerial choice. That would be a dubious proposition under any circumstance. It is particularly so in the case of FSC, whose management has been shown to be thor-

[112] FSC's Limited Reply Br. 4.

[113] Tr. 3882 (FSC witness Haworth).

ough, knowledgeable, and deliberate in all matters relating to employee compensation.

As one witness said, and as the record as a whole proves, finding a way to reconstruct FSC's Charlotte and Indiantown wages is "a very horrible task."[114] It is clear that a wage reconstruction model that reconstructs FSC wages based on end-of-base-period relationships to AHE will not precisely duplicate the wages that FSC would have implemented had it not violated the Act. But no method of reconstructing FSC wages could ever do that. And the end-of-base-period approach is a more reasonable one than anything else anyone has proposed. That is enough for me to conclude that it should be used to reconstruct, for backpay purposes, FSC's Charlotte and Indiantown wage rates for the years since 1973.

B. *Wage Structure*

As may be recalled, FSC provided three different ways of using an "index" approach to wage reconstruction: (1) a straight percentage approach; (2) an "across-the-board" model; and (3) a combination of (1) and (2). The main difference between them is that under method (1) the percentage difference between the various grades stays the same (as wage levels increase over time) while the dollar difference between grades increases. Under method (2) the dollar difference between grades stays the same while the percentage difference decreases. (Method (3), of course, has some of the elements of both (1) and (2).) Those same three approaches can be used with an end-of-base-period model. And that means that it is necessary to focus on wage structure: Had FSC not unlawfully changed its wage policies, would the grade-versus-grade wage relationships that existed during the pre-1974 base period have changed; and if so, how.

General Counsel's Wage Structure Contentions—Charlotte. As discussed earlier, the General Counsel's Charlotte wage reconstruction is based on two regression models. Both of those models assume that the various grades would have maintained a constant dollar difference from one another throughout the post-1973 years but for FSC's unlawful behavior. For example, under the General Counsel's proposed wage reconstruction, although the Charlotte Grade 7 wage increases from $3.69 in February 1974 to $7.47 in February 1981, it remains exactly $1.27 less than the General Counsel's proposed Grade 15 wage throughout that time. Thus, the percentage difference between those two projected wage rates decreases: from 34 percent in 1974 to 16 percent in 1981.

The General Counsel based the projected grade-to-grade dollar differences on the average grade-to-grade dollar differences between the various Charlotte labor grades during the 1969–1973 base period. (I.e., the projected difference between, say, Grade 4 RF and Grade 5 RF was the average dollar difference between those two grades during the base period.)[115]

The use of a constant dollar difference between grades is contrary to the grade-versus-grade behavior at Charlotte during the base period. Throughout the base period the dollar difference between grades steadily increased. And the percentage spread between grades, which would have decreased if a constant-dollar-difference had been maintained, instead remained relatively steady.[116]

Table 13 [see Appendix G] shows the percentage and dollar difference between the highest and the lowest grades covered by the General Counsel's Charlotte models.

The General Counsel once again points to Tampa as support for his projections. And the fact is that at the Tampa mill the General Counsel's assumption of fixed dollar differences between grades is borne out throughout the 1976–1980 period "reconstructed" by the General Counsel's Tampa model: The dollar difference between any two labor grades remained constant (which resulted in a substantial decrease in the percentage spread). But I cannot conclude that the Tampa data permit the conclusion that but for FSC's unlawful wage policy change FSC would have maintained a fixed dollar difference between the nine lower Charlotte labor grades and between the various upper labor grades. First, there remains the fact that Tampa represents but 1 of FSC's 11 facilities. And second, nothing during Charlotte's base period hints at such a trend. The Tampa projection, on the other hand, precisely reflects the fact that during the Tampa "base period" FSC did maintain a constant dollar difference between grade levels.

Wage Structure—FSC's Regression Model. As discussed earlier, the CPI wage surveys include wage data on a labor-grade-by-labor-grade basis. AHE surveys, of course, do not. FSC's regression model uses the CPI data to obtain, on a yearly basis, the average gap between labor grades. (For example, FSC's models show the average gap between adjacent CPI labor grades in 1974 to have been about 28 cents. The FSC model then uses the CPI average-gap-between-labor-grades figure without modification to reconstruct FSC wages. Thus FSC's 1974 forecast for the wages of Grades 5 and 6 are, respectively, $3.99 per hour and $4.27 per hour: i.e., 28 cents apart.[117])

There are several problems with FSC's approach to reconstructing Charlotte's wage structure. But of most interest to us here is that FSC's regression model's processes inextricably mix together the predicted average yearly increase in wages (for all labor grades) and the predicted average gap between labor grades. (Statisticians call the problem one of "multicollinearity.")[118] As

[114] Tr. 3147 (witness Fearn).

[115] Actually, the model determined the average dollar difference between each grade and Grade 1. But the effect is the same.

[116] The grade-by-grade regression models for Charlotte (see Table 2 [Appendix G]) show with relatively minor exception a steady increase in slope from low labor grade to high. That further reflects the invalidity of the constant-dollar-spread assumption.

[117] See RX–62.

[118] Dr. Haworth defined multicollinearity this way (referring to multiple regression models): "[W]hen two variables are related to each other, the coefficient of one of them in most cases [is] likely to take up some of the effect of the other one. The coefficient [of] that particular variable is really supposed to be measuring the impact of that variable. But perhaps it's measuring a joint impact of both variables. That's called confounding, because both variables' effects may be incorporated or imbedded in a single coefficient." (Tr. 3799–3800.)

a result there is a possibility that, for any given year, part of the grade-to-grade gap figure shown in FSC's model in fact should be ascribed to the year-to-year change. The reverse is true too. It could be that for any given year the grade-to-grade gap should be increased to include part of what the model shows to be the year-to-year difference.[119]

The premise behind FSC's use of CPI data to reconstruct the relationship of the various FSC grades to one another is that FSC's wage structure will inevitably refect market forces. The premises is an accurate one. And it points to examining CPI data directly, so as to avoid the multicollinearity problems generated by FSC's regression model.

Wage Structure Information Produced by the CPI Surveys. The General Counsel has compiled grade-by-grade CPI data for grades 1 through 9, for the years 1970 through 1980.[120] The data show that during the 4 years 1970 through 1973 the average CPI grade 9 wage rose from 66 percent higher than the average CPI grade 1 wage to 81 percent higher. [See Appendix G, Table 14.]

Generally speaking, the average CPI grade 9 wage increased relative to the CPI grade 1 wage during the years following 1973. [See Appendix G, Table 15.]

Charlotte Wage Structure—Conclusion. As noted earlier, using an end-of-the-base period index model, and the three most thoroughly considered index methods, the choice is among models producing the following relationships between FSC grades 1 and 15.

Method	*Grade 15 as Percent of Grade 1 As of Feb. 1980*
"Proportional"	181%
"Across-the-Board"	140%
"Combination"	153%

FSC's witness Haworth suggested that, if an index method is to be used, she would recommend the "combination" approach since it reflects the way FSC granted wage increases at its other plants. And a combination approach would be closer to the preference of the General Counsel and the Steelworkers than would the proportional approach.

Nevertheless it seems to me that the proportional approach is the more appropriate one. FSC's Charlotte grade 15 wage rates ranged from 174 percent to 181 percent of the grade 1 wage rates during the base period. Thus the proportional model more closely squares with Charlotte's wage structure during the base period than does any other index approach. And it is the closest to market realities, as shown by CPI data.

I accordingly conclude that for backpay purposes the wages of FSC's hourly paid bargaining unit Charlotte employees should be reconstructed by using an index model based on the percentage relationships that existed in February 1973 between, on the one hand, each of the various FSC wage levels and, on the other, the Charlotte SMSA primary metals AHE for February 1973 (12-month moving average).

Table 16 [see Appendix G] gives some examples of the reconstructed wage rates produced by the model adopted by this decision, together with analogous wage rates produced by the principal models of the General Counsel and FSC.[121]

Appendix D gives further examples of the reconstructed wage rates produced by the model adopted by this decision.

Wage Structure—Indiantown. During the base period the percentage difference between Indiantown grades 9 and 1 (the highest and lowest grades) ranged between 76 and 91, as Table 17 [see Appendix G] shows.[122]

As with his Charlotte models, the General Counsel's principal Indiantown wage reconstructions maintain a constant dollar difference between grades, resulting in an enormous decrease in the percentage difference. (The General Counsel's reconstructed grade 9 for 1980 is only 36 percent greater than his reconstructed grade 1.) Since the evidence supporting that approach at Indiantown is no more convincing than it was in the case of the General Counsel's Charlotte wage reconstructions, it must be rejected.

FSC's model, utilizing Indiantown wage surveys for the base period and for 1980, produces reconstructed wages that result in grade 9 starting 78 percent higher than grade 1 and increased gradually so that in 1980 it is 91 percent higher than grade 1. But as with FSC's Charlotte regression, its Indiantown model presents multicollinearity problems.

As for the Indiantown survey itself, it is based on so small a sample that the average grade-by-grade wage rates that it produces bounce around far more dramatically than they ought to. But for whatever it is worth, the 1980 survey suggests that in the Indiantown area the grade 9 relationship to grade 1 for that year was comparable to that of the pre-1974 period.[123]

Indiantown wage structure—Conclusion. The "proportional" index approach would produce the same relationship between grade 9 and grade 1 at each point in the post-1973 period as existed at the end of the base period; thus grade 9 would remain 76 percent greater than grade 1. The "across-the-board" index approach would produce a grade 9 wage that steadily declined relative to grade 1, so that by 1980 grade 9 would be only 39 per-

[119] "Because of the way Respondent's model is built and the difinitionally induced multicollinearity, it's virturally impossible to say with any reliability what the wage structure would be at any point in time, because you just can't disentangle the wage structure issues from the [year-to-year] trend issues": Tr. 2767 (witness Clapper).

[120] GCX-105. Under the CPI system the higher the grade number the *lower* the skills and wage level. But throughout this proceeding the parties revised the CPI numbering system to track FSC's (under which the higher the grade number the greater the skills and wage level). This decision follows the parties' practice.

[121] The labor grades referred to in the table are the grades based on the old, 19-grade, structure. I have used a four-place index figure (e.g., .8125 for Charlotte grade 1 and 1.472 for Charlotte grade 15). The figures given for FSC's regression model are as of January of the indicated years, not February.

[122] The various individual Indiantown grade-versus-grade relationships varied considerably. For example, grade 3 started out (in 1970) 11.2 percent higher than grade 2 and ended the base period only 3.3 percent higher. Grade 7, on the other hand, started 8.0 percent higher than grade 6 and climbed to 11.7 percent higher at the end of the base period. But the grade 9 relationship to grade 1 is the best one to focus on for our purpose in that it summarizes all the others.

[123] Data from GCX-106.

cent higher. (Under the "combination" approach, grade 9 would be 50 percent higher than grade 1 as of 1980.)

Given the base period wage relationships at FSC's Indiantown plant plus the scanty data from the 1980 survey, my conclusion is that, as with the Charlotte wage reconstructions, the most appropriate index model is one that maintains the end-of-the-base-period grade-versus-grade relationships—that is, the proportional approach. Thus my conclusion regarding the reconstruction of the wages of FSC's Indiantown hourly paid bargaining unit employees is that such reconstruction be based on an index model utilizing Florida statewide all manufacturing AHE (12-month moving average); and that the reconstructed wages reflect the relationship between the average level of such AHE for the 12 months ended December 1973 and each of the FSC wage rates that were retroactively made effective in that month.

Examples of the impact of that approach are set out in Appendix G, Table 19, and in Appendix E.

VII. POST-1973 DEVELOPMENTS AFFECTING WAGE RECONSTRUCTION

"TEAM"

Up through early 1974 FSC followed a policy of granting general wage increases annually. But as inflation rates climbed in 1974 FSC concluded that it should instead implement general wage increases quarterly. FSC called the new policy "TEAM."[124] FSC continued to conduct wage surveys on an annual basis (at plants other than Charlotte and Indiantown), and thus each year one of the four TEAM increases was influenced by the survey. The size of the other three increases each year reflected whatever tentative information could be collected plus, of course, corporate decisions about corporate needs.

FSC resumed its annual wage increase policy in late 1976.

The parties agree that, but for FSC's unlawful change in wage policy, FSC would have granted TEAM increases at Charlotte during the period November 30, 1974, through November 27, 1976. The comparable Indiantown dates are September 28, 1974, and September 25, 1976.[125]

As for reconstructing wage levels on TEAM dates, the most reasonable approach is simply to reconstruct each TEAM increase on the basis of the 12-month moving average AHE figure for the month of the TEAM increase—that is, use exactly the same method for reconstructing quarterly increases as is used for reconstructing annual increases. (For example, the Charlotte SMSA primary metals AHE figure for the 12 months ended May 1975 was $3.91. Since FSC's Charlotte grade 12 (mill) wage rate was 126.6 percent of AHE at the end of the base period, the reconstructed grade 12 wage rate for May 1975 is $4.95.)

Transformation of the Charlotte Grade Structure. As discussed earlier, the Charlotte grade structure during the pre-1974 base period specified 19 separate grades. (See Table 3, Appendix G.) FSC continued to use that structure until April 1977. At that point FSC, with the Steelworkers' concurrence, adopted a 9- or 10-grade structure for the Charlotte plant. (FSC says it is a 9-grade structure; the General Counsel says it is a 10-grade structure.) That raises the question of how to transform the old 19-grade structure into the new 9- or 10-grade structure for wage reconstruction purposes. In this proceeding FSC first transformed the Charlotte base period grades into a 9-grade structure; built its principal wage reconstruction models around the transformed grades; and then re-transformed the 9-grade structure produced by those models back into the old 19-grade structure for purposes of determining reconstructed Charlotte grades for the period 1974 to April 1977.

The General Counsel took a very different approach. For one thing, the General Counsel built its Charlotte wage reconstruction models around the old structure, and then determined post-April 1977 wages by transforming the old structure into the new one solely from that point on. Second, the General Counsel made the transformation in a noncomplex fashion. To determine the reconstructed wage levels for the transformed grades, the General Counsel assumed that old grade 1 became new grade 1, and that old grade 17 became new grade 10. As for new grades 2 through 9, the General Counsel divided the reconstructed wage difference between grades 1 and 17 by 9 and used the resulting figure as the dollar interval between each grade. The following is an example of the General Counsel's approach (using, for illustration purposes, the General Counsel's reconstructed wage rates for February 1978 and transformed grades 1, 2, 3, and 10).

1. General Counsel's reconstructed Grade 1 wage (untransformed)	$4.31
2. General Counsel's reconstructed Grade 17 wage (untransformed)	$7.30
3. Grade 1 reconstructed wage (transformed structure)	$4.31
4. Grade 10 reconstructed wage (transformed structure)	$7.30
5. Grade 10 wage minus Grade 1 wage:	$2.99
6. Difference from step 5 divided into nine intervals	$2.99 divided by 9 equals $.332
7. Grade 2 (transformed) reconstructed wage	$4.31 plus $.33 equals $4.64
8. Grade 3 (transformed) recon-	$4.31 plus two times

[124] See part I, above.

[125] See Appendix F for the precise dates of the reconstructed wage increases.

structed wage $.33 equals $4.97

The General Counsel's approach to the transformation of Charlotte's wage structure is relatively simple to do and easy to understand; and it is in line with FSC's intentions in shifting to a new grade structure as those intentions were described to representatives of General Counsel. I accordingly conclude that the General Counsel's approach to the transformation of Charlotte's wage structure should be adopted by the Board for purposes of reconstructing Charlotte wage rates.

Merit Pay Adjustment. Prior to the arrival of the Steelworkers at FSC's Charlotte plant, FSC used a merit system there. Under that system employees who were evaluated as doing better than satisfactory work received extra pay. FSC put that system on hold in 1974 (see sec. VIII, G, below). Then, at the time of the grade structure transformation in 1977, FSC eliminated the merit system (with union concurrence). FSC thereupon increased the base rate of pay (i.e., non-merit rate) for its Charlotte employees by 4 percent.

The General Counsel proposes that that circumstance be handled by adding 4 percent to all post-April 1977 (reconstructed) wage levels produced by whatever Charlotte model the Board choses. (For example, the General Counsel's regression model produces a reconstructed Grade 1 wage rate for February 1978 of $4.31. Adding the 4 percent merit adjustment brings the rate to $4.48, which is the rate on which the General Counsel urges that backpay be based.)

FSC does not take issue with the 4-percent adjustment.

Accordingly the reconstructed Charlotte wages produced by the end-of-the-base-period index model described earlier should be increased by 4 percent to compute the backpay of the Charlotte hourly employees for the period beginning April 24, 1977.

VIII. OTHER ISSUES

A. *Dates on Which FSC Offered Reinstatement to Unlawfully Discharged Employees*

On various dates in 1973 Florida Steel fired a dozen employees because of the employees' union activities. The Board subsequently required FSC to offer the discharged employees "reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges" and to "make the . . . employees whole for any loss of earnings suffered by reason of their discharge."[126]

Issues remain regarding the dates on which FSC made valid reinstatement offers to six of the discriminatorily discharged employees. This section will deal with those issues.

Bruce N. Lemmond. Lemmond had worked as a truckdriver at FSC prior to his discharge in July 1973. On November 22, 1976, FSC Regional Industrial Relations Manager James S. Rogers wrote a letter to Lemmond that included the following language:

> You are hereby offered full, immediate and unconditional reinstatement to your former, or a substantially equivalent, position with this Company, without prejudice to your seniority or other rights.
>
> If you desire reinstatement, contact the undersigned no later than Friday, December 3, 1976, for instructions as to when and where to report for work. . . .

Lemmond called Rogers on December 3 and asked to come in and talk to Rogers about the offer. Lemmond wanted further information about the job that FSC had planned for him. Rogers refused, saying that the November 22 letter was "self-explanatory" and that there was "no need" to meet on the matter.[127] In the course of the telephone conversation Rogers did add that: (1) Lemmond would receive the same rate of pay that he had been getting in 1973; (2) Lemmond's reporting date would be December 20, 1976; and (3) there were no truckdriver job vacancies—which left Lemmond with the impression that he was being offered some sort of "equivalent" job, not reinstatement into his old job. Rogers did not tell Lemmond exactly what kind of job Lemmond would get or on what shift Lemmond would work.

On December 7 Rogers called Lemmond to advise Lemmond of a change in the reporting date. Rogers told Lemmond to report on December 13 rather than December 20. Lemmond responded equivocally, saying that he was going to talk to his then current employer about the situation and that he would be back in touch with Rogers.[128]

On the date of that second telephone call, Rogers sent another letter to Lemmond:

> This letter will confirm our conversation of today . . . at which time we established your return to work date as Monday, December 13, 1976. You should report to my office at 8 a.m. at which time you will receive an appointment for your return to work physical as well as your job assignment.[129]

Lemmond did not communicate further with Rogers about the job offer and did not show up for work on December 13.

Representatives of the General Counsel subsequently advised FSC that they did not consider FSC's communications with Lemmond to be a valid offer of reinstatement. In response, in late 1977 FSC again offered employment to Lemmond, and all parties agree that that 1977 offer was a valid offer of reinstatement effective December 19, 1977. The issue is whether the letters and telephone conversations of November and December 1976 constituted a valid offer of reinstatement to Lemmond. If they did, FSC's backpay obligations toward Lemmond stopped running at that time. If, on the other

---

[126] 214 NLRB 264, 281 (1974). The Board's order covered 13 employees. That order of the Board was enforced in respect to 12 of the 13 discharged employees in 551 F.2d 306 (4th Cir. 1975).

[127] Tr. 256.

[128] Lemmond testified that he had only one telephone conversation with Rogers, not two, and that it was Rogers who said that he would be back in touch with Lemmond. But I credit Rogers' account over Lemmond's in this respect, as the text above indicates.

[129] GCX-11.

hand, those communications did not amount to a valid offer of reinstatement, FSC's backpay obligations continued to run until the time of FSC's 1977 job offer, notwithstanding Lemmond's unexplained failure to show up for work on the reporting date: See, e.g., *Craw & Son*, 244 NLRB 241, 242 (1979); *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978).[130]

In dealing with that issue one question that needs to be resolved is whether the reference in Rogers' December 7 letter to a physical examination rendered the job offer invalid for purposes of meeting the Board's reinstatement requirements. For in most circumstances a job offer that is conditioned on the discriminatee passing a physical examination does not comply with a Board reinstatement order: e.g., *Craw & Son*, supra. The question is a close one since FSC does not routinely require that its employees take periodic physical examinations. Thus if Lemmond had not been unlawfully discharged and had remained at FSC without interruption, he would have come under no duty to take a physical examination.

But FSC did not tell Lemmond that his reemployment was conditioned on his passing a physical examination. In fact the job offer letter (of November 22) said nothing about a physical examination at all. Rather, the reference to a physical examination (in the December 7 letter) indicated that it would be given after Lemmond reported to work. And FSC nowhere stated that its employment of Lemmond was conditioned on his passing the physical. Finally, FSC requires physicals of all employees who return to work after any substantial period away from the job. Thus there was nothing discriminatory about the requirement of a physical examination nor did it suggest that FSC was treating Lemmond as a new employee: Compare *Woodlawn Hospital*, 233 NLRB 782 (1977). Under all these circumstances FSC's reference to a physical examination in its December 7 letter to Lemmond did not invalidate the job offer, assuming that FSC's job offer otherwise met the requirements imposed by the Board's reinstatement order.

FSC's employment offer, however, did not otherwise comply with the Board's order of reinstatement.

FSC's November 22 letter ("You are hereby offered full, immediate and unconditional reinstatement to your former, or a substantially equivalent, position.") was enough to require some sort of response from Lemmond. If Lemmond had said nothing, or had declined the offer, FSC's backpay obligation towards Lemmond would have thereby ended: e.g., *Knickerbocker Plastic Co.*, 132 NLRB 1209 (1961). But Lemmond did respond, indicating that he wanted to find out more about what FSC had in mind. FSC refused to provide the information that Lemmond sought. None of FSC's communications to Lemmond in November or December 1976 specified the job or even the shift that FSC planned for Lemmond. That put Lemmond in the position of having to decide whether to revamp the circumstances of his life (by giving up his existing employment and returning to work at FSC) without any information about crucial aspects of his prospective work at FSC. I appreciate that FSC felt that it would be less disruptive to its employees as a whole if FSC could delay selecting jobs for returning discriminatees until after FSC determined just who would be returning. But that does not excuse FSC's failure to meet its obligation to be specific in offering reinstatement: see *Powell Valley Electric Cooperative*, 236 NLRB 1040, 1043–44 (1978); *Pace Motor Lines*, 260 NLRB 1395 (1982).

I accordingly conclude that the backpay owed by FSC to Lemmond should be computed on the basis that FSC's first and only valid reinstatement offer was effective on December 19, 1977.[131]

Alfred Haynes. FSC fired Haynes in May 1973. At the time, Haynes was a Grade 9 forklift operator. He was being paid $3.35 per hour base pay plus a shift differential (Haynes was on a rotating shift) of 16 cents per hour.

On February 4, 1977, FSC sent a letter to Haynes that reads, in substantial part:

> You are hereby offered full, immediate and unconditional reinstatement to your former, or a substantially equivalent position with this Company, without prejudice to your seniority or other rights.
>
> If you desire reinstatement, contact the undersigned no later than Friday, February 18, 1977, for instructions as to when and to where to report for work.

Haynes responded with a visit to Rogers' office. Haynes credibly testified that:

> I told him [Rogers] that I came to listen to see what I was offered. . . . I told him I wanted to see what was offered and what I was going to be doing and what job I would have and what not and what I would be paid.[132]

Rogers responded by saying that the job that Haynes held at the time of his discharge had been discontinued and that FSC was not then in a position to tell Haynes what job he would be assigned to, what department he would be working in, or what shift he would be on. Rogers did tell Haynes that his rate of pay would be $3.35 per hour, the same base rate that Haynes had been receiving when he was fired in 1973.[133]

Haynes then mentioned that, due to family needs, he could work only during the day and argued that in view of his seniority with the Company he ought to be entitled to his choice of shifts. Rogers responded that the Company did not take seniority into account in assigning

[130] References in this section to backpay will relate exclusively to the period between unlawful discharge and the effective date of a valid reinstatement offer. It should be understood, however, that the amount of backpay owed by FSC to the six employees discussed in this section is affected by FSC's wrongful withholding of general wage increases, as discussed in parts I through VII of this decision.

[131] FSC initially placed returning discriminatees in entry level jobs (while paying them their old wage rates). Had Lemmond been aware of that practice that alone would have been enough to invalidate FSC's job offer. But there is no evidence that Lemmond (or any of the other employees referred to in this section) knew of that practice.

[132] Tr. 266.

[133] FSC had granted no general wage increases at its Charlotte facility between the time Haynes had been fired and February 1977.

employees to shifts and reiterated that he could not tell Haynes what shift Haynes would be assigned.

That ended Haynes' conversation with Rogers. On February 18, 1977, Haynes sent the following letter to Rogers:

> This is to inform you and the Florida Steel Corporation that I am not interested in returning to the employ of the Company due to the pay scale you offered me in our conference on February 15, 1977. The amount per hour is not what I was making when I left the Company and is not what I now make at my present job.
>
> Your offer at the conference does not meet with what I was making when I left the Company's employ in 1973 and therefore, this is not offering me full and unconditional reinstatement with the Company.[134]

As in Lemmond's case, the Company's first letter to Haynes (on February 4, 1977) was, on its face, a valid reinstatement offer. But also as in Lemmond's case, Haynes' questioning put the Company under an obligation to be more specific: Haynes was entitled to be told, at the very least, what job he was to be assigned to if he returned to work with the Company. Rogers' failure to provide that information brought to an end any requirement on Haynes' part that he further respond to the Company.

Haynes did respond, however, saying that he was not going to return to FSC because of his dissatisfaction with the wage FSC offered. And the letter says nothing about declining to work for FSC because of uncertainty about the nature of the prospective job. But the reasons Haynes gave for refusing to return to FSC are irrelevant. Due to Rogers' lack of specificity, at the end of the meeting between Haynes and Rogers no valid reinstatement offer was outstanding.[135] And a valid reinstatement offer must be outstanding in order for an employee's refusal of employment to toll the backpay period: e.g., *Craw & Son*, supra; *W. C. McQuaide, Inc.*, supra.

In sum, neither FSC's communications to Haynes in February 1977 nor Haynes' February 18 letter to FSC in which he rejected FSC's offer brought FSC's backpay obligations toward Haynes to an end.[136]

Charles D. Frazier. FSC fired Frazier on May 4, 1973. Using its usual language the Board ordered FSC to reinstate Frazier and to pay him backpay. All parties agree that in December 1977 FSC made a valid reinstatement offer to Frazier and that, accordingly, Frazier's backpay period ended no later than December 19, 1977. But as with Lemmond and Haynes, FSC contends that it made an earlier valid reinstatement offer to Frazier and that Frazier's backpay period thereby ended in December 1976.

On November 22, 1976, Rogers wrote a letter to Frazier that was identical to the letter he had sent to Lemmond on that same day. Rogers sent the letter by certified mail, return receipt requested, to Frazier's address at the time he was fired, as listed in the Company's personnel records. The Postal Service ultimately returned the letter to Rogers on December 8, with the indication that the Postal Service had tried to deliver it but that the letter had gone "unclaimed."[137]

FSC made no further attempt to contact Frazier.

As discussed earlier, the language used in the letter sent to Frazier represents a valid reinstatement offer. That being the case, if FSC's transmittal of the letter represented a reasonable, good-faith effort to contact Frazier, FSC's backpay obligations to Frazier ended on the last day he could have responded to the offer, December 3.[138] The question is whether FSC did make a reasonable, good-faith effort to contact Frazier. And that question is a close one.

On the one hand transmittal of a reinstatement offer by certified mail to an employee's last known address is an appropriate means of attempting to communicate without more satisfies the obligations placed on an employer by a Board order requiring reinstatement of an employee: see, e.g., *Knickerbocker Plastic Co.*, supra; *General Iron Corp.*, 218 NLRB 770 (1975).

But in view of the circumstances present here, my conclusion is that FSC did not satisfy its notification obligation by its one letter to Frazier. For one thing, the letter was returned to FSC by the Postal Service, so that FSC knew that Frazier had not received the notification. For another, FSC had discharged Frazier 3-1/2 years prior to its transmittal of the November 1976 letter to him, and the address used in that letter was taken from a file that had not been updated since Frazier had been discharged. Third, the plant's employees had a bargaining unit representative, the Steelworkers, and it would have been a simple and obvious thing for FSC to have enlisted the Steelworkers in attempting to locate Frazier. But FSC did not do that. Finally, the Steelworkers affirmatively sought information from FSC concerning the identity of the discharged employees who were receiving reinstatement offers. FSC refused to provide the information.[139]

That, it seems to me, adds up to something less than a good-faith effort by FSC to reach Frazier with a reinstatement offer. I accordingly conclude that FSC's backpay obligation towards Frazier was not tolled until December 19, 1977.

John Wells, Jr. On November 22, 1976, FSC sent a letter to Wells worded identically to the letters it sent on that date to Lemmond and Frazier.

According to Rogers, Wells telephoned Rogers on December 1, 1976, in response to the November 22 letter. The focus of the conversation was on Wells' prospective reporting date at FSC. Rogers testified that

---

[134] Rogers responded to Haynes' February 18 letter with a letter dated February 22. In that letter Rogers reconfirmed that Haynes' "base rate of pay" at the time of Haynes' discharge was $3.35.

[135] See *Powell Valley Electric Cooperative*, supra.

[136] All parties agree that FSC made a valid offer of reinstatement to Haynes in December 1978, which Haynes declined. Thus FSC's backpay obligations to Haynes ended on December 21, 1978.

[137] RX-7.

[138] *Southern Household Products Co.*, 203 NLRB 881 (1973). No one argues that FSC's demand in its November 22 letters that the addressees respond by December 3 was unreasonable.

[139] See *Florida Steel Corp.*, 242 NLRB 1333 (1979).

Wells did not ask for more details about the job to which FSC planned to assign him. But according to Rogers he did indicate to Wells that Wells "would not necessarily be going back to the same identical position which he was in" at the time he was fired, but that "he [Wells] would be making the same rate of pay as that which he was making at the time he left."

Wells did not testify.

Following Rogers' December 7 conversation with Wells, Rogers sent the following letter to Wells:

> This letter will confirm our telephone conversation of today, December 7, 1976, at which time we established your return to work date as Monday, December 13, 1976. You should report to my office at 8 a.m. at which time you will receive an appointment for your return to work physical as well as your job assignment.
>
> As we discussed previously, your rate of pay will be $3.17 per hour.[140]

Wells did not report to work on December 13, 1976, and there is nothing in the record about why he failed to report.

My recommendation is that the Board conclude that FSC's communications to Wells in 1976 constituted a valid reinstatement offer and that FSC's backpay obligations towards Wells were tolled on December 13, 1976, the date Wells failed to report for work.

As indicated earlier, the language that FSC used in its initial reinstatement letters—"You are hereby offered . . . reinstatement to your former, or a substantially equivalent, position"—while ambiguous, is sufficient to require some sort of response from the employee. But if the employee does respond, asking for further details about the job to which he will be assigned, a failure of the employer to provide that detail precludes the employer from claiming that the letter was a valid reinstatement offer. Here Wells did respond, and in the course of his conversation with Rogers, Rogers said that Wells would not "necessarily" be getting his old job back and said nothing about what job Wells would be getting. But Wells did not ask for any information about the kind of job that FSC had planned for him (at least insofar as the record indicates). And since Wells did not ask for more information about the nature of the work he would be given, my conclusion is that the initial validity of FSC's letter offering reinstatement stands unimpaired.[141]

James W. Ashcraft and Loren D. Theodore. On November 22, 1976, Rogers sent letters to Ashcraft and Theodore that were identical in wording to those he sent on that day to Lemmond, Wells, and Frazier.[142] The letters were sent by certified mail and, according to the Postal Service, both were received by the addressees a few days after they were sent. Ashcraft did not respond to the letter and, as far as the record indicates, never communicated thereafter with FSC. Theodore responded to Rogers' letter with a letter of his own declining the job offer.[143]

As discussed earlier, if Ashcraft and Theodore had responded to Rogers' letters with expressions of interest and if they had inquired further about the nature of jobs they were to be offered, Rogers almost surely would have failed to provide them with a reasonable amount of detail about their forthcoming job. Moreover, if they had nonetheless accepted the job offers, the record is clear that FSC would initially have placed them in entry level positions—in violation of the terms of the Board's order. But there is no indication whatever in the record that either Ashcraft or Theodore was aware that those circumstances would occur if he responded favorably to the November 22 letters. And since the November 22 letters contained a reinstatement offer that was "valid on its face," those letters ended the backpay obligation of FSC toward Ashcraft and Theodore: *Eastern Die Co.*, 142 NLRB 601, 603 (1963).

As for the precise date that FSC's backpay obligations toward Ashcraft and Theodore ended, Rogers' letter required the two employees to contact him no later than December 3, 1976. Since Ashcraft did not reply it is clear that FSC's backpay obligation tolled on December 3: *Eastern Die Co.*, supra; *Southern Household Products Co.*, supra. As for Theodore, if we knew the date on which he rejected FSC's November 22 order, that date would be the date of the tolling of FSC's backpay obligation. *Southern Household Products Co.*, supra. Since the record does not provide that information, FSC's backpay obligation toward Theodore will be deemed to have tolled on December 3, as in Ashcraft's case.

B. *Robert Early's Missed Promotions*

FSC fired Early in August 1973. The Board ordered FSC to reinstate Early, and FSC did return him to work at his previous wage rate in December 1976.

The General Counsel contends that, had Early not been fired, he would have been promoted in 1975 and then again in 1976. If the General Counsel's contentions are correct, the computation of the amount of backpay that FSC owes to Early should take into account those missed promotions: *Pepsi Cola Bottling Co.*, 187 NLRB 1017 (1971), enfd. 467 F.2d 164 (9th Cir. 1972), affd. 414 U.S. 168 (1973). FSC denies that Early would have been promoted.

The Period to November 1979. Early was a Grade 8 crane operator when FSC fired him.[144] At that time (in 1973), FSC operated three different kinds of cranes in the area of the Charlotte facility in which Early worked. Each of the cranes had different functions, controls, and capacity. Then in May 1975 FSC changed the manner in which it produced steel. That, in turn, required FSC to eliminate one kind of crane, add another, and make

[140] GC-12.

[141] As for the reference to a physical examination in Rogers' December 7 letter to Wells, see the above discussion about Rogers' letter to Lemmond.

[142] Copies of both letters are included in the record as RX-1 (Ashcraft) and RX-2 (Theodore).

[143] The only evidence on this point is Rogers' testimony. Neither Theodore nor Ashcraft testified. Theodore's letter was not placed into evidence.

[144] Early was employed at FSC's Charlotte facility. The grade levels referred to in this section of the decision refer to the 19-grade system used at Charlotte until April 1977 (see part VII, above).

changes in the operation of the remaining two. But, for present purposes, it is enough to know that, at the time FSC fired Early, there were two different kinds of Grade 8 crane operator jobs and one kind of Grade 11 crane operator job. That was altered in May 1975 so that from then until November 1979 there was a Grade 9 crane operator position as well as two different kinds of Grade 8 crane operator jobs and one kind of Grade 11 crane operator job.

There is no dispute that in the normal course of things (after May 1975) FSC filled Grade 11 crane operator openings from among the Grade 9 crane operators, and filled Grade 9 crane operator openings from among the Grade 8 crane operators. As for how FSC selected a Grade 8 or Grade 9 crane operator for promotion, it is clear that the Company considered both ability and seniority. But the record says nothing about what factors FSC took into account in evaluating the relative ability of competing crane operators.

Early's Performance. As of August 1973 (when Early was fired), Early was the most senior of all the Grade 8 crane operators. From time to time he had performed Grade 11 crane operator duties and had done so satisfactorily. Since 1970 Early had been graded "better than satisfactory" on all of his periodic performance reports. (The record contains no information on his previous performance evaluations.)

The Other Crane Operators. FSC employed six Grade 8 crane operators (in addition to Early) at the time the Company fired Early.[145] Another employee became a Grade 8 crane operator about a month after Early's discharge.[146] And still another employee became a Grade 8 crane operator about a year after Early was fired.[147] Of those eight, six were promoted to the Grade 9 crane operator job prior to the time that Early was reinstated.[148] And of those six, three became Grade 11 crane operators.[149]

The record contains information on the performance evaluations of four of those eight other crane operators—three who became Grade 11 operators and one who never made it beyond Grade 9. While the record is less than complete on point, the available information shows that Early's performance evaluations were at least as good as those given to the other crane operators, and probably better.

In terms of relative experience, as indicated above Early had more time on the job as a Grade 8 crane operator at the time he was fired than any of the other FSC Grade 8 operators. On the other hand two of the other operators came to FSC as Grade 11 operators. While both lost their Grade 11 status for considerable periods of time (for reasons not stated in the record) it was they (plus one other employee) who became Grade 11 crane operators during the period that Early was away from FSC.[150]

The Period to November 1979—Conclusion. The General Counsel has the burden of showing that Early would have been promoted but for his unlawful discharge by FSC.[151] Since FSC presented virtually no evidence on point, the question is whether the General Counsel has made out a prima facie case. My conclusion is that for the period prior to November 1979 the General Counsel did so for the Grade 9 crane operator job, but did not do so for the Grade 11 position.

Turning to the Grade 9 job first, as indicated earlier, of the six emloyees who were, with Early, Grade 8 crane operators at the time of Early's discharge, four were promoted to the Grade 9 position. And of the two employees who became Grade 8 operators after Early's discharge, both became Grade 9 crane operators. Given those statistics, the reasonable inference is that any employee who was a Grade 8 crane operator at the time of Early's discharge would have become a Grade 9 operator unless there was some specific reason precluding the promotion. Nothing about Early's career at the time he was discharged suggests any such factor that would have prevented his promotion. That, in my view, adds up to a prima facie case: see *S. E. Nichols of Ohio, Inc.*, 258 NLRB 1, 9-10 (1981); *Golay & Co. v. NLRB*, 447 F.2d 290 (7th Cir. 1971).

The situation is quite different for the General Counsel's contention that Early would have been promoted to Grade 11 crane operator during the period he was away from FSC. Of the six employees who held Grade 8 crane operator positions at the time Early was fired, three eventually became Grade 11 operators. But, as noted above, of those three, two had originally been hired as Grade 11 crane operators. Their promotion to Grade 11 crane operator indicates nothing about whether Early would have been promoted to that position. A fairer way of looking at the question is that at the time Early was fired, there were four Grade 8 crane operators who had not previously held the position of Grade 11 operators. Of those four, only one was ever promoted to the Grade 11 position.[152]

Given the fact that seniority was only one consideration used by FSC in selecting employees for promotion, given the absence of information in the record about the factors FSC used in selecting Grade 11 crane operators, and in view of the foregoing statistics, my conclusion is that the General Counsel failed to present a prima facie case that, but for Early's unlawful discharge, FSC would have promoted Early to Grade 11 crane operator at any time prior to November 1979.

[145] The six: Brewer, Hauser, Johnson, Jones, Marshall, and McIlwain.
[146] Employee Nilsson.
[147] Employee Anderson.
[148] The promoted employees: Anderson, Brewer, Hauser, Johnson, McIlwain, and Nilsson.
[149] Johnson (in April 1976); McIlwain (in August 1976); and Nilsson (in June 1976).

[150] The two employees: Johnson (hired in August 1968 as a Grade 11 crane operator and became Grade 8 crane operator in 1970), and McIlwain (hired as a Grade 11 crane operator in October 1969 and became a Grade 8 crane operator in 1972).
[151] The parties have agreed that the General Counsel has the burden of proof on this issue. See also *Decker Truck Lines*, 139 NLRB 65 (1962), modified on other grounds 322 F.2d 238 (8th Cir. 1963).
[152] Employee Nilsson. He became a Grade 11 crane operator in June 1976. He was terminated as an FSC employee (for reasons not set forth in the record) in August 1976.

The Period November 1979 to January 1980. On November 4, 1979, FSC reclassified the Grade 9 crane operator job so that employees holding the position were thereafter paid at the Grade 11 rate.[153] Absent evidence to the contrary, I can only assume that, had Early not been unlawfully discharged, and had he been a Grade 9 crane operator at the time of the 1979 reclassification (as discussed above), he would have been promoted to Grade 11 in keeping with the reclassification.

FSC did in fact promote Early to Grade 11 crane operator on January 27, 1980 (directly from Grade 8). That ended FSC's backpay obligation toward Early.[154]

The Dates on Which Early Would Have Been Promoted. As touched on earlier, the record indicates that six FSC employees who were Grade 8 operators at the time Early was fired, and two FSC employees who became Grade 8 operators after Early was fired, became Grade 9 crane operators prior to Early's reinstatement. The record contains information about the dates of the promotions of those employees only for four of the employees. Of those four, three became Grade 9 crane operators in early May 1975, when the Grade 9 position was first created.[155] And the fourth was promoted to the Grade 9 position in June 1976. In the absence of further information, the most reasonable inference to draw—having concluded that Early would have been promoted to the Grade 9 position at some point in time, is that Early would have been promoted at the beginning of May 1975, when the Grade 9 position came into being. In view of the lack of information about the precise date when such promotion would likely have occurred, and in view of the specification's reference to a May 17, 1975 date, I shall recommend that the Board conclude that the backpay amounts owing Early be based on a May 17, 1975 hypothetical promotion date, as stated in the General Counsel's specifications.

As for the date on which Early would have been promoted to Grade 11, as stated above that would have occurred on November 4, 1979.

C. *Are "Bending Coordinators" Members of the Bargaining Unit*

FSC's Charlotte facility is made up of two divisions. The "mill" (where steel is produced) and the "rebar foundry." (Rebars are steel bars used for reinforcing concrete.) The pertinent part of the Board's description of the Charlotte bargaining unit reads as follows: "All production and maintenance employees . . . employed at the Employer's [Charlotte] N.C. steel mill and fabricating division, excluding . . . fabricating shop leadmen . . . and supervisors as defined in the Act."

At issue here is whether persons occupying the position of "bending coordinator" in the rebar foundry division are members of that unit. If they are, persons who occupied the bending coordinator position at any time since February 1974 are entitled to backpay (because of FSC's unlawful change in wage policies). Bending coordinators are not members of the unit (and not entitled to backpay) if they are supervisors within the meaning of Section 2(11) of the Act if they are "fabricating shop leadmen," within the meaning of the Board's unit description. They are members of the bargaining unit if they do not fit within either of those categories.[156]

Administrative Law Judge Harmatz, who conducted the prehearing conference in this proceeding, ruled, without objection, that the General Counsel had the burden of proving that persons occupying bending coordinator positions are members of the bargaining unit.[157] The question to be resolved in this section of this decision is whether the General Counsel has met that burden.

Bending Coordinators as "Fabricating Shop Leadmen." Insofar as the record here indicates, there is no entity at the Charlotte facility known as the "fabricating shop." There is, however, a "rebar shop" that handles the "fabrication" of the rebars.[158] That fabrication, in turn, "consists of shearing [the rebars] to certain lengths and then some of it has to be bent in different shapes and designs."[159] As that quotation suggests, there is a "bending department" in the rebar shop. Until about 1973 or early 1974 the senior worker on each of the shifts in the bending department (under the rebar shop foreman) was known as the "bending crew chief." (The bending crew chief was in fact senior to everyone in the entire rebar shop, other than the foreman.) He assigned work to the 10 or so other bending department workers on his shift; guided and directed them (including instructing inexperienced employees); checked on their output; coordinated "work flow through [the] bending operations";[160] made hiring and firing recommendations to his superiors; kept production records; and did some setup work.

Under these circumstances there is no doubt that the bending crew chiefs were the "leadmen" in the rebar shop's bending division. And since the reference in the unit designation to "fabricating shop" must be construed to mean, or at least include, the rebar shop, the bending crew chiefs were excluded from the unit by virtue of the unit designation.

The "bending crew chief" title was subsequently changed to "bending coordinator." (Actually the title was changed on some categories of company documents

[153] The November 4 date is based on a posthearing stipulation that I am including in the record as Exh. ALJ-4. The upgrading of the Grade 9 crane operator job is also referred to at Tr. 334 and 341 (witness Moore). The Charlotte wage structure had shifted in 1977 to a 10-grade system from a 19-grade structure, so that that actual reclassification of the crane operator job was from Grade 4 to Grade 5. For the sake of clarity, the discussion in this section refers to jobs in their pre-1977 designations, even for the 1979–1980 period.

[154] That reference to the end of FSC's backpay obligation toward Early does not take into account the backpay that FSC owes to Early based on FSC's unlawful change in wage policies.

[155] Johnson and Nilsson became Grade 9 crane operators on May 4, 1975; Anderson became a Grade 9 crane operator on May 11, 1975.

[156] Three persons occupied the position of bending coordinator during periods in which bargaining unit employees at the Charlotte plant became entitled to backpay by reason of FSC's wrongful withholding of pay increases: J. A. Tabor (from October 26, 1973, to February 9, 1975); W. T. Newell (from April 7, 1974, to February 9, 1975); and C. R. Chastain (from January 1, 1975, to February 9, 1975, and from May 11, 1975, to November 1979).

[157] Transcript of January 15, 1981 prehearing conference at 18–19.

[158] Tr. 608 (witness Hunt).

[159] Id.

[160] GCX-31.

by early 1973, which was prior to the issuance of the Board's bargaining unit description.) But that title change was the only change in the position. Everything else about it—duties, responsibilities, pay, and the persons holding the job—remained the same.[161] Since bending coordinators filled precisely the same role as bending crew chiefs, and since bending crew chiefs were excluded from the bargaining unit by virtue of the Board's exclusion of "fabricating shop leadmen," I can only conclude that the bending coordinators have never been part of the unit and are not entitled to backpay.

Bending Coordinators as Supervisors. Section 2(11) of the Act defines the term "supervisor" as—

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As touched on above, bending coordinators do "assign" employees to particular tasks. But the record is too sketchy to permit any determination of whether that function "requires the use of independent judgment." And bending coordinators recommend the hiring and discharging of employees. But again, the record is insufficient to permit a determination of whether such recommendations are "effective" and are based on independent judgment. As for the various secondary indicia of supervisory status, by and large they cut both ways.[162]

Given the state of the record, it might well be that further information that is wholly consistent with the existing evidence on point would make it clear that bending coordinators are "employees": see, e.g., *Bodolay Packaging Machinery*, 263 NLRB 320 (1982); *Vapor Corp.*, 242 NLRB 776, 787 (1979); *Commercial Movers*, 240 NLRB 288 (1979). But it equally might be that further information (again, wholly consistent with existing evidence) would prove that bending coordinators are "supervisors": see *NLRB v. Porta Systems*, 625 F.2d 399 (2d Cir. 1980); *Abilene Steel Metal v. NLRB*, 619 F.2d 332 (5th Cir. 1980); *Conair Corp.*, 261 NLRB 1189, 1203–04 fn. 9 (1982). And what all that adds up to is that the General Counsel has not met his burden of proving that the bending coordinators are employees, not supervisors.

D. *Medical Insurance Premiums*

On May 5, 1974, FSC implemented in its employee group medical insurance plan and, at the same time, increased the insurance contributions ("premiums") paid by participating employees. FSC made the changes at all of its plants except Charlotte. Since FSC excluded the Charlotte plant from the changes because of an antiunion discriminatory intent, the Board ordered the Company to retroactively grant the medical insurance benefits to the employees in the Charlotte bargaining unit.

Some of the Charlotte employees did incur medical expenses during the post-May 1974 period which were not covered by the medical insurance plan then in effect in Charlotte but which would have been covered had the May 1974 changes been implemented at Charlotte. (I will refer to these previously nonreimbursable expenses as "additional medical claims.") FSC has reimbursed the employees for their additional medical claims.

The Parties' Positions. The General Counsel's concern is that FSC has required all persons who were in the Charlotte bargaining unit during the period at issue to pay to FSC amounts equal to the higher premiums they would have had to have paid if FSC had in fact implemented the medical plan changes in May 1974. (I will use the term "additional premiums" to refer to the difference between: (a) the total amount of premiums an employee would have to have paid had the new plan been implemented, and (b) the premiums actually paid by an employee during that period.)[163] According to the General Counsel, FSC is entitled to the additional premiums only in limited respects. To more fully describe the General Counsel's position, it is best to divide the employees into three categories.

Category 1: Employees whose additional medical claims exceeded their additional premiums. The General Counsel agrees that FSC is entitled to collect the additional premiums from these employees.

Category 2: Employees who had additional medical claims but whose additional premiums exceeded the amount of their additional claims. The General Counsel's position is that FSC is entitled to the additional premiums from this category of employees only up to the amount of each of the employee's additional claims. FSC insists it is entitled to the full amount of additional premiums.

Category 3: Employees who had no additional medical claims. The General Counsel urges that FSC be precluded from collecting any additional premiums from this category of employees. FSC, again, claims that it is entitled to the full amount of additional premiums from such employees.

Medical Insurance premiums—Conclusion. The lines are drawn most clearly in respect to Category 3 employees—those who had no additional medical claims. My conclusion is that FSC is not entitled to recover the additional premiums from such employees. One basis for

[161] Chastain and Newell were the bending crew chiefs at the time of the change, and they remained on as bending coordinators.

[162] For example: on the one hand (1) bending coordinators are paid on an hourly basis and receive the fringe benefits of hourly employees, while all persons other than bending coordinators claimed by FSC to be supervisors are salaried and receive different kinds of fringe benefits; (2) during the Steelworkers' organizing efforts the bending coordinators did not attend management meetings on union matters, and at least one bending coordinator became a member of an antiunion "employee" committee; and (3) bending coordinators wore red hardhats, not the white ones worn by all other persons FSC claims to be supervisors. On the other hand: (1) everyone (except the bending coordinators) who the General Counsel claims to have been "employees" wore yellow hardhats (i.e., bending coordinators were the only personnel in the Charlotte facility to wear red hardhats); and (2) the bending coordinators park their cars in the area of the plant reserved for supervisors.

[163] In October 1976 FSC again modified the medical insurance plan, at all locations except Charlotte, by eliminating the employees' group insurance premiums. Thus the period under consideration here is limited to May 1974 to October 1976.

that conclusion is precedent: *Rice Lake Creamery Co.*, 151 NLRB 1113, 1129–31 (1965), enf. denied 365 F.2d 888 (D.C. Cir. 1966). But beyond that, the only bases for charging the employees for the additional premiums are that: (1) the employees would be unjustly enriched by having "had the benefit of the increased coverage without the corresponding detriment of higher premiums";[164] and (2) only by that approach would the employees be in the same position they would have been in absent FSC's discrimination.

The problem with those arguments is that neither takes into account that insurance, by its nature, is forward looking and involves protection against possible future loss. Had FSC implemented the insurance changes at Charlotte in 1974, each premium payment by an employee would have bought something: "security against anticipated loss."[165] But for those employees with no additional medical claims for the period May 1974-October 1976, payment of the additional premiums at this juncture buys nothing. For those employees: (1) Requiring them to pay the additional premiums does not put them in the same position that they would have been in but for FSC's discrimination. There is simply no way to retroactively give them the additional security they would have had if FSC had implemented the medical plan nondiscriminatorily. (2) It is hardly unjustly enriching the employees to refrain from requiring them to make the additional premium payments. Rather, requiring them to do so would be requiring them to pay something for nothing.

I recognize that requiring the extra premiums would ease FSC's burden and would put *FSC* more closely in the position it would have been in but for the discrimination. But the object of a Board order in an 8(a)(3) case is to make the discriminated-against parties whole, as nearly as possible. That rarely means restoring things to exactly how they would have been but for the discrimination. And sometimes the order to make whole will be costly to the respondent. While that ought not to be the object of a Board backpay order,[166] individual employees ought not to be asked to pay for benefits they did not buy simply in order to reduce that costliness.

That leaves for consideration the Category 2 employees—those whose additional medical claims are less than their additional premiums. In *Rice Lake*, three employees incurred additional medical expenses during the period of their unjust discharge by their employer. The additional medical claims of two of the three totaled less than the premiums they would have paid had they remained employed. As to those two employees (Category 2 in the above listing), the Board held that: (1) they should pay *no* additional premiums; and (2) they should receive *no* compensation for their additional medical claims: 151 NLRB at 1130. While the bases for the Board's decision on this point are not spelled out in detail, the logic is clear. For an employee to be entitled to reimbursement for any additional medical claims, he ought to be treated as though he chose the revised medical coverage, including all the additional premiums that went with it. Since no one would choose such retroactive coverage if it resulted in a net loss, the only answer is to disallow both the employees' claims for reimbursement of their additional medical claims and the employer's demand for reimbursement for the additional premiums.

Under the circumstances I conclude that: (1) FSC may not recover any additional premiums from employees who had no additional medical claims; (2) FSC may not recover any additional premiums from those employees who did have additional medical claims if the amount of those claims was less than their additional premiums; and (3) FSC is not required to pay the additional medical claims of any employees whose additional premiums exceeded their additional medical claims, and FSC may take as an offset against any remaining backpay due such employees the amounts already paid such employees as reimbursement for such additional medical claims.

E. *Vacation Benefits*

On January 1, 1974, FSC changed its vacation policy in the following ways, at all locations other than Charlotte. No changes in vacation policy were implemented at the Charlotte facility.

(1) Employees who had been with FSC for at least 10 years became eligible for 3 weeks of vacation. Previously employees had to have 12 years' service to be eligible for 3 weeks' vacation.

(2) Employees who had been with the Company for 20 years became eligible for 4 weeks' vacation.

(3) Employees with less than 1 year's service no longer were entitled to a vacation. Previously they were.

In sum, the changed vacation policy benefited employees with 10 or 11 years' service and those with more than 20 years' service. It adversely affected employees with less than 1 year's service.

The Board concluded that FSC had excluded the Charlotte employees from the "improved vacation policy"[167] for antiunion reasons. FSC accordingly was ordered to grant to the Charlotte employees the vacation benefits that FSC had granted elsewhere, retroactive to January 1, 1974. FSC has agreed to make the ordered vacation benefit payments to employees. But FSC contends that it is entitled to be reimbursed by those Charlotte employees who, subsequent to January 1, 1974, received vacation benefits when they had less than 1 year's service.

FSC's contention is erroneous. The adverse changes that FSC made in the first year employees' vacation rights are readily separable from the improvements in the vacation rights that FSC granted to its long-service employees. And the Board ordered only that FSC grant the withheld fringe "benefits" to the Charlotte employees. The Order says nothing about FSC having to implement at Charlotte the reductions in new employees' vacation rights that FSC made elsewhere. The language used in the Order was not inadvertent: see, e.g., *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 308 (7th Cir. 1981). Since the Order does not require, either expressly or im-

[164] FSC Br. 107.

[165] *Metropolitan Police Retiring Assoc. v. Tobriner*, 306 F.2d 775 (D.C. Cir. 1962).

[166] E.g., *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10, 12 (1940).

[167] 220 NLRB at 264.

plicitly, that FSC implement any 1974 vacation policy changes that adversely affected the Charlotte employees, FSC is not entitled to be compensated by any employee based on a retroactive implementation of those adverse changes.

F. *Cutoff Date of the Backpay Period for Clerical Employees*

In the period 1977–1978 there were about 150 employees in the Charlotte bargaining unit. All but 4 of those 150 were paid on an hourly basis. The other four—"clerks" and "recorders"—were salaried. (I will refer to those four as "bargaining unit clericals.")[168] Until the arrival of the Steelworkers at Charlotte, FSC kept the salaries of the bargaining unit clericals equivalent to its clerical employees of the same grade who were not in the bargaining unit. But as in the case of the hourly employees, after the arrival of the Steelworkers FSC stopped granting periodic increases to the bargaining unit clericals even though FSC continued to grant such increases to employees who were not in the bargaining unit. The Board concluded that FSC had thereby violated the Act.

The only backpay issue involving the bargaining unit clericals relates to the cutoff date from backpay liability. According to FSC's answer to the General Counsel's backpay specification: "the backpay period for [bargaining unit clericals] ended November 20, 1977 when the Company offered in negotiations with the Union to implement on November 20" the salary increases implemented on that day for clericals not in the bargaining unit.

The facts are that in early December 1977, in the course of a meeting with union representatives, FSC representatives proposed salary increases for the bargaining unit clericals that were identical to the increases that the nonbargaining unit clericals had started getting on November 20, 1977. The union representatives neither accepted the proposal nor objected to it, and the meeting moved on to other subjects. The matter of clerical salaries was not raised again in FSC-union meetings until September 1978. (At that time union officials, upset at learning that the bargaining unit clericals had missed the pay increase that FSC had earlier proposed, quickly agreed to an increase for the clericals. FSC implemented the increase a few days later.)

At no time has the Union ever told FSC that it did not want FSC to implement a proposed pay increase for the clericals. Nor has there been any agreement between the Company and the Union regarding the appropriate pay scale for the bargaining unit clericals.

As discussed in section I,B, above, the import of the various underlying Board orders in this proceeding is (among other things) that FSC had been under an obligation to pay to the Charlotte bargaining unit employees increases that, under all the relevant circumstances, are analogous in timing and amount to those received by other FSC employees. The only limitation on that obligation is that such increases are not to be put into effect if "the Union as bargaining agent objects."[169] The Union did not "object" to implementation of the 1977 increase for the clericals. It certainly did not do so expressly. And even if silence by the Steelworkers could under some circumstances be interpreted as an objection, that was not the case with regard to the 1977 increase: The Company raised the matter only once (prior to September 1978). And it did so in the course of a meeting that dealt with numerous matters of far greater importance—in dollars-and-cents terms—than small raises for four employees. The only implication that FSC could reasonably have drawn in those circumstances from the Steelworkers' silence was that the Union overlooked the subject, not that it opposed the increase.

The cutoff date of the backpay period for the bargaining unit clericals accordingly is the same as for the other bargaining unit emloyees (see part I,C, above).

G. *Merit Pay*

At all material times FSC employees have been periodically evaluated—generally every 6 months—by their supervisors in "performance reviews."[170] Until January 14, 1973, the grades received by FSC's Charlotte employees as a result of these performance reviews affected their pay: Employees who received grades above "satisfactory" (or its equivalent) were paid more than employees graded satisfactory or worse. The differential was known as "merit pay."

Complications arose if an employee who had been receiving merit pay subsequently received a grade of satisfactory or worse. FSC did not reduce employee's pay. Rather, it "red-circled" the employee. When a general wage increase was thereafter implemented, the red-circled employee received the greater of: (a) 50 percent of the increase; or (b) the amount that would put him on a par with other employees of his grade with satisfactory or worse performance evaluations. Of course, once the employee's pay was at the proper, nonmerit, level, he was no longer red-circled.

In January 1973 FSC ended the merit pay system at Charlotte. Thereafter employees who were being paid at the regular, nonmerit, level in January 1973 received no merit pay notwithstanding evaluations of better than satisfactory. And employees who in January 1973 were receiving merit pay kept getting the differential even if their performance review grades fell to satisfactory or worse. The Board held that FSC's post-January 1973 failure to grant merit pay to employees who had qualified for the additional pay violated the Act. It accordingly ordered FSC to make such employees whole "by paying each of them a sum of money equal to that which he would have earned . . . if Respondent had not withheld his merit increase."[171]

---

[168] The Company refers to all nonsupervisory, salaried, clerical, and "technical" employees as "salaried non-exempt" employees. ("Non-exempt" refers to the applicability to them of the Fair Labor Standards Act. "Non-exempt" thus distinguishes them from management personnel, who are also salaried, but who are "exempt.") The pleadings and the evidence in this proceeding track company usage.

[169] 226 NLRB at 124

[170] See, in this connection, the discussion above of Robert Early and other FSC crane operators.

[171] 220 NLRB at 268. The Steelworkers and FSC agreed to the termination of the merit pay system as of April 24, 1977. (See part VII, above.) Thus FSC has incurred no backpay liability for its failure to pay merit pay subsequent to that date.

Only two issues regarding merit pay are outstanding. First, would the wage controls imposed by Phase III of the Economic Stabilization Act have caused FSC to refrain from granting merit pay increases during the period that it was in effect. And second, some of the employees who became entitled to merit pay after January 1973 subsequently received evaluations of satisfactory or worse. They accordingly would have been red-circled had FSC actually had its merit pay system then in effect. Should the backpay owed to those employees reflect those below-merit evaluations.

The Impact of the Economic Stabilization Act. This issue has already been litigated and decided. Administrative Law Judge Wilson heard evidence on this precise subject. He found that: "Originally in 1973 at Charlotte this merit plan was interrupted by the wage guidelines established by the Cost of Living Council, out that interruption was removed on August 13, 1973."[172] That finding is conclusive. Employees who became entitled to merit pay in the period January through August 1973 would not have started receiving merit pay until August 13, 1973. FSC's backpay obligations should reflect that circumstance.

The Impact of FSC's Red-circled Procedures. It is evident that had FSC continued its pre-1973 merit pay practices at Charlotte, employees there whose performances deteriorated to below-merit levels thereby would have ceased qualifying for merit pay. Their subsequent pay increases would accordingly have been affected by FSC's red-circle procedures. All that is as FSC contends. The only matter of concern is the nature of the evidence submitted by FSC purporting to show which employees would have been red-circled.

At various times in the period at issue employees were graded on a letter or integer basis. The record is clear that for employees graded on that basis, "4" or "5" or "A" or "B" meant above satisfactory and qualified the employees for merit pay. "C," "D," or "E," or "1," "2," or "3," meant satisfactory or worse.[173] Thus C or 3 (or worse) was not high enough for merit pay.

But during the period 1973 through 1975 employees sometimes received noninteger numerical grades (like 2.8 or 3.4).[174] During the 1973–1975 period in which those noninteger numerical grades were given, no employee went on to merit pay or came off it (because of FSC's wrongful cessation of the merit system). Accordingly the question is this: Had FSC been on the merit pay system in 1973–1975, how would FSC have dealt, in terms of merit pay, with noninteger grades—grades that were never in fact considered for merit pay purposes. One possibility is that FSC would have granted merit pay to any employee who received a grade at all better than 3.0 ("satisfactory"). Under that assumption a 3.1 grade would entitle employees to merit pay. Another possibility is that FSC would have insisted that employees receive at least a 4.0 ("above satisfactory") grade. Under that approach an employee receiving merit pay would be red-circled if he received an evaluation of 3.9 or lower.

FSC proposed a middle ground. Its answer to the specifications assumes that had merit pay been effect in the 1973–1975 period, employees receiving merit pay would have continued to do so if they were graded 3.5 or higher. Such employees would have been red-circled, under this assumption, with grades of 3.4 or lower.[175]

FSC's approach is a reasonable and fair one. (Indeed, the General Counsel seems to interpolate the grades the same way FSC does, referring to a "34" (i.e., 3.4) as "satisfactory" and "36" as "above satisfactory.")[176] I accordingly conclude that the backpay due FSC employees because of FSC's unlawful cessation of its merit pay plan should reflect FSC's red-circle procedures as applied to the evaluations set forth in Respondent's Exhibit 21.[177]

IX. CONCLUSION

Interest Rate. All of the Board orders underlying this backpay proceeding provide that FSC shall pay interest on the backpay amounts at 6 percent per annum. The 6-percent figure was in keeping with the Board's invariable practice at the time. In August 1977 the Board changed its approach to determining the interest rate to be imposed on respondents.[178] And since then the interest rate levied on backpay has been considerably higher than 6 percent.

The Steelworkers argues that the new higher rates ought to be applied to the backpay FSC owes to interest rates "is not applicable in cases in which an earlier order of the Board providing for a different interest rate has been enforced by a court of appeals." *S. E. Nichols of Ohio, Inc.*, 258 NLRB 1, 1–2 (1981). Accord: *Iron Workers Local 378 (Judson Steel Corp.)*, 262 NLRB 421 (1982). Since all the underlying orders in this proceeding were enforced by courts of appeals (see fn. 1, above), I am required to leave the 6-percent figure intact.

Computation of Backpay. FSC's Charlotte and Indiantown plants have each employed well over 100 bargaining unit personnel throughout the backpay period. And all such employees are owed backpay. Moreover, the backpay period is a lengthy one. Because of that, because there are no issues outstanding on matters such as interim earnings or numbers of hours each of the various employees worked, and because the parties are in a better position than is the Board to do the arithmetic computation necessary to arrive at backpay amounts, the parties stipulated that "computation of individual employee backpay amounts owing will not be sought from the Administrative Law Judge or any reviewing authorities."[179] In view of that stipulation, the accompanying

[172] 220 NLRB at 265.

[173] See Tr. 52–53 (witness Rogers) and GCX–7.

[174] The grades were sometimes listed as a total of 10 separate grades for individual aspects of the employee's performance. Thus an employee's grade might be "28" or "34." But for all intents and purposes those would be equivalent to 2.8 or 3.4. See GCX–7 and Tr. 358.

[175] FSC witness Rogers was frank to say that the 3.5 cutoff that the Company is arguing for is solely one of "judgment": Tr. 358.

[176] G.C. Br. at 41.

[177] The General Counsel raised several arguments not specifically dealt with above in opposition to FSC's red-circle contentions. I considered those arguments, but found none to be persuasive.

[178] The case happened to involve FSC: 231 NLRB 651.

[179] I am including the stipulation in the record as ALJ–5.

Order will simply require FSC to pay the employees named in the backpay specifications amounts reflecting the conclusions of this decision.

ORDER

The Respondent Florida Steel Corporation, Charlotte, North Carolina, and Indiantown, Florida, its officers, agents, successors, and assigns, shall, within 30 days of the date of this Order, make whole the employees named in the backpay specifications in this proceeding by paying to those employees amounts reflecting the various conclusions set forth in the foregoing decision.

APPENDIX D

Reconstructed Wage Rates, FSC's Charlotte Plant, as of February 28, 1976[1]

Grade	*Wage Rate in February 1973*[2]	*Percent of AHE in February 1973*[3]	*Reconstructed Wage Rate as of February 28, 1976*[4]
1 RF & Mill	$2.60	81.25%	$3.38
2 RF	2.75	85.94	3.58
3 RF	2.80	87.50	3.64
4 RF	2.85	89.06	3.70
5 RF	2.90	90.63	3.77
3 & 4 Mill	2.94	91.88	3.82
5 Mill & 6 RF & Mill	3.00	93.75	3.90
7 RF & Mill	3.17	99.06	4.12
8 RF & Mill	3.33	104.1	4.33
9 RF & Mill	3.50	109.4	4.55
10 RF & Mill	3.64	113.8	4.73
11 RF & Mill	3.83	119.7	4.98
12 Mill	4.05	126.6	5.27
13 Mill	4.27	133.4	5.55
14 Mill	4.49	140.3	5.84
15 Mill	4.71	147.2	6.12
17 Mill	5.16	161.3	6.71

[1] February 28, 1976, is one of the dates on which FSC would have granted a wage increase to its hourly Charlotte employees but for the Company's unlawful change in wage policy.

[2] The last wage increase that FSC granted at Charlotte before its change in wage policy was in February 1973.

[3] Based on AHE of $3.20 (Charlotte SMSA primary metals average AHE for the 12 months ended February 1973).

[4] Based on AHE of $4.16 (Charlotte SMSA primary metals average AHE for the 12 months ended February 1976).

APPENDIX E

Reconstructed Wage Rates, FSC's Indiantown Plant, as of December 25, 1976[1]

Grade	*Wage Rate as of Dec. 1973*[2]	*Percent of AHE as of Dec. 1973*[3]	*Reconstructed Wage as of Dec. 25, 1976*[4]
1	$3.50	101.4	$4.42
2	3.80	110.1	4.80
3	4.00	115.9	5.05
4	4.30	124.6	5.43
5	4.70	136.2	5.94
6	5.15	149.3	6.51
7	5.75	166.7	7.27
9	6.15	178.3	7.77

[1] December 25, 1976, is one of the dates on which FSC would have granted a wage increase to its hourly Indiantown employees but for the Company's unlawful change in wage policy.

[2] The last wage increase that FSC granted before its change in wage policy was in April 1974. That increase was made retroactive to December 1973.

[3] Based on AHE of $3.45 (Florida Statewide all manufacturing average AHE for the 12 months ended December 1973).

[4] Based on AHE of $4.36 (Florida Statewide all manufacturing average AHE for the 12 months ended December 1976).

APPENDIX F

Presumed Dates of Reconstructed Wage Increases[1]

Charlotte

Feb. 3, 1974	May 29, 1976
Nov. 30, 1974	Aug. 28, 1976
Feb. 22, 1975	Nov. 27, 1976
May 24, 1975	Feb. 26, 1977
Aug. 30, 1975	Feb. 26, 1978
Nov. 29, 1975	Feb. 25, 1979
Feb. 28, 1976	Feb. 24, 1980

1981, 1982, and subsequent years, if any: last Sunday in February.

Indiantown

Sept. 28, 1974	June 26, 1976
Dec. 21, 1974	Sept. 25, 1976
Mar. 29, 1975	Dec. 25, 1976
June 28, 1975	Dec. 25, 1977
Sept. 27, 1975	Dec. 31, 1978
Dec. 20, 1975	Dec. 23, 1979
Mar. 27, 1976	Dec. 28, 1980

1981, 1982, and subsequent years, if any: last Sunday in December.

[1] Source: GCX-97 and 100.

APPENDIX G

Table 1

	Methodology Adopted by this Decision	*General Counsel's Model*	*FSC's Regression Model*
1980 Charlotte Grade 11 Reconstructed Wage	$6.70	$7.31	$6.27
1980 Indiantown Grade 5 Reconstructed Wage	8.14	8.64	7.40

Table 2

Separate Regressions of FSCWages on AHE for Each CharlotteLabor Grade

Labor Grade	*Slope*
1	0.877
2	1.033
3	1.110
4	1.094
5	1.956
6	0.965
7	1.064
8	1.055
9	1.052
10	1.141
11	1.328
12	1.329
13	1.363
14	1.440
15	1.523
16	1.625

Table 2—Continued

Separate Regressions of FSCWages on AHE for Each CharlotteLabor Grade

Labor Grade	*Slope*
17	1.722
18	1.823

Table 3

Base Period Wages at FSC's Charlotte Plant

	May 1969	*May 1970*	*May 1971*	*Jan. 1972*	*Feb. 1973*
1. RF & Mill	$2.01	$2.14	$2.24	$2.35	$2.60
2. RF	2.07	2.20	2.30	2.46	2.75
3. RF	2.07	2.23	2.35	2.51	2.80
4. RF	2.13	2.30	2.42	2.58	2.85
5. RF	2.21	2.37	2.50	2.66	2.90
3. Mill	2.30	2.43	2.53	2.67	2.94
4. Mill	2.30	2.43	2.53	2.67	2.94
5. Mill	2.30	2.45	2.55	2.72	3.00
6. RF & Mill	2.31	2.47	2.59	2.75	3.00
7. RF & Mill	2.42	2.60	2.72	2.84	3.17
8. RF & Mill	2.52	2.70	2.84	3.01	3.33
9. RF & Mill	2.63	2.82	2.97	3.14	3.50
10. RF & Mill	2.75	2.94	3.10	3.27	3.64
11. RF & Mill	2.84	3.08	3.25	3.52	3.83
12. Mill	3.01	3.25	3.43	3.61	4.05
13. Mill	3.17	3.41	3.61	3.80	4.27
14. Mill	3.33	3.57	3.79	3.98	4.49
15. Mill	3.59	3.73	3.98	4.17	4.71
16. Mill	—	—	—	—	—
17. Mill	—	—	—	4.53	5.16
Average Hourly Wage, All Grades	$2.65	$2.84	$2.99	$3.21	$3.57

Table 4

Charlotte Lower Grades

February	*Reconstructed Wage*	*% of AHE*
	Grade 1 RF and Mill	
1973	2.60	81%
1974	2.93	84%
1976	3.59	86%
1979	4.75	91%
1981	5.78	92%
	Grade 6 Mill	
1973	3.00	94%
1974	3.30	94%
1976	3.96	95%
1979	5.12	98%
1981	6.15	98%

Table 4—Continued

Charlotte Lower Grades

February	*Reconstructed Wage*	*% of AHE*
	Charlotte Upper Grades	
	7 RF and Mill	
1973	3.17	99%
1974	3.69	105%
1976	4.63	111%
1979	6.32	121%
1981	7.74	124%
	15 Mill	
1973	4.71	147%
1974	4.96	142%
1976	5.90	142%
1979	7.59	145%
1981	9.01	144%

Table 5A

Comparison of Tampa Wage Rate Reconstruction with Actual Tampa Rates

Labor Grade	*4/76*		*7/76*		*10/76*		*5/77*		*4/78*		*4/79*		*4/80*	
	Predicted	*Actual*	*Predicted*	*Actual*	*Predicted*	*Actual*	*Predicted*	*Actual*	*Predicted*	*Actual*	*Predicted*	*Actual*	*Predicted*[1]	*Actual*
1	$4.01	$3.97	$4.06	$4.04	$4.18	$4.14	$4.39	$4.37	$4.77	$4.86	$5.31	$5.44	$5.92	$6.08
2	4.23	4.19	4.28	4.26	4.40	4.36	4.61	4.59	4.99	5.08	5.53	5.66	6.14	6.30
3	4.49	4.46	4.54	4.53	4.66	4.63	4.87	4.86	5.25	5.35	5.79	5.93	6.40	6.57
4	4.71	4.68	4.76	4.75	4.88	4.85	5.09	5.08	5.47	5.57	6.01	6.15	6.62	6.79
5	4.98	4.95	5.03	5.02	5.15	5.12	5.36	5.35	5.74	5.84	6.28	6.42	6.89	7.06
6	5.84	5.82	5.89	5.89	6.01	5.99	6.21	6.22	6.60	6.71	7.14	7.29	7.75	7.93
7	6.21	6.20	6.26	6.27	6.38	6.37	6.59	6.60	6.97	7.09	7.51	7.67	8.12	8.31
8	6.42	6.41	6.47	6.48	6.59	6.58	6.80	6.81	7.18	7.30	7.72	7.88	8.33	8.52
9	6.64	6.63	6.69	6.70	6.81	6.80	7.01	7.03	7.40	7.52	7.91	8.10	8.52	8.74
10	6.85	6.85	6.90	6.92	7.02	7.02	7.23	7.25	7.61	N/R	8.15	N/R	8.76	N/R

[1] Based on the preliminary AHE figure for April 1980.

Table 5B

Reconstructed FSC Charlotte Wages, Illustrative Grades and Years

	FSC Regression Model	General Counsel Models
Labor Grade 1 (RF and Mill)		
1974	$2.86	$2.93
1980	4.36	5.07
Labor Grade 14 (Mill)		
1974	$4.83	$4.78
1980	7.20	7.86

Table 6

	5/69	5/70	5/71	1/72	2/73
AHE, Primary Metals, Charlotte SMSA Moving Average	2.57	2.72	2.85	2.99	3.20
Average FSC Charlotte Wage, All Grades	2.65	2.84	2.99	3.21	3.57
Dollar Difference Between Average Charlotte Wage and AHE	$ .08	$ .12	$ .14 $ .22 $ .37		
Average Charlotte Wage as % of AHE	103.1%	104.4%	104.9%	107.4%	111.6%

Table 7

Reconstructed Charlotte Wage Rates, 1980

	Grade 1	*Grade 9*
FSC Proportional Index	$4.79	$7.90
FSC Combination Index	5.12	7.55
FSC Across-the-Bd-Index	5.28	7.38
FSC Regression Model	4.36	7.60

Table 8

Base Period Wages at FSC's Indiantown Plant

Labor Grade	*Sept. 1970*	*Dec. 1971*	*Oct. 1972*	*Feb. 1973*	*Dec. 1973* [a]
1	$2.29	$2.50	$2.75	$3.10	$3.50
2	2.59	2.80	3.00	3.40	3.80
3	2.88	3.11	3.32	3.60	4.00
4	3.17	3.39	3.63	3.90	4.30
5	3.47	3.70	3.95	4.30	4.70
6	3.76	3.99	4.25	4.75	5.15
7	4.06	4.30	4.60	5.35	5.75
8	•	•	•	•	•
9	4.37	4.61	4.93	5.75	6.15
	Average Hourly Wage, All Grades				
	3.31	3.54	3.78	4.21	4.61

[a] This wage increase was agreed to during April 1974 but it was made retroactive to December 1973.

Table 9

General Counsel's Indiantown Model

December	Reconstructed Wage	Reconstructed Wage As Percent of AHE
	Grade 1	
1973	$3.50	101%
1974	3.96	105%
1976	4.90	112%
1979	6.66	122%
	Grade 5	
1973	$4.70	136%
1974	5.16	137%
1976	6.10	140%
1979	7.86	143%
	Grade 9	
1973	$6.15	178%
1974	6.61	176%
1976	7.55	173%
1979	9.31	170%

Table 10

Reconstructed Indiantown Wage Rates

	FSC Regression Model	General Counsel Regression
	Labor Grade 1	
Dec. 1974	$3.69	$3.96
Dec. 1980	4.86	7.44
	Labor Grade 4	
Dec. 1974	$4.65	$4.76
Dec. 1980	6.76	8.24
	Labor Grade 9	
Dec. 1974	$6.60	$ 6.61
Dec. 1980	9.30	10.09

Table 11

	Sept. 1970	Dec. 1971	Oct. 1972	Feb. 1973	Dec. 1973
AHE All Manufacturing Florida Statewide Moving Average	2.83	3.04	3.16	3.23	3.45
AVERAGE FSC Indiantown Wage, All Grades	3.31	3.54	3.78	4.21	4.61
Difference Between Average Indiantown Wage And AHE	$ .48	$ .50	$ .62	$ .98	$1.16
Average Indiantown Wages as % of AHE	117%	116%	120%	130%	134%

Table 12

Reconstructed Indiantown Wage Rates for 1980

	Grade 1	*Grade 9*
FSC Percentage Index	$5.21	$9.57
FSC Combination Index	6.12	9.34
FSC Across-the-Board Index	6.57	9.22
FSC Regression	4.86	9.30
General Counsel Regression	7.44	10.09

Table 13

Spread Between Charlotte Grade 1

(RF and Mill) and Charlotte Grade 6 (RF)

	1969	1970	1971	1972	1973
Grade 1 Wage	2.01	2.14	2.24	2.35	2.60
Grade 6 Wage	2.31	2.47	2.59	2.75	3.00
Dollar Spread	.30	.33	.35	.40	.40
Percent Spread	14.9%	15.4%	15.6%	17.0%	15.4%
Grade 7 Wage	2.42	2.60	2.72	2.84	3.17
Grade 15 Wage	3.59	3.73	3.98	4.17	4.17

Table 13—Continued

Spread Between Charlotte Grade 1 (RF and Mill) and Charlotte Grade 6 (RF)

	1969	1970	1971	1972	1973
Dollar Spread	1.17	1.13	1.26	1.33	1.54
Percent Spread	48.3%	43.5%	46.3%	46.8%	48.6%

Table 14

Year	Average CPI Grade 9 as a Percent of Average CPI Grade 1
1970	166%
1971	172%
1972	182%
1973	181%

Table 15

Year	Average CPI Grade 9 as a Percent of Average CPI Grade 1
1974	191%
1975	180%
1976	203%
1977	191%
1978	184%
1979	181%
1980	172%

Table 16

Reconstructed Charlotte Wage Rates,

	Gr. 1 (RF)	Gr. 7 (RF & Mill)	Gr. 14 (Mill)
February 1974			
As Adopted by this Decision	$2.84	$3.47	$4.91
General Counsel's Regression Models	2.93	3.69	4.78
FSC's Regression Model	2.86	3.42	4.83
February 1980			
As Adopted by this Decision	$4.55	$5.55	$7.86
General Counsel's Regression Models	5.07	6.77	8.04

Table 16—Continued

Reconstructed Charlotte Wage Rates,

	Gr. 1 (RF)	Gr. 7 (RF & Mill)	Gr. 14 (Mill)
FSC's Regression Model	4.36	5.17	7.20

Table 17

Base Period Relationships between FSC Indiantown Grades 9 and 1

Year	Percentage Difference Between Grades 9 and 1	Dollar Difference Between Grades 9 and 1
1970	91%	$2.08
1971	84%	2.11
1972	79%	2.18
1973 (Feb.)	85%	2.65
1973 (Dec.)	76%	2.65

Table 18

Year	Grade 9 as a Percentage of Grade 1, Indiantown Survey
1970	149%
1971	216%
1973	191%
1980	200%

Table 19

Reconstructed Indiantown Wage Rates

December 1974			
As Recommended by this Decision	$3.81	$5.12	$6.70
General Counsel's Regression Models	3.96	5.16	6.61
FSC's Regression Model	3.69	5.09	6.60
December 1980			
As Recommended by this Decision	$6.06	$8.14	$10.66
General Counsel's Regression Models	7.44	8.64	10.09
FSC's Regression Model	4.86	7.40	9.30

Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local 1-J, SEIU, AFL-CIO *and* The I. Shor Company, Inc.

Jewelry Manufacturers Association, Local 1-J, Welfare Fund[1] *and* The I. Shor Company, Inc.

Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local No. 1-J, SEIU, AFL-CIO and Jewelry Manufacturers Association, Local 1-J Welfare Fund *and* Joan Maffettone

The I. Shor Company, Inc. *and* Joan Maffettone, Petitioner and Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local 1-J, SEIU, AFL-CIO. Cases 2-CB-9557, 2-CB-9557-2, 2-CB-9580, and 2-RD-1073

14 December 1984

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 6 June 1984 Administrative Law Judge Thomas T. Trunkes issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel and the Employer filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified[2] and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent, Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local 1-J, SEIU, AFL-CIO (the Union) violated Section 8(b)(1)(A) by threatening to terminate and Section 8(b)(1)(A) and (2) by suspending Joan Maffettone's health and welfare benefits because she filed a decertification petition. Contrary to the judge, however, we find the Respondent, Jewelry Manufacturers Association, Local 1-J, Welfare Fund (Fund), as agent of the Union, also violated the Act.

In fall 1982, approximately 20 employees of I. Shor Company, Inc. (Employer) met to discuss decertifying the Union. A decertification petition was circulated among the employees and on 1 October 1982[3] bookkeeper Joan Maffettone filed the petition with the Regional Office.

On 25 October Maffettone received a letter at work on Fund stationery dated 12 October from Joseph Tarantola, union president and Fund administrator, stating, inter alia, that it had come to "[the Fund's] attention through the Union that you may not be a member of the bargaining unit" and that "commencing November 14, 1982, you shall no longer be covered under this plan."

Maffettone, who was being treated for cancer at the time, testified she became extremely upset upon receiving the letter and showed it to five or six fellow employees. According to her credited testimony, several employees voiced the fear they would lose their medical benefits as they had also signed the decertification petition.

Maffettone wrote to Tarantola on 28 October objecting to the cancellation of her benefits and requesting a detailed explanation for the suspension. She also retained an attorney, who wrote to Tarantola on 4 November.

On 22 November union organizer Pedro Ortiz spoke with Maffettone while visiting the Employer's place of business. When she requested that he not speak to her but with her attorney, Ortiz asked her approximately five or six times whether she was "throwing [him] out as an official of this company." Maffettone reported the matter to Supervisor Pete Shor, who requested Ortiz to leave.

On 30 November, Tarantola, again in his capacity as Fund administrator, wrote Maffettone and Nat Shor, president of the Employer, to invite them to participate in the investigation of Maffettone's status. In the meantime, the Employer's attorneys had protested Tarantola's threatened cancellation of Maffettone's benefits and assured Tarantola that she was a unit employee. Finally, on 20 December, Tarantola wrote Maffettone and advised her, without explanation, that the Fund was reinstating her benefits.

As stated, the judge found the Union violated Section 8(b)(1)(A) by threatening to terminate and Section 8(b)(1)(A) and (2) by suspending Maffettone's Fund benefits between 14 November and 20 December for filing the decertification petition.[4]

[1] We grant the General Counsel's motion to correct the caption for the name of the Fund to read, "Jewelry Manufacturers Association, Local 1-J, Welfare Fund."

[2] An election was held 10 March 1983 in Case 2-RD-1073 pursuant to a Decision and Direction of Election. The tally of ballots shows 14 for, and 11 against, Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local 1-J, SEIU, AFL-CIO, with 1 nondeterminative challenged ballot.

Absent exceptions, we adopt pro forma the judge's recommendations that Employer's Objections 1(a), (c), (e), 2, 4(a), (b), (c), and 6 to the election be sustained, and that Employer's Objections 1(b), (d), 3, 4(d), (e), and 5 be overruled, and that the election held 10 March 1983 be set aside and a second election conducted.

[3] All dates are in 1982 unless otherwise noted.

[4] The General Counsel alleges Tarantola "terminated" Maffettone's Fund benefits, while the Union argues Tarantola merely "suspended" her

Continued

He found Maffettone had been an employee of the Employer and a member in good standing of the Union for more than 20 years, and that, prior to October, there was no suspicion by the Union or credible evidence that she was not included in the bargaining unit. The judge further found Tarantola harbored animosity toward Maffettone for instigating and filing the decertification petition. The judge noted Tarantola admitted at the hearing that, upon learning Maffettone had filed the petition, "he became very angry."

The judge also found insufficient evidence existed to support sending the 12 October letter to Maffettone. He noted the sole evidence presented to Tarantola consisted of statements by Pedro Ortiz, union organizer, and Oswald Gutierrez, union vice president, that Maffettone was a supervisor. However, the judge found Ortiz did not conduct his investigation in good faith. While Gutierrez testified he had no problem speaking with employees at the facility, Ortiz stated he was unable to verify Maffettone's supervisory status because she constantly followed him around the plant. The judge noted, however, that Ortiz made no effort to contact employees at their home or somewhere outside the Employer's premises.[5]

The judge found Tarantola at no time prior to the 12 October letter attempted to obtain Maffettone's position on the planned suspension of benefits, and it was not until 30 November that Tarantola wrote to either Maffettone or the Employer requesting their assistance in investigating her alleged supervisory status. The judge also found the Union chose not to participate in the hearing following the filing of the decertification petition, although Maffettone's eligibility to vote in the election was at issue. Finally, the judge observed that Tarantola offered no explanation for his "change of heart" in reinstating Maffettone's coverage in the 20 December letter.

Based on his analysis of the above facts, the judge concluded Maffettone's benefits were suspended because of her filing of the decertification petition. As stated above, we agree.

We next examine the relationship between the Union and the Fund. The Union and the Fund are located in the same office at 133 West 44th Street in New York City. The Fund was established pursuant to a collective-bargaining agreement between the Union and the Jewelry Manufacturers Association, of which the Employer is a member. The trust agreement, as amended, provides that the plan be jointly administered; four trustees are designated by the Union and four are designated by the Employer participants. The four union trustees of the Fund, Joseph Tarantola, Oswald Gutierrez, Herbert Johnson Jr., and Pedro Ortiz, are, respectively, president, vice president, secretary-treasurer, and organizer of the Union. All four use their own offices to conduct all union and Fund business. In addition, Joseph Tarantola serves as president of the Union, administrator of the Fund, and chairman of the board of trustees of the Fund.

In his capacity as Fund administrator, Tarantola decides whether or not a participant of the welfare plan is entitled to its benefits, and has authority temporarily to suspend benefits while investigating claims. Tarantola testified that, as union president, he could order an investigation by union agents into participant eligibility, but that he acted as Fund administrator in making decisions based on the information supplied. We agree with the judge, therefore, that it is "difficult to separate one function from the other."

The judge found Tarantola represented the Union's "principal interests" in regard to Maffettone and his actions as administrator were therefore imputed to the Union. The judge found, however, that the Fund was not an agent of the Union because the board of trustees of the Fund, including the employer-appointed trustees, "never was afforded an opportunity to either confirm or refute Tarantola's actions with respect to Maffettone." We reverse the judge and find that, because Tarantola had actual authority to suspend and to threaten to terminate fund benefits, the Fund is responsible for his conduct.

Tarantola has served as Fund administrator for nearly 15 years. His duties include, inter alia, directing the work of claims processors, corresponding with individual participants, doctors, hospital administrators, and attorneys, and, finally, investigating and suspending participants ineligible to receive benefits. He testified his power to perform these duties is derived from past practice, directions of the board of trustees of the Fund, and the agreement and declaration of trust, as amended. While Tarantola had the power to suspend participant benefits, only the board of trustees could terminate participation. Thus, according to Tarantola, the procedure in a typical case involved suspending coverage either before or during an investigation into a participant's eligibility, and, if appropriate, recommending to the board of trustees to terminate participation. Tarantola testified over the last 2

Fund benefits. The judge found that Maffettone's health and welfare benefits were suspended between 14 November and 20 December 1982. We agree. The uncontradicted evidence indicates that a vote before the full board of trustees is required to terminate a participant's benefits. The board took no such action concerning Maffettone.

[5] The judge further discounted the affidavit of union shop steward Jacquline Gross, asserting Maffettone's supervisory status, because it was obtained subsequent to the 12 October letter.

years a "number of participants" suspected of supervisory status had been terminated under this procedure. In the instant case, Tarantola testified Maffettone's coverage was merely suspended not terminated. These facts clearly indicate the Fund vested Tarantola with actual authority to suspend participant eligibility, as well as to threaten termination based on his responsibility to make such recommendations to the Board.[6]

We now turn to the question of whether Tarantola's actions as Fund administrator made the Fund a union agent. The language of Section 8(b) specifically limits our jurisdiction to unfair labor practices committed by a "labor organization or its agents." In determining whether fund actions can be attributed to a union, the courts[7] have identified at least three factual situations:[8]

1. Where provisions of a collective-bargaining agreement remove the discretion to administer the funds solely for the benefit of the employees.

2. Where the trustees' actions were in fact directed by union officials.

3. Where the trustees' acts were undertaken in their capacities as union officials rather than as trustees.

Here, the facts demonstrate that, on learning Maffettone might be a supervisor, Tarantola immediately notified her that her coverage would no longer be in effect. The judge found that Tarantola, as Fund administrator, would have no reason "for his hastiness in writing the letter without further evidence." Moreover, Tarantola testified that, under normal circumstances, a benefit claim took 6 to 12 months to process. Here, however, it is undisputed that Maffettone's benefit coverage was suspended only 2 weeks after the decertification petition was filed. As the judge correctly found, therefore, the Fund had no interest in such unusually expeditious action.

In this case, the trustees delegated certain authority to Tarantola, which he exercised to further the interests of the Union in his capacity as union president, thus bringing the facts within the third set of circumstances under which a fund may be deemed a union agent. Tarantola's action constituted a transparently pretextual retaliation against an employee for filing a decertification petition, not a good-faith effort to preserve Fund assets.[9]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3 and 4.

"3. By threatening to terminate the health and welfare benefits of Joan Maffettone through its agent, Jewelry Manufacturers Association, Local 1-J, Welfare Fund, because she filed a decertification petition with the Board, the Union has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

"4. By suspending the health and welfare benefits of Joan Maffettone between 14 November and 20 December 1982 through its agent, Jewelry Manufacturers Association, Local 1-J, Welfare Fund, the Union has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local 1-J, SEIU, AFL-CIO, New York, New York, and Jewelry Manufacturers Association, Local 1-J, Welfare Fund, New York, New York, their officers, agents, and representatives, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election conducted 10 March 1983 in Case 2-RD-1073 is set aside and that a new election be held as directed below.

[Direction of Second Election omitted from publication.]

---

[6] Restatement 2d, *Agency* § 212, 215, 229 (1958). See *Longshoremen ILWU Local 61 (Sunset Line)*, 79 NLRB 1487, 1509 (1948) (Board has clear statutory mandate to apply ordinary law of agency).

[7] See *NLRB v. Teamsters Local 449*, 728 F.2d 80, 89 (2d Cir. 1984); *Griffin Corp. v. NLRB*, 660 F.2d 406, 410 (9th Cir. 1981). See also *NLRB v. Laborers Local 1140*, 577 F.2d 16, 21 (8th Cir. 1978), cert. denied 439 U.S. 1070 (1979).

[8] *Teamsters Local 449*, above, 728 F.2d at 89.

[9] In finding the Fund to be the Union's agent when Tarantola threatened to terminate and suspended Maffettone's benefits, we emphasize our holding does not subject trustees to "conflicting duties imposed by the National Labor Relations Act and ERISA." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 337 fn. 21 (1981). In *Amax*, the Supreme Court held employer-selected trustees of a jointly administered trust fund, such as the one involved in this proceeding, are not agents of the employer but fiduciaries "whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed [them]." The Court found ERISA vested exclusive authority to manage and control fund assets in the trustees alone, and not the employer or the union. By contrast, Tarantola, as Fund administrator, had actual authority from the trustees to take the actions he did and did so on the Union's behalf.

DECISION

STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge. This proceeding,[1] under Section 10(b) and Section 9 of the National Labor Relations Act, was heard pursuant to due notice on September 29 and 30, 1983, and January 11 and 12, 1984, in New York, New York, based on an order consolidating cases, consolidated complaint, and notice of hearing, dated April 15, 1983, issued in Cases 2–CB–9557, 2–CB–9557–2, and 2–CB–9580, and an order consolidating the above-captioned cases with a notice of hearing on objections in Case 2–RD–1073, dated April 28, 1983.

The issues presented at the hearing were as follows:

1. Whether Joseph Tarantola, for the purposes of the instant case, should be considered an agent of Respondent/Union, Respondent Fund, or both?

2. Whether Respondent Union, Respondent Fund, or both, through Tarantola, violated Section 8(b)(1)(A) and (2) of the Act by threatening to suspend Joan S. Maffettone from her participation in Respondent Fund and by suspending her participation in said fund because of her protected concerted activity, namely, the filing of a decertification petition?

3. Whether or not the conduct of agents of the Union, including, inter alia, the acts of Tarantola as described in paragraph 2, constitute objectionable conduct sufficient to overturn the results of a Board-conducted election?

All parties were afforded a full opportunity to participate at the hearing. Briefs were filed by the General Counsel and the Charging Party/Employer. A joint brief was filed by Respondent Union and Respondent Fund.

On the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The I. Shor Company, Inc. (the Employer), a New York corporation, with an office and place of business located in New York, New York (the Employer's facility) is engaged in the business of selling and servicing machines and factory supplies for the manufacture of jewelry. Annually, the Employer, in the course and conduct of its business operation, derives gross revenues in excess of $500,000 and purchases and receives at its facility goods and supplies valued in excess of $50,000 directly from suppliers located outside the State of New York. Respondents admit, and I find, that the Employer is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local 1–J, SEIU, AFL–CIO (Respondent Union or Local 1–J) is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act, as admitted by Respondent Union and Respondent Fund.

Jewelry Manufacturers Association, Local 1–J Welfare Fund (Respondent Fund), a jointly administered welfare plan, exists for the purpose of administering various health and welfare plans maintained under one or more collective-bargaining agreements that Respondent Union has with various employers, as admitted by Respondents.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Operations of the Employer and Its Relationship with Respondent Union*

As stated above, the Employer is engaged in the business of selling and servicing machines and factory supplies used for the manufacture of jewelry, with its principal place of business located in New York, New York. It employs approximately 30 employees who are supervised by Nat and Peter Shor. Nat is president of the Employer. The record does not indicate Peter's title, if any.

For many years, Respondent Union has been the exclusive collective-bargaining representative of the employees of the Employer in the following unit:

> All full-time and regular part-time employees of the Employer, including office clerical employees, sales persons, repairmen, and shipping and receiving employees, excluding all outside sales help, guards, and supervisors as defined in the Act.

The Employer has recognized the Union and has negotiated successive collective-bargaining agreements with it, the most recent of which was effective for the period September 12, 1981, to September 12, 1982. Pursuant to article XIV of this agreement, the Employer maintained and provided group insurance for the benefit of its employees covered by the agreement by making contributions on their behalf to Respondent Fund. The payment and receipt of the contributions continued for all unit employees, including Maffettone, subsequent to the expiration of the agreement.

Pursuant to article VII of the agreement, the Employer withheld union dues from unit employees, including Maffettone, and forwarded these dues to Respondent Union on a monthly basis. This practice also continued subsequent to the expiration of the most recent collective-bargaining agreement.

The undisputed evidence established that the Employer has permitted union representatives to enter the working area of its facility and to speak to various unit employees during working hours.

B. *Status of Maffettone*

In his Decision and Direction of Election, dated February 10, 1983, in Case 2–RD–1073, one of the consolidated cases in the present proceeding, the Regional Director for Region 2 of the National Labor Relations Board made the following finding:

> The evidence presented at the hearing reveals that Maffettone has worked for the Employer for

[1] Andrew J. Schaffran replaced Respondent's original attorney after 2 days of hearing.

21 years and has been a member of the Union throughout her employment. As of the date of the filing of the petition, on October 1, 1982, Maffettone occupied the position of bookkeeper. The evidence reveals that the Employer employs approximately 25 bargaining unit employees including five employees in the bookkeeping department. Maffettone's job duties include making deposits, making cash disbursements, calling customers concerning overdue bills, filing, preparing the payroll, and answering the telephone. The record reveals that the other employees in the bookkeeping department perform similar functions, and that on occasion, these employees assist each other. The evidence presented at the hearing further revealed that Maffettone does not have the authority to hire, fire, discipline, promote, transfer, lay off, recall, reward, reprimand, or grant overtime to employes, nor does she have the authority to effectively recommend such actions. She is paid on an hourly rate, as are the other unit employees, receives no sick leave, and receives vacation time and hospital benefits pursuant to the collective-bargaining agreement between the Union and the Employer. The supervisory personnel of the Employer are paid a weekly salary and receive paid sick leave. The bookkeepers are supervised by Nathan Shor, the sales manager, who interviews all job applicants. If the applicant is acceptable to Shor, he will then have the applicant meet the employees who perform the office work, to assure that these employees will be able to work together. There was no evidence presented at the hearing that Maffettone or anyone else in the bookkeeping department has the authority to recommend the hire of any job applicant, but Shor will solicit the opinions of these employees and take these opinions into account as well as his view of the appplicant's abilities in making his determination of whether to hire an applicant.

Section 2(11) of the Act defines a supervisor as an "individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . ." While Maffettone may participate, along with other employees, in discussions with job applicants, I find that the evidence presented reveals that these discussions are for the purpose of describing the job duties and assuring that there will be a harmonious working relationship among the office staff, and thus does not rise to the level of recommending the hire of employees. See *Willis Shaw Frozen Food Express*, 173 NLRB 487, 488 (1968).

As there is no evidence that Maffettone possesses any of the indicia of supervisory authority enumerated in Section 2(11) of the Act, I find that she is not a supervisor and thus shall be included in the unit. In view of my finding that Maffettone, the Petitioner, is not a supervisor within the meaning of the Act, I shall direct an election in a bargaining unit coextensive with the contractual unit.

During the hearing in which the evidence was presented on which the Regional Director made his decision, a representative of Respondent Union made an appearance but did not take part in the hearing. Respondent Fund, not being a party to that proceeding in any respect, did not participate at the hearing. The Regional Director's decision was not appealed by anyone to higher authority. Accordingly, I shall accept this finding that Maffettone was not a supervisor of the Employer on October 1, 1982.

C. *Filing of the Decertification Petition*

Maffettone testified, without contradiction, that during the summer or fall of 1982,[2] approximately 20 employes held a meeting at the facility of the Employer to discuss the decertification of Respondent Union. Subsequent to the meeting, Maffettone was informed by agents of Region 2 of the Board what steps were to be taken in order to effectuate a decertification of Respondent Union. Thereafter, a petition was circulated among the employees requesting a decertification, and after obtaining a sufficient amount of signatures Maffettone presented the document to Region 2 on October 1 at which time a formal petition for a decertification election was filed.

D. *Relationship of Respondent Union and Respondent Fund*

Respondent Union's offices are located at 133 West 44th Street, New York, New York, on the third floor. Its president is Joseph Tarantola; the vice president is Oswald Gutierrez; the secretary-treasurer is Herbert Johnson Jr.; and Pedro (Pete) Ortiz is an organizer.

Respondent Fund also has an office located at the same address on the third floor. Four trustees are appointed by the Employer and four are appointed by Respondent Union. Tarantola is chairman of the board of trustees. The three other trustees appointed by the Union are Gutierrez, Johnson, and Ortiz. None of the trustees receives any payment from the Fund for work performed on the Fund's behalf. The four union trustees do not have a separate office to perform work for the Fund.

E. *Status of Joseph Tarantola*

Tarantola has been president of Respondent Union since June 1968. As such, he is a salaried employee. In addition to being a trustee and chairman of the board of trustees of Respondent Fund, he has been the administrator of the Fund since approximately the end of 1968. Both his positions as trustee and as administrator of the Fund are unsalaried.

As administrator of the Fund, Tarantola directs the work of the Fund, which included directing the work of the claims processors and handling all correspondence and communications. He is in communication with doctors, hospital administrators, insurance actuaries, and at-

[2] Unless otherwise indicated, all dates refer to 1982.

torneys of the Fund. Further, he corresponds with other attorneys and with individual participants of the Fund. Additionally, he helps the claims department "draw up different forms for the development and expediting of the claims and the processing routines." As administrator, Tarantola decides whether or not a participant of the welfare plan is entitled to its benefits.

F. *The Alleged Violations of Section 8(b)(1)(A) and (2) of the Act*

Maffettone testified that about October 25 she received a letter, dated October 12, addressed to her from Tarantola. The body of the letter, in its entirety, is as follows:

> It has come to our attention through the Union that you may not be a member of the bargaining unit. Therefore, pursuant to the Trust Agreement of the Welfare Fund and the Plan, you are not entitled to receive health and welfare benefits until this matter is clarified.
>
> Please be advised that commencing November 14, 1982, you shall no longer be covered under this Plan. We suggest that you use this grace period to obtain individual coverage.
>
> A question has arisen with respect to your and/or I. Shor's responsibility in advising us of your non-bargaining unit status while receiving benefits. Therefore, we are commencing an investigation to determine whether a fraud has been perpetrated upon the Fund. If so, we may hold you and/or I. Shor's liable for any claims paid to you during your period of non-bargaining unit status.

Although the letter also revealed that Tarantola was aware of Maffettone's home address, the letter was sent and received by Maffettone at the office of the Employer. The letter was signed by Tarantola as administrator of Respondent Fund.

On receipt of the letter, Maffettone testified that she "panicked, cried, cursed, screamed. I was devastated." She contended that she reacted this way because at the time she was being treated for cancer and could not afford to be without benefits. She further asserted that five or six fellow employees who occupied desks in the same room where she sat were present at the time she received the letter. On being asked what the problem was, she showed the employees the letter in question. According to Maffettone, several employees voiced the fear that they would lose their medical benefits because they had also signed the decertification petition.

Thereafter, by letter dated October 28, Maffettone wrote to Tarantola, acknowledging receipt of his letter on Monday, October 25. She objected to the cancellation of her benefits and requested a detailed explanation from Tarantola for the reason for his planned action. In addition, Maffettone retained an attorney, Robin Woodrow, who further wrote to Tarantola, as administrator of Respondent Fund, on November 4, threatening to institute legal action should Maffettone be denied coverage or benefits under the welfare plan. Woodrow further advised Tarantola that any further correspondence with Maffettone be directed to her.

Maffettone further testified that on November 22 union organizer Ortiz visited the premises of the Employer, and stood by her desk looking down on her. She requested that he not speak to her but speak to her attorney. He asked her if she was "throwing me out as an official of this company" to which she replied, "No." He repeated his question approximately five or six times. When Ortiz refused to leave, Maffettone reported the matter to Peter Shor, who, on ascertaining that none of the employees wished to speak to Ortiz, requested Ortiz to leave. Ortiz complied with this request.

On November 30, Tarantola, again in his capacity as administrator of Respondent Fund, wrote to Maffettone, requesting her presence at the Fund office to continue the investigation concerning her status as a bargaining unit member. Maffettone did not comply with this request.

Meanwhile, by letter dated October 27 to Tarantola as Fund administrator, attorneys for the Employer also protested the threatened cancellation of benefits of Maffettone, and assured the Fund that she was a unit employee. By letter dated November 4, Tarantola, as administrator of the Fund, replied to the letter of October 27. By letter dated November 30, Tarantola, as administrator of the Fund, invited Nat Shor, president of the Employer, to participate in the investigation of Maffettone's status with the Employer. By letter dated December 7, the Employer, through its attorney, notified Tarantola, as administrator of the Fund, that as the Board had already found Maffettone not to be a supervisor, Tarantola should reinstate Maffettone to full coverage under the plan. By letter dated December 20, Tarantola advised Maffettone that on consideration, Respondent Fund had reinstated her coverage. Maffettone testified that at no time did anyone from Respondent Fund or Respondent Union explain to her why her benefits had been reinstated.

G. *Defense of Respondents*

In their defense, Respondents did not dispute that Tarantola took the actions recited above; rather, they attempted to show that the reasons behind these actions were lawful

Tarantola, the principal witness of Respondents, testified that he received information from his union agents, Ortiz and Gutierrez, that Maffettone might be a supervisor within the meaning of Section 2(11) of the Act, in which case she would be ineligible to participate in the Fund's benefits. Accordingly, Tarantola sent Maffettone the October 12 letter and suspended her benefits. He further testified that, as administrator of the Fund, he had full authority to suspend a participant as he did to Maffettone between November 14 and December 20, but the final authority for termination of coverage could only be made by the full board of trustees of the Fund. His principal concern in suspending Maffettone was to execute his duty as Fund administrator by ensuring that Fund moneys were not depleted through payment to ineligible parties. Specifically, when asked why he did not termi-

nate Maffettone from participating in the Fund, he stated:

> Because I don't think that you handle those things lightly. You have got to be careful about people's rights, individual's rights, and the obligation to the fund. As well as the fact that I certainly wouldn't want the fund to be accused of improper action. So, I instituted an investigation. Rather than terminate benefits, I suspended them.

When asked why the letter of October 12, although addressed to Maffettone's residence in Brooklyn, was mailed to the Employer's facility in Manhattan, Tarantola replied:

> It was sent certified, and we wanted to make sure that Ms. Maffettone got the letter. It was supposed to be a return receipt requested letter, and figure [sic] that if she were working, she would not be able to get it at home and sign for it. The letter may have lain in the post office for some period of time before she got to the post office, because all they would have done, they would have left a notice. We therefore felt that she would have gotten it sooner had it been sent to her place of work.

When asked the reason for sending the letter of December 20, which reinstated Maffettone to the plan, Tarantola responded:

> From the evidence that had been presented to me from the information that I received during the investigation, it seemed to me that her status had changed with the company. That she was no longer functioning as a supervisor.

Tarantola continued by stating that he had obtained this information from Ortiz and Gutierrez who, in turn, had heard of it during their investigation at the Employer's facility.

Ortiz testified that, as an organizer for Respondent Union, he serviced the Employer's facility. Some time at the beginning of October, at one of his visits to the Employer's facility, he observed Jacquline Gross, who at the time was the shop steward, crying. Although Gross had given the Employer a 2-week notice that she was resigning from her job, a fact of which Ortiz was aware, Gross told Ortiz that Maffettone had fired her that day, and that Maffettone was the Employer's comptroller. Ortiz reported this matter to Tarantola, who instructed him to investigate the matter further. Ortiz testified that he returned to the Employer's facility a number of times in an attempt to ascertain Maffettone's alleged supervisory status. He stated that he was unable to do so because every time he entered the facility he was followed by Maffettone who stood within hearing distance each time he attempted to speak to an employee. He thereafter reported to Tarantola that he could obtain no further information with respect to Maffettone's status as a supervisor.

On cross-examination by the General Counsel, Ortiz conceded that he made no attempt to contact any of the employees of the Employer outside the Employer's facility or outside their working hours.

On redirect examination Ortiz recalls having spoken to several employees at the Employer's facility who informed him that Maffettone marked their timecards and would grant them permission to leave the facility early without speaking to anyone else. Ortiz asserted that none of the employees was prepared to submit an affidavit detailing this information. Ortiz also reported this information to Tarantola.

Gutierrez testified that in early October Gross came to his office and related to him that she had been discharged by the Employer, through Maffettone, who had hired her in the first place 6 months earlier. Gross related further information to indicate to Gutierrez that Maffettone actually was a supervisor. He passed on this information to Tarantola. Tarantola instructed him to investigate the matter further, which he did by speaking to several workers at the Employer's facility without any interference or obstruction by Maffettone. Several employees furnished information on which one might conclude Maffettone was a supervisor. However, no one was prepared to submit an affidavit to document this fact.

Under examination by counsel for the Fund, Gutierrez acknowledged that following his conversation with Gross he did obtain an affidavit, dated October 21, from her in which she stated, among other things, that Maffettone was the only person who had interviewed her before her employment and that Maffettone informed her "that she does the hiring and firing for the Company."

On the same day that Gross furnished the affidavit to him, Gutierrez filed an unfair labor practice charge against the Employer, alleging violations of Section 8(a)(1), (3), and (5) of the Act, which were eventually dismissed by the Regional Director.[3]

H. *Discussion and Analysis—The Alleged Violations*

The complaint alleges that Respondents violated Section 8(b)(1)(A) and (2) of the Act by threatening to terminate and thereafter terminating Maffettone's fund coverage effective November 14. The General Counsel contends that the latter action violates Section 8(b)(2) of the Act, which forbids a union, except in limited circumstances, from taking action which causes or attempts to cause the employer to discriminate against its employees. Thus, the General Counsel urges, by causing or attempting to cause the Employer to cease making fund contributions, and by causing the Fund to cancel Maffettone's coverage, Respondents clearly violated Section 8(b)(1)(A) and (2) of the Act.

Agreeing with the contentions of the General Counsel, the Employer further contends that Respondents' actions against Maffettone were clearly designed to restrain and coerce her and fellow unit employees in the exercise of their Section 7 rights and to encourage membership in the Union by causing the Employer to discriminate against her.

[3] This was a second amended charge, the original charge having been filed in September.

Respondents contend that they acted in good faith in their actions and did not engage in any discriminatory conduct against Maffettone in violation of the Act.

Before one can judicially make findings and conclusions as to whether any of the alleged violations did occur as contended by the General Counsel, it is necessary to make credibility findings with respect to the testimony of the various witnesses presented at the hearing. In addition to considering the demeanor of the witnesses, the Board has stated, "It is abundantly clear that the ultimate choice between conflicting testimony also rests on the weight of the evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record, and, in sum, all of the other variant factors which the trier of fact must consider in resolving credibility." *Northridge Knitting Mills*, 223 NLRB 230, 235 (1976).

At the hearing, I emphasized that the credibility of Maffettone was not an issue for two reasons: (1) There was no dispute as to what Maffettone said or did which led to the instant conflict; and (2) essentially, there was no conflict with respect to relevant testimony offered by Maffettone. However, I made it clear that the credibility of Respondents' witnesses was at stake, especially that of Tarantola, the key person who performed the various acts which led to the instant complaint.

After listening to the testimony, I found it difficult to make a finding based on the demeanor of Tarantola that he undertook his actions for other than legitimate motives. He appeared extremely sincere as a witness, and I left the hearing with a visceral reaction that he truly believed that the actions he undertook, considering the evidence that was presented to him, were just and proper. Notwithstanding my initial thoughts, after a careful study of the transcript and an evaluation of the totality of the evidence, I have concluded that there is merit in the General Counsel's position for the following reasons.

1. Timing of the actions of Tarantola

Had Maffettone not filed a petition for a decertification of the Union on October 1, there would be no basis for a charge or a complaint in this case. At the time, Maffettone had been an employee of the Employer and a member in good standing of the Union for more than 20 years. There was no suspicion at any time prior to October that she was a supervisor of the Employer. Nevertheless, shop steward Gross, following her termination of employment, informed agents of the Union, according to the undisputed testimony of Ortiz and Gutierrez, that Maffettone had certain indicia of supervisory status under Section 2(11) of the Act. Her affidavit, presented later to the Union, states that she was interviewed and hired by Maffettone 6 months earlier. Despite this alleged occurrence, this information was not presented to the Union before the filing of the decertification petition by Maffettone.

2. Animosity toward Maffettone

Tarantola frankly admitted without hesitation that, on hearing that Maffettone was responsible for the filing of the decertification petition, he became very angry. This, of course, would be a natural reaction of any agent of a union which represented a group of employees. Although under similar circumstances, other union representatives may react in a very calm and placid manner on hearing such news, even they would not appreciate Maffettone's actions.

3. Insufficient evidence to support the sending of the October 12 letter to Maffettone

The General Counsel argues that the October 12 letter advised Maffettone of the termination of her health and welfare benefits. Respondents, on the other hand, argue that the letter merely signified a suspension of benefits which eventually was restored. A reading of the letter reveals that neither the word "termination" nor "suspension" was used. The first paragraph appears to indicate that the benefits would be *suspended* "until this matter is clarified." However, in the second paragraph, the letter also states, "you shall no longer be covered under this plan," and further suggests that Maffettone obtain individual coverage. Although Maffettone's coverage was reinstated at a later date, for at least the period from November 14 to December 20 she was not covered by the plan, and therefore suffered potential harm. Inasmuch as the record revealed that Maffettone had a serious medical problem at the time, at minimum the receipt of the letter had a chilling effect on her.

Although he may have believed he was acting in good faith, Tarantola had insufficient evidence as of October 12 to warrant the issuance of the letter. The sole evidence presented to Tarantola consisted of statements by his two agents, Ortiz and Gutierrez, that they had heard from employees in the unit that Maffettone was a supervisor. Respondent argues that the affidavit of Gross substantiates in detail these allegations. However, as the General Counsel and the Employer correctly point out, the affidavit of Gross was obtained subsequent to the issuance of the October 12 letter. Although Ortiz and Gutierrez were requested by Tarantola to obtain evidence of Maffettone's supervisory status, the record revealed that, as of October 12, no further evidence had been obtained.

4. Failure to contact Maffettone prior to the issuance of the letter

The record is clear that it was not until November 30 that Tarantola wrote to both Maffettone and the Employer requesting their assistance in the investigation of her alleged supervisory status. It is further clear that at no time prior to the issuance of the October 12 letter, although Maffettone had been a union member and in the appropriate unit for many years, did Respondents obtain Maffettone's position with respect to the problem at hand. No explanation was offered at the hearing for this failure to contact Maffettone.

5. Failure to respond to communications from Maffettone and the Employer

It is undisputed that following the receipt of the October 12 letter both Maffettone and the Employer wrote letters to Tarantola protesting the threat of termination

of benefits. Tarantola did not respond to these communications. In addition, although Maffettone's attorney advised him that any further correspondence to Maffettone should be directed to her, Tarantola ignored this request and continued to deal with Maffettone directly.

6. Conflict between Ortiz and Gutierrez

Ortiz testified that he was unable to obtain verification of Maffettone's supervisory status from unit employees because Maffettone followed him around the facility while he was attempting to speak to employees. On the other hand, Gutierrez testified that he had no problem in speaking to other employees at the facility. Ortiz was unable to explain why he did not diligently pursue the matter further by contacting employees either at their homes or somewhere outside the Employer's premises where Maffettone could not interfere. Whether he was negligent, had no time, or was aware that no evidence was forthcoming to support the allegations furnished to him earlier is of no consequence. I conclude that the evidence presented at the hearing is sufficient to warrant a finding that Ortiz did not act in good faith.

7. Failure to contest the status of Maffettone

The evidence is undisputed that, following the filing of the decertification petition, a hearing was held to determine, among other matters, the eligibility of Maffettone to vote in a Board-conducted election. Although aware that this representation hearing was taking place, Respondent Union chose not to participtate at the hearing. Had Respondent Union reason to believe that Maffettone was a supervisor, which belief warranted the suspension of her benefits, logic dictates that it would have participated at the hearing in an effort to prove this point. Yet, no effort was made by Respondent Union to contest the supervisory status of Maffettone at the hearing.

8. The letter of December 20 reinstating Maffettone's benefits

In his letter to Maffettone reinstating her coverage, Tarantola offered no explanation for his change of heart. The record is bare of any evidence indicating that any further investigation was conducted following the refusal of Maffettone and the Employer to cooperate in the investigation of her supervisory status. Had Tarantola acted in good faith, on being advised by Ortiz and Gutierrez that employees would not cooperate with them, he could have advised Maffettone immediately thereafter, by telephone or telegram if necessary, of the reinstatement of her benefits. Surely by November 14, the date that the coverage was suspended, Tarantola was aware that he would be unable to obtain any concrete evidence to justify the suspension as indicated in his October 12 letter.

Although the General Counsel argues that the addressing of the October 12 letter to the employer's establishment is further evidence of Respondents' wrongdoing, I do not adopt this argument. Tarantola's explanation for the reason he sent the letter to the workplace rather than to the residence of Maffettone is most reasonable. As the letter was sent certified, and as Tarantola was aware that Maffettone was at work, it is logical that the letter be sent there, rather than to her home where she would not be able to retrieve the letter until a Saturday morning. However, her reaction on receipt of the letter, including the fact that she showed it to other employees, many of whom, according to Maffettone's undisputed testimony, expressed fears that their own benefits would be terminated, is a consequence for which Respondents must be held accountable. I do not accept Respondents' contention that Maffettone, with authority from the Employer, deliberately circulated the October 12 letter in order to instill a sense of fear in employees. As evidence is lacking that Maffettone is an agent of the Employer, I do not hold the Employer liable. Maffettone's reaction was one of anger and fear and moreover, it was quite natural that her coworkers would inquire about her apparent agitation, thus leading to the disclosure of the October 12 letter.

Respondents further contend that the General Counsel has failed to prove that, but for Maffettone's filing of the decertification petition, Tarantola would not have undertaken the actions he did. I find no merit in this argument.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board enunciated a test in all cases alleging violations of Section 8(a)(3) of the Act or violations of Section 8(a)(1) turning on employer motivation: (1) The General Counsel must make a prima facie showing sufficient to support an inference that the protected conduct was a motivating factor in an employer's decision; and (2) on such a showing, the burden of proof then shifts to the employer to demonstrate that even in the absence of the protected conduct, the same action would have been undertaken by him.

In subsequent decisions, the Board's analysis of *Wright Line* has been applied to cases involving the motivation of respondent unions under Section 8(b)(1)(A) and (B) and (2) of the Act. *Plumbers Local 669 (American Fire Protection)*, 268 NLRB 515 (1984).

Based on my analysis of the evidence as detailed above, I conclude that the benefits enjoyed by Maffettone under the health and welfare plan would not have been suspended but for her filing of the decertification petition. I reject Respondents' argument that in two other instances employees' benefits had been suspended pending investigation of charges against them. The facts of those cases are unlike the facts of the instant case. Here, Maffettone was attempting to decertify the Union and Respondents' actions were in retaliation for her attempt.

Respondents further argue that Tarantola acted within the provisions of Section 302(c)(5) of the Labor Management Relations Act and Sections 404, 405, and 502 of the Employee Retirement Income Security Act (ERISA). I find both these laws inapplicable to the instant matter. In the first place, for the reasons as detailed above, there is insufficient evidence on which anyone could have accused Tarantola of any violation of any other law had no action been taken against Maffettone until such time as sufficient probative evidence had been obtained to establish her supervisory status, which, of course, never oc-

curred. Furthermore, as detailed below, I find that Tarantola acted as president of Respondent Union, rather than as a trustee or administrator of Respondent Fund.

In conclusion, although standing by itself, each and every one of the specific points explained above may not be sufficient to warrant a conclusion that a violation occurred, the totality of the evidence has convinced me that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.

I. *Relationship of Respondent Fund and Respondent Union*

Having found that Tarantola violated the Act, the next questions are in what capacity did he violate the Act, and whether or not the Fund should be held liable for Tarantola's acts.

In *Hospital Employees (Sinai Hospital)*, 248 NLRB 631, 633 (1980), the Board found that a union's collective-bargaining representative, who was also a trustee of a fund, collaborated with other fund trustees in denying an employer's request for certain specific information. The Board held that the union representative violated the Act as a trustee of the fund by his action, and thereby violated his "affirmative obligation to make a reasonable effort to obtain the information, or to investigate reasonable alternative means for obtaining it or to truthfully explain or document the reasons for its unavailability."

The Board's decision in *Sinai* preceded a Supreme Court decision in which the Court held that employer-designated trustees of a trust fund are not representatives of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of Section 8(b)(1)(B) of the Act. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 337 (1981).

In light of the Supreme Court decision in *Amax*, in a recent decision the Board modified its holding in *Sinai* and concluded that "our decision in *Sinai* continues to be valid only where a collective-bargaining representative demonstrates that it is in de facto control of a nominally independent trust fund." *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780, 781 (1984).

The General Counsel contends that the evidence is clear that Respondent Union made Respondent Fund its agent "when it had the Fund threaten Maffettone with civil suit, threatened to terminate her coverage, and terminated her benefit coverage because she filed a decertification petition."

Respondent contends that the record does not contain any direct evidence to support the General Counsel's position. Moreover, it argues, citing *Amax*, that Tarantola's actions as Fund administrator were not only lawful but mandatory under ERISA, which provides that trustees owe their primary loyalty not to those protected under Section 7 of the Act but to those defined as trust beneficiaries, namely, all the participants and their dependents. Respondent further argues that if the matter is dismissed against Respondent Fund, then Respondent Union also must be found innocent of any wrongdoing.

As related above, the facts are not in dispute. The four union-appointed trustees of the fund are Tarantola, Gutierrez, Johnson, and Ortiz, who are respectively the president, vice president, secretary-treasurer, and organizer of Respondent Union. The offices of the Fund are located in the same building and on the same floor as the offices of the Union. The union agents perform their duties as Fund trustees from their union offices. Although Tarantola attempted to demonstrate that he performed certain functions as a union officer, and other functions as the administrator of the Fund, I find it difficult to separate one function from the other.

As the General Counsel correctly pointed out in her brief, on hearing from the union agents of the possibility that Maffettone was a supervisor, Tarantola, without much deliberation or hesitation, immediately notified her that her coverage would no longer be in effect. As administrator of the Fund, there would be no reason for his hastiness in writing the letter without further evidence. Although Respondent Fund asserts that it was Tarantola's duty as Fund administrator to protect the beneficiaries of the Fund, it was also his duty as union official and collective-bargaining agent of Maffettone to protect her rights. As I find that there was no reason for the Fund to act as quickly as Tarantola did, I conclude that his action in writing to Maffettone was for the benefit of the Union and that, although he characterized his action as that of the Fund administrator, in reality it was an action of an agent of Respondent Union.

Another factor which militates against Respondents' claim that Tarantola was acting for the Fund was the fact that, before benefits of beneficiaries of the Fund could be terminated, the matter had to be considered and voted on by the entire board of trustees of the Fund. In this case, however, Tarantola made his decision unilaterally, without consultation with anyone. Although Respondent may contend that as administrator of the Fund Tarantola had the right to act as he did, again, I conclude that his actions cannot be attributed to the Fund but to Respondent Union whose principal interests Tarnatola represented at the time he committed his actions.

Accordingly, in applying the Board ruling enunciated in *Food & Commercial Workers*, supra, I am constrained to draw the conclusion that, as Tarantola had de facto control of the Fund, all actions by him, as related above, are imputed to Respondent Union. I further find that the board of trustees of Respondent Fund, which included the employer-appointed trustees, never was afforded an opportunity to either confirm or refute Tarantola's actions with respect to Maffettone. Therefore, I do not find, as the General Counsel contends, that the Fund was an agent of Respondent Union. Having found that the actions of Tarantola were performed in his capacity as the agent of Respondent Union, I shall recommend that the complaint against Respondent Fund be dismissed in its entirety.

IV. REPORT ON OBJECTIONS TO THE ELECTIONS

The record establishes that a petition for decertification of Respondent Union in Case 2–RD–1073 was filed on October 1. Pursuant to a Decision and Direction of Election issued by the Regional Director on February 10, 1983, an election was held on March 10, 1983. The tally of ballots revealed that 14 votes were cast for Re-

spondent Union and 11 were cast against it, with 1 challenged ballot insufficient to affect the results of the election. A majority of the valid votes counted plus the challenged ballot were cast for Respondent Union. On March 17, 1983, the Employer filed timely objections to the conduct of the election. The objections, verbatim, were as follows:

> 1. On or about October 12, 1982, and continuously thereafter, the Amalgamated Jewelry, Diamond and Watchcase Workers' Union, Local 1-J, S.E.I.U., AFL-CIO [hereinafter the "Union"] by its officers, agents, representatives, and others acting in concert with them, restrained and coerced the decertification petitioner and other eligible voters and is restraining and coercing the decertification petitioner and other eligible voters in the exercise of their Section 7 rights, by:
>
> a. threatening to terminate the decertification petitioner's welfare benefits;
>
> b. threatening to commence legal action against the decertification petitioner;
>
> c. terminating the decertification petitioner's welfare plan coverage on or about November 14, 1982;
>
> d. failing and refusing to pay claims submitted to the Union and its Welfare Fund in behalf of the decertification petitioner;
>
> e. creating an atmosphere of fear of retaliation among the eligible voters that any who opposed or voted against the Union would risk imminent loss of insurance coverage and other Welfare Fund benefits.
>
> The above-specified acts and other related actions or inaction by the Union within the critical preelection period so impaired voter free choice that the election should be set aside on these grounds alone and a new election should be conducted.
>
> 2. On or about October 12, 1982, and continuously thereafter, the Jewelry Manufacturers Association/Local 1-J Welfare Fund, a labor organization or, an agent of the Union, by its officers, agents, representatives and others acting in concert with them, restrained and coerced the decertification petitioner and other eligible voters and is restraining and coercing the decertification petitioner and other eligible voters in the exercise of their Section 7 rights by engaging in the acts specified in Count 1 (a-e) and other related actions or inactions. Such actions within the critical pre-election period so impaired voter free choice that the election should be set aside on these grounds alone and a new election should be conducted.
>
> 3. Threats of violence and retaliation against employees during the critical period so permeated the atmosphere of the election as to impair voter free choice and destroy the laboratory condiditions required in Board elections.
>
> 4. During the critical period preceding the election, the Union, by its officers, agents, representatives, and others acting in concert with them coerced and intimidated eligible voters by entering the Employer's premises and committing the following acts:
>
> a. threatening employees with loss of employment, if they voted against the Union;
>
> b. threatening employees with loss of wages, hours, benefits and working conditions, if they voted against the Union;
>
> c. coercing, harassing and intimidating workers at their work station;
>
> d. stopping production at the Employer's facility without notice to or permission by the Employer;
>
> e. disrupting and interfering with the Employer's business by engaging in boisterous harangues of employees in the middle of the production area.
>
> By this and other related conduct, the Union created fear of retaliation in the minds of voters, which impaired voter free choice and affected the results of the election
>
> 5. During the 24-hour period immediately preceding the election, the Union, by its officers, agents, and representatives made campaign speeches to assembled groups of employees on Company time. *Peerless Plywood Co.*, 107 NLRB 427, 333 LRRM 1151 (1953).
>
> 6. By this and other conduct, the Union interfered with the election and destroyed the laboratory conditions required in Board elections.

An analysis of each objection reveals the following:

1(a) *Threatening to Terminate the Decertification Petitioner's Welfare Benefits*: The facts and conclusions relating to this specific objection have been detailed above under the section "Unfair Labor Practices." Having found that the conduct of the Union constituted a violation of the Act, a fortiori I find that the Employer has sustained its burden of proof with respect to this objection.

(b) *Threatening to Commence Legal Action Against the Decertification Petitioner*: Apparently, the Employer bases this objection on language in the third paragraph of the October 12 letter which states, "Therefore, we are commencing an investigation to determine whether a fraud has been perpetrated upon the Fund. If so, we may hold you and/or I. Shor liable for any claims paid to you during your period of non-bargaining unit status."

Although the General Counsel and the Employer have concluded that a threat of legal action was being made to Maffettone by Tarantola, I do not find that this conclusion is warranted. Nowhere in the letter is there any language stating that legal action would be commenced against Maffettone. To hold Maffettone or the Employer liable for any claims paid to her can be construed in many ways. Tarantola had options of collecting the moneys paid, if warranted, through various means, including threatening to expel Maffettone from the Union. Accordingly, I find that the Employer has not sustained its burden of proof with respect to this objection.

(c) *Terminating the Decertification Petitioner's Welfare Plan Coverage about November 14, 1982*: For the same

reasons as stated in 1(a), I find that the Employer has sustained its burden of proof with respect to this objection.

(d) *Failing and Refusing to Pay Claims Submitted to the Union and Its Welfare Fund in Behalf of the Decertification Petitioner*: Tarantola testified, without contradiction, that no claims to the Fund were submitted by Maffettone between November 14 and December 20. Accordingly, I find that the Employer has not sustained its burden of proof with respect to this objection.

(e) *Creating an Atmosphere of Fear of Retaliation among the Eligible Voters that Any Who Opposed or Voted Against the Union Would Risk Imminent Loss of Insurance Coverage and Other Welfare Fund Benefits*: The undisputed evidence as submitted by Maffettone that fellow employees reacted in fear on reading the letter of October 12, as detailed above in the unfair labor practices section of this decision, supports the objection. Accordingly, I find that the Employer has sustained its burden of proof with respect to this objection.

2. The objection contained in paragraph 2 is substantially identical to the objection raised in paragraph 1. Thus, for the reasons stated above, I find that the Petitioner has sustained its burden of proof with respect to this objection.

3. *Threats of Violence and Retaliation Against Employees During the Critical Period so Permeated the Atmosphere of the Election as to Impair Voter Free Choice and Destroy the Laboratory Conditions Required in Board Elections*: I find no evidence in the record of any threats or violence against any employees by agents of the Union. Despite the hostility that Respondent Union may have had and demonstrated against Maffettone, I find no evidence that threats or actual violence were committed by any agent of Respondent Union. Accordingly, I find that the Employer has not sustained its burden of proof with respect to this objection.

4(a), (b), and (c). To support these objections, Respondent relied on the testimony of Maffettone who stated that, on March 8, 2 days prior to the scheduled election, union agents Ortiz and Johnson spoke with employees, including Maffettone, at their work stations during working hours. Ortiz warned employees that if they voted the Union out they would be out of a job the day after. Maffettone testified that Johnson yelled and screamed at her that "if we vote the Union on Thursday that we'd all be out of jobs on Friday, and he just was screaming at me and I don't remember everything he said." As neither Johnson nor Ortiz disputed that these statements were made by them, I find that the Employer has sustained its burden of proof with respect to these objections.

4(d) and (e). The undisputed evidence revealed that during the entire period that the collective-bargaining agreement was in effect, union agents were able to enter the Employer's premises and speak to employees at will. Nothing is contained in the record which establishes that specific permission from the Employer was necessary prior to their speaking to employees. No evidence was adduced that the union agents, either themselves or through other employees, stopped production and interfered with the Employer's business during their visits to the facility. Accordingly, I find that the Employer has not sustained its burden of proof with respect to 4(d) and (e).

5. *Violation of the Peerless Plywood Rule*: The Employer contends that on the morning of the election, March 10, 1983, Ortiz entered the Employer's premises and made campaign speeches lasting 5 to 15 minutes apiece to assembled groups of unit employees on company time and less than 1 hour before this scheduled election.

The evidence on which the Employer relied to support its objection is the testimony of Maffettone who asserted that on the morning of the election she observed Ortiz speaking to two unit employees from 5 to 15 minutes. She did not hear what he said. She then testified that she went to the receiving and shipping area in the back of the facility, remaining there about 10 minutes. No evidence was offered to indicate what, if anything, took place in the shipping and receiving area.

Under *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953), the Board established a rule banning campaign speeches of any kind by either unions or employers to assembled groups of employees on company time and property within 24 hours before a scheduled election. A violation of this rule automatically is grounds for setting aside the election. I do not conclude that a union agent speaking to two employees at the employer's premises approximately 45 minutes prior to the opening of the polls, in which no evidence was obtained as to what was said to these employees, constitutes a violation of the *Peerless Plywood* rule. Accordingly, I find that the Employer has not sustained its burden of proof with respect to this objection. *Hudson Oxygen Therapy Co.*, 268 NLRB 1374 (1984).

6. *Through the Conduct of Its Agents, the Union Interfered with the Election and Destroyed the Laboratory Conditions Required in Board Elections*: Although there is insufficient evidence to sustain some of the objections raised by the Employer, I find that other objections do have merit. Accordingly, I recommend that the election held in Case 2–RD–1073 on March 10, 1983, be set aside and a second election be conducted following an appropriate posting period.

CONCLUSIONS OF LAW

1. The I. Shor Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to terminate the insurance benefits of Joan Maffettone because she filed a decertification petition with the Board, Respondent Union has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. By suspending the insurance benefits of Joan Maffettone between November 14 and December 20, 1982, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent Union's unlawful conduct interfered with the representation election conducted on March 10, 1983.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action, as provided for in the Order, to remedy and remove the effects of the unfair labor practices and to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local 1-J, SEIU, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening to terminate insurance benefits of Joan Maffettone or any other employee of the I. Shor Company, Inc. for filing a decertification petition with the Board, or engaging in any other protected concerted activity.

(b) Suspending the insurance benefits of Joan Maffettone, or any other employee of the I. Shor Company, Inc., for filing a decertification petition with the Board, or engaging in any other protected concerted activity.

(c) In any like or related manner restraining or coercing employees of the I. Shor Company, Inc. in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Joan Maffettone for any loss of benefits suffered by her and for any expenses incurred by her as a result of the unfair labor practices of Respondent Union. Said pecuniary loss, with interest, is to be determined by the Regional Director for Region 2.

(b) Post copies of the attached notice marked "Appendix" in conspicuous places in its business offices and meeting halls, and all places where notices to members are customarily posted.[5] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Local 1-J to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices committed by Jewelry Manufacturers Association, Local 1-J Welfare Fund.

IT IS FURTHER ORDERED that the election in Case 2-RD-1073 conducted on March 10, 1983, is set aside and that, after an appropriate posting period, a new election be scheduled by the Regional Director for Region 2.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten to terminate insurance benefits of Joan Maffettone, or any other employee of the I. Shor Company, Inc., for filing a decertification petition with the National Labor Relations Board or engaging in any other protected concerted activity.

WE WILL NOT suspend insurance benefits of Joan Maffettone, or any other employee of the I. Shor Company, Inc., for filing a decertification petition with the National Labor Relations Board or engaging in any other protected concerted activity.

WE WILL NOT in any like or related manner restrain or coerce employees of the I. Shor Company, Inc., in the excercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL make whole Joan Maffettone for any loss of benefits suffered by her and for all expenses incurred by her as a result of our unfair labor practices.

AMALGAMATED JEWELRY, DIAMOND AND WATCHCASE WORKERS UNION, LOCAL 1-J, SEIU, AFL-CIO

Continental Composition, Inc. *and* Linda Dziwak, Petitioner and Chicago Typographical Union, No. 16. Case 13–RD–1400

14 December 1984

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held 22 March 1984 and the Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows none for and 11 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings[1] and recommendations, and finds that a certification of results of election should be issued.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Chicago Typographical Union, No. 16, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER HUNTER, dissenting.

Contrary to my colleagues in the majority, I would remand the instant case to the Regional Director for a hearing on the issue of whether, as alleged, Regional Office personnel advised bargaining unit employees that they were not required to abide by the union-security clause of the collective-bargaining agreement between the Union and the Employer.[1] In my view, this allegation raises a substantial and material issue of fact which should be resolved in a hearing.

The majority dismisses the allegations concerning Regional Office communications with employees on the grounds that the Board, considering this allegation in a representation proceeding, presumes the parties' union-security clause valid unless it has been found invalid in an unfair labor practice proceeding and that in *Typographical Union 16 (Continental Composition)*, 268 NLRB 347 (1983), the Board found the union-security clause in question to be unlawful because it did not provide existing employees with the statutory 30-day grace period. The majority's reliance on *Typographical Union* is misplaced. In that case, the Board held that the Union violated Section 8(b)(2) of the Act by enforcing the union-security clause in the collective-bargaining agreement—the same bargaining agreement involved in the instant case—by requiring all bargaining unit employees who were on the payroll as of the date on which the contract was ratified to be members of the Union on that date. The Board found that this provision violated the requirement of Section 8(a)(3) of the Act that employees must be given a 30-day grace period before being required to join a union pursuant to a union-security clause and ordered the Union, inter alia, to cease and desist from entering into, maintaining, or enforcing such a provision. The Board's decision did not address the more general provision of the parties' union-security clause requiring employees to join the union by the 45th day following commencement of employment. Indeed, there would appear to be no basis for invalidating that portion of the parties' agreement since it provides for more than the statutorily required minimum 30-day grace period. Consequently, there is no basis for inferring, as the majority implicitly does, that *whatever* Regional Office personnel may have said to employees about not being required to join the Union or pay dues in accordance with the union-security clause such statements were not objectionable because the clause had been invalidated.[2] Depending

[1] Two weeks after filing its objection, the Union filed a position statement which alleged that during the critical period "one or more Board representatives provided information and advice" to unit employees to the effect that they should not comply with the union-security clause until after the election. The Regional Director did not address this allegation. When considering this allegation in a representation proceeding, the Board presumes the union-security clause to be valid unless found otherwise in an unfair labor practice proceeding. In *Typographical Union 16 (Continental Composition)*, 268 NLRB 347 (1983), the Board found that the union-security clause involved here violated Sec. 8(b)(2) of the Act because it did not provide present employees with the statutory 30-day grace period. The Union does not proffer evidence showing that the compliance stage of the earlier proceeding was completed before the election. We therefore find that the parties did not have a valid union-security clause in effect during the critical period. Consequently, we find no merit in the Union's allegation.

[1] Although this allegation was not specifically raised in an objection it should have been addressed by the Regional Director in his report, and is properly addressed by the Board on review, since it is a matter which came to the attention of the Regional Director during the course of his investigation of the objections and which raises an issue of possible election taint. See *Thomas Products Co.*, 169 NLRB 706 (1968); *American Safety Equipment Corp.*, 234 NLRB 501 (1978).

[2] Moreover, in view of the fact that the Board's decision in *Chicago Typographical Union* issued more than 100 days prior to the election, it is certainly possible that the Union had completed compliance with the Board's Order not only before the election but also before any comments by Board personnel to employees concerning their union-security obligations were made. This is another reason why I believe a hearing should be held in the present case. I cannot agree with the majority's implicit requirement that the Union was obligated to come forth with evidence as to whether or not compliance with the Board Order in the unfair labor practice proceeding had been completed prior to the election. This is especially so since completion of compliance is particularly within the

Continued

on what the Regional Office personnel said to employees regarding their obligations under the clause, and the circumstances under which such statements were made, such statements may have affected employees' free choice in the election. For this reason, an evidentiary hearing should be held to determine what, if anything, Board personnel said to bargaining unit employees during the critical period concerning the employees' obligations under the union-security clause. Accordingly, I dissent.

knowledge of the Board's Regional Office personnel. Thus, requiring an objecting party in a representation case to come forward with such evidence as a precondition of obtaining a hearing on its objections is to require it to inform the Regional Office (and/or the Board) of the status of the Region's own proceedings in a related unfair labor practice case. In my view, an objecting party should not be required to present such evidence in order to obtain a hearing, so long as other requirements for ordering a hearing are met.

Glade Springs, Inc. *and* **Carol McLaughlin** *and* **Mary Mayes** *and* **Shirley Walton** *and* **Lucy Ramieh** *and* **Ethel Edwards** *and* **Lilli Toney** *and* **Rebecca Gilkerson** *and* **Deborah Ledger** *and* **Emma Jane Genoble** *and* **Margaret Flynn.** Cases 9-CA-18481, 9-CA-18761-1, 9-CA-18761-2, 9-CA-18761-3, 9-CA-18761-4, 9-CA-18975-1, 9-CA-18975-2, 9-CA-18975-3, 9-CA-18975-4, and 9-CA-18975-5

14 December 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 2 August 1983 Administrative Law Judge Thomas A. Ricci issued the attached decision. The Respondent and Charging Party Carol McLaughlin each filed exceptions and a supporting brief. The General Counsel filed a brief in answer to the Respondent's exceptions and in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, as modified below, and to adopt the recommended Order as modified.

1. As a partial ground for finding that the Respondent unlawfully refused to recall employee Lucy Ramieh, the judge surmised that the Respondent recalled her during the recess in the hearing merely to reduce its backpay liability. The Board has previously ruled that a respondent's interim remedial actions are not conclusive proof of an unlawful motivation.[3] Accordingly, we rely only on those sections of the judge's analysis which do not rest on his inference regarding the timing of the Respondent's recall of Ramieh.

2. The judge properly found that the Respondent unlawfully failed to recall nine employees on their unconditional offers to return. However, he found that the violation commenced 5 days after the date of the Respondent's receipt of each offer. We disagree with this finding and amend the remedy to mark the commencement of backpay as the date of the Respondent's receipt of each offer.[4] Because the record does not disclose the dates the Respondent received the offer letters, we leave that determination to the compliance proceedings. This includes the dates of the Respondent's receipt of Edwards' and Walton's offers, which the judge, without record support, described as the date the letters were sent.

3. In determining whether employee Lilli Toney had engaged in picket line misconduct sufficiently egregious to deprive her of her right to recall as an economic striker who had made an unconditional offer to return, the judge considered the testimony of three witnesses. One employee witness testified that Toney along with several other employees yelled abusive and obscene language. Another witness testified that during the picketing Toney came up to him and threatened to kick his wife, an employee, if she continued to come to work and threw coke on him twice. Toney denied all the alleged misconduct, explaining that she had accidentally spilled coke on the second witness. The judge declined to make a credibility resolution and considered that the picket line misconduct was "halfway" between the two versions. He then found all that emerges is "the usual picture of disagreement that by the nature of things characterizes all enthusiastic picket lines." He concluded that the Respondent's attempt to single out one picket from an animated group did not justify the refusal to reinstate the picket. On this basis, he found that the Respondent's refusal to recall Toney violated Section 8(a)(3) and (1) of the Act.

The judge's failure to resolve the conflicting testimony concerning Toney's misconduct precludes us from determining whether any misconduct Toney engaged in was sufficiently egregious to deprive her of the protection of the Act. In addition, *Clear Pine Mouldings*,[5] in which the Board recently revised its standard for determining where strike misconduct justifies denying an employee's reinstatement, issued subsequent to the judge's decision.[6] We therefore sever this portion of the pro-

[1] The Respondent and Charging Party Carol McLaughlin have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In finding violations concerning the reinstatement of employees Ethel Edwards and Shirley Walton, the judge relied on *Laidlaw Corp.*, a case for which he gave no citation. The citation for that case is 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

The judge made the overly broad statement that economic strikers are entitled to recall on demand. As the judge correctly acknowledged elsewhere in his decision, this right is subject to the limitations of an unconditional offer to return to work by the striking employee and the absence of replacements or other legitimate and substantial business considerations. E.g., *Laidlaw Corp.*, above.

[3] See, e.g., *Allied Maintenance Corp.*, 261 NLRB 1145, 1147 fn. 2 (1982).

[4] See, e.g., *Cutting, Inc.*, 255 NLRB 534, 544 (1981), enf. denied on other grounds 701 F.2d 659 (7th Cir. 1983); *Routh Packing Co.*, 247 NLRB 274, 281-282 (1980). See also *Adams Book Co.*, 203 NLRB 761, 769 fn. 39 (1973) (date of offer by letter is date it is received).

[5] 268 NLRB 1044 (1984).

[6] That standard is to be applied retroactively. Id. at fn. 14.

ceeding and remand it to the judge to make definite credibility findings on the alleged strike misconduct[7] and to apply the revised standard of *Clear Pine Moldings*.

4. The judge similarly found the alleged picket line misconduct of employee Mary Mayes was not sufficiently egregious to deprive her of her right to recall as an economic striker who had made an unconditional offer to return. In making this finding the judge referred to the testimony of employee Rebecca Ramsey that on 1 June many pickets, including Mayes, yelled at her on her way to work and threatened her with the loss of her job, and to the admissions by strikers that they had engaged in rough talk on the picket line. Relying on this evidence and his findings that Mayes was only one of many participants and that a strike is not "a tea party," the judge concluded that Mayes' conduct did not justify the Respondent's refusal to recall her. He therefore found that the Respondent's refusal to recall Mayes violated Section 8(a)(3) and (1) of the Act.

However, the judge neither credited nor discredited the further testimony of Ramsey that on another date, in the midst of similar shouting, four employees blocked her egress to work at the direction of Mayes, which resulted in Ramsey calling into the plant for assistance in making her way into the facility.

The judge's failure to make specific findings on this testimony deprives us of the necessary factual basis on which to decide whether any misconduct Mayes engaged in was sufficiently egregious to deprive her of the protection of the Act. We therefore also sever this portion of the proceeding and remand it to the judge to make definite credibility findings on *all* the alleged strike misconduct by Mayes and to apply the revised standard of *Clear Pine Mouldings*.[8]

5. The judge recommended that a broad cease-and-desist order issue against the Respondent. However, we have considered this case in light of the standard set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that a narrow cease-and-desist order is appropriate. We shall modify the judge's recommended Order accordingly.[9]

A corrected Order and notice have been included to conform with the judge's recommended remedy, as amended.

AMENDED CONCLUSIONS OF LAW

The Conclusions of Law shall be amended as follows:

Substitute the following for Conclusion of Law 1:

"1. By refusing to reinstate economic strikers Ethel Edwards, Shirley Walton, and Lucy Ramieh, on receipt of each employee's unconditional offer to return to work, by reducing the hourly pay of Ramieh, and by changing the conditions of employment for Emma Genoble, Rebecca Gilkerson, Debbie Ledger, and Margaret Flynn, including by reducing their hourly pay, because they had engaged in protected concerted activity, the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, Glade Springs, Inc., Daniels, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate economic strikers on unconditional offers to return to work.

(b) Refusing to credit recalled economic strikers with seniority for prior service.

(c) Reducing the pay scale of recalled economic strikers because they have engaged in protected concerted activities.

(d) Threatening to close its business in retaliation for the union activities of its employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Ethel Edwards, Shirley Walton, and Lucy Ramieh for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

(b) Credit economic strikers with seniority for prior service after they have been recalled to work.

(c) Pay Emma Genoble, Rebecca Gilkerson, Debbie Ledger, and Margaret Flynn for any vacation benefits and medical insurance benefits, includ-

[7] See, e.g., *Deauville Hotel*, 256 NLRB 561 (1981).

[8] Member Zimmerman disagrees with his colleagues that it is necessary to remand the issue of the alleged strike misconduct of employee Mary Mayes. Even crediting the testimony described above which the judge did not mention, he does not consider that Mayes' conduct on the picket line was sufficiently egregious to deprive her of her right to reinstatement. In reaching this conclusion, he has applied the standard for strike misconduct expressed in his concurrence in *Clear Pine Mouldings*, above.

[9] Member Zimmerman agrees with the judge's recommendation that a broad cease-and-desist order should issue.

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ing the cost of any premium payments made in order to retain equivalent insurance coverage, to which they would have been entitled but for the Respondent's discrimination against them, plus interest.

(d) Restore the pay scale of all reinstated strikers whose pay has been reduced because of their strike activities to the scale which they were being paid before the strike, and make each of them whole for any loss of pay resulting from the interim reductions in their wage scale, plus interest.

(e) Post at its facility in Daniels, West Virginia, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 9–CA–18975–1 which contains the allegations that the Respondent unlawfully failed to recall employees Lilli Toney and Mary Mayes be severed from the instant proceeding and that proceeding be remanded to Judge Thomas A. Ricci for the purpose of making credibility resolutions on all testimony concerning the alleged picket line misconduct by these employees and recommendations as to whether the conduct they each engaged in was such as to require the forfeiture of either's rights as an economic striker who had made an unconditional offer to return to work. In making this recommendation, the judge is further ordered to apply the standard for strike misconduct recently enunciated in *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth the resolution of such credibility issues and findings and conclusions with respect thereto. Copies of such supplemental decision shall be served on all the parties, after which the provisions of Section 102.46 of the Board's Rules shall be applicable.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to reinstate economic strikers on unconditional offers to return to work.

WE WILL NOT refuse to credit recalled economic strikers with the seniority previously enjoyed.

WE WILL NOT reduce the pay scale of recalled economic strikers because they have engaged in protected concerted activities.

WE WILL NOT threaten to close the business down in retaliation for the union activities of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL credit returned economic strikers with seniority acquired before the strike.

WE WILL make whole Ethel Edwards, Shirley Walton, and Lucy Ramieh for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL pay Emma Genoble, Rebecca Gilkerson, Debbie Ledger, and Margaret Flynn for any vacation benefits and medical insurance benefits, including the cost of any premium payments made in order to retain equivalent insurance coverage, to which they would have been entitled except for our discrimination against them, plus interest.

WE WILL restore the pay scale of all reinstated strikers whose pay has been reduced because of their union activity to the scale to which they were being paid before the strike, and WE WILL make them whole for any loss of pay resulting from the interim reduction of their pay scale, plus interest.

GLADE SPRINGS, INC.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held at Beckley, West Virginia, on February 28 and 29, March 1, and May 24 and 25, 1983, on complaint of the General Counsel against Glade Springs, Inc. (the Respondent or the Company). The complaint issued on January 12, 1983, based on separate charges filed on various dates between June 29, 1982, and December 17, 1982, by 10 individuals as Charging

Parties. A number of issues are presented: (1) Was a prounion activist discharged in violation of Section 8(a)(3) of the Act, or was she in fact a supervisor who could be dismissed with impunity? (2) Was the strike which took place at the time of the events an unfair labor practice strike, or was it an economic one? (3) Was the Respondent justified in denying reinstatement to two strikers who offered to return to work on the ground that they had engaged in improper picket line activity? (4) And, were seven other strikers who offered to return to work illegally denied "full" reinstatement, in violation of Section 8(a)(3) of the Act? Briefs were filed by the General Counsel and the Respondent.

On the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

This Company, a Delaware corporation, is engaged in the operation of a resort in Daniels, West Virginia, providing food, beverages, lodgings, and recreational activities for guests. During the 12-month period preceding issuance of the complaint, in the course of its business it derived gross revenues in excess of $500,000. During the same period it purchased and received products and materials valued in excess of $50,000 directly from out-of-state sources. I find that the Respondent is an employer engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Hotel and Restaurant Employees' Local Union No. 863, affiliated with Hotel and Restaurant Employees' and Bartenders International Union, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Case in Brief*

At its resort location in West Virginia the Respondent employs people in many categories. The only ones involved in this case worked in the food and beverage department, where they were cooks, food and cocktail waitresses, and cleanup people, a total of about 30 employees. During May 1982 a move towards joining the Union developed among them; Carol McLaughlin, the head cook, was among the principal activists toward that end. She called the Union's business agent, brought cards to the work location, and assisted in obtaining a number of signatures to authorization cards. She was discharged on May 25. The complaint alleges McLaughlin was discharged because of her union activities, and that thereby the Respondent violated Section 8(a)(3) of the Act.

On May 29 the employees of the food and beverage department struck, and many of them quit work and went on the picket line. A number of the strikers testified that their reason for striking was twofold: to protest many undesirable conditions of employment and to protest McLaughlin's discharge. If in fact the discharge of the head cook was an unfair labor practice, it follows the work stoppage was an unfair labor practice strike. If her dismissal was lawful, the strike was a purely economic one. *Roma Baking Co.*, 263 NLRB 24 (1982).

The Company hired a number of replacements and work went on as usual. Three months later the picketing ceased and nine of the strikers offered to return to work. Two were refused employment on the grounds that they had misbehaved toward employees who came to work during the strike. Some were reinstated, but paid a lesser hourly rate than they had been earning before the strike, and some were taken back as new employees and denied their previously acquired seniority.

B. *The Discharge of McLaughlin*

I find that McLaughlin was a supervisor within the meaning of the Act when she was discharged, and that therefore by releasing her the Respondent did not commit an unfair labor practice. Were I to find she was not a supervisor, as contended by the General Counsel, I would dismiss the complaint as to her in any event because the record as a whole fails to prove a prima facie case against the Company. When discharged she was told it was because of listed failings on her part at work. It is true she had never been warned about delinquencies, either orally or in writing, so that the sudden dismissal would appear suspect. But it is also a fact, as McLaughlin admitted, no one in management had ever told her she might be fired because of her union activities, or threatened her in any manner. I am not sure why she was fired, although a possible explanation does appear. A man named DuPriest had been hired shortly before, and put in charge of the department, over her. The Company probably did not need her any more. Moreover, when, in August, McLaughlin filed a charge against the Company with the West Virginia Department of Human Resources, she told the investigator that the reason for her dismissal was "because of sex . . . I have been replaced by a male who was hired one week prior to my termination." But whatever this aspect of the case, dismissal here rests solely on the fact she was a supervisor.

(1) McLaughlin was the only salaried employee in the department, and the only one who did not punch a timecard. During February 1982, her annual salary was $16,800. The next highest below her was the bartender, who received a salary of $9600. All the rest were hourly paid, the highest getting $4.50 per hour. In March the Respondent gave almost all employees in the department a raise. The resulting picture shows McLaughlin being paid $26,000 per year, the bartender $10,000 and, again, the highest hourly paid employee receiving $6.76 per hour.

(2) With so many employees hourly paid there were many times when errors appeared on their timecards. Joyce Meadows, the personnel director, testified only McLaughlin was authorized to correct the timecards, always placing her initials on the cards. McLaughlin, and a number of employees testifying for the General Counsel, kept saying other ordinary employees were also authorized to initial timecards to correct errors of fellow employees and in fact did so. The Respondent placed into evidence 90 separate timecards, covering a period of 3 or 4 months, each showing McLaughlin's initials au-

thorizing corrections. It was then stipulated that, pursuant to subpoena, the Respondent had produced for the General Counsel's inspection all the timecards for the period February 1982 to the day of McLaughlin's discharge. None was offered into evidence by the General Counsel. This means that there are no timecards showing any other person having corrected errors. The General Counsel's witnesses were not telling the truth on this point.

(3) The Respondent makes it a practice to evaluate the employees periodically—annually, after the probationary period, etc. The form it uses is a four-page document listing 14 separate aspects of employment, such as quantity of work, attendance, dependability, creativity, etc. Seven such evaluations were placed in evidence, all dated during March 1982. Each of them shows McLaughlin's signature at the end, with the word "supervisor" written in her hand as to the "title" she held. Immediately below her signature appears the typed statement, "A copy of this Report has been given to me and has been discussed with me," followed by the employee's signature. On their face these exhibits constitute evidence that McLaughlin was authorized and in fact did evaluate all the employees, proof positive of her supervisory status.

She testified that when Meadows gave her those forms for evaluation of all the employees in her department, the personnel director told her to have each employee evaluate herself, or himself, and a number of the employees who testified as to this very form received in evidence said they put the check marks on the various appraisals themselves, i.e., that they evaluated themselves! Meadows, to the contrary, said it was McLaughlin's duty to evaluate the employees, and that McLaughlin in fact did so, because she was the supervisor.

As to who made these evaluations, resolution of credibility is easy. On every one of the exhibits the 14 checks—one for each of the various aspects of the job—are in red ink. McLaughlin's signature and the words "supervisor, kitchen and dining" are also in red ink. At the bottom of each form the signature of the employee appears in blue ink. Am I to believe that in each instance the employee borrowed McLaughlin's pen to place the appropriate checks, and then returned it to her and signed her own name in blue with her own pen? Or am I to believe each did whatever she did with a single pen? And why should any employer have the employee evaluate herself? McLaughlin even said she signed these forms only because Meadows asked her to do so. She even referred to other forms received in evidence, disciplinary and layoff forms—which she signed, as supervisor—by saying she only signed them because Meadows told her to. Asked why did Meadows tell her to do that, she answered: "Because I was the longest there and knew the people."[1] But this is exactly why supervisors evaluate their subordinates.

[1] All the forms in which McLaughlin evaluated employees received in evidence are dated March 1982. The first contact with the Union was made in May, as McLaughlin herself testified. With this, the General Counsel's assertion, in her brief, that all the evaluation forms were filled in by the supervisor "to be used at the trial herein" merits no comment.

(4) Repeatedly the witnesses on both sides spoke in conclusionary terms, that McLaughlin was or was not a supervisor. These statements are not evidence to me. But time and again, over the years, the General Counsel has relied on formal documents to prove supervisory status. There was another document placed in evidence that puts to rest this question here with finality. As set out above, McLaughlin, 3 months after her discharge, and after she had filed her charge with the Board, signed an affidavit for the Department of Human Resources in West Virginia. The body of the affidavit, its very essence, reads as follows:

> 1. On May 25, 1982, I was terminated from my employment as Supervisor of Food Services.
>
> 2. Bob McLean, president, and Ron DuPriest, Food and Beverages Manager, alleged that I handled my supervisory responsibilities poorly and that I was unable to control money.
>
> 3. I believe that I have been discriminated against because of sex, female, in that:
>
> (a) I have been replaced by a male who was hired one week prior to my termination.

Called as a witness in rebuttal at the close of the hearing, McLaughlin said, under oath, that when she swore to the truth of the affidavit the Human Resources investigator prepared during her interview, all that was set out on the affidavit now was not written on it at all, that the document consisted of no more than the formal, printed parts. Did the investigator have McLaughlin sign a blank affidavit so she could run to the Respondent and obtain a statement that would hurt McLaughlin in a proceeding that had nothing to do with the investigation she was interested in at all? Without further comment, in my judgment McLaughlin stands as a completely discredited witness in this case wherever she is contradicted by any other witness.

Because McLaughlin was a supervisor I shall recommend dismissal of the complaint as to her.

C. *The Returning Strikers*

It was an economic strike. In August nine of the strikers made unequivocal offers to return to work. Seven of them were accepted as new employees and under conditions of employment different from the past and to the material disadvantage of all seven. Two who offered to return were refused outright.

1. Mayes

Mary Mayes, a striker, wrote to Baker, the general manager, on August 5, offering to return to work unconditionally. She never received an answer from anyone in the Company. The only witness who spoke about the Respondent's failure to reinstate Mayes at the hearing was Meadows, who worked in the office. She admitted she was not the one who made the decision not to rehire Mayes, but merely said what she thought was the reason for Baker's refusal to rehire that girl. On this record, therefore, it can well be said the Respondent has not

come forth with any explanation for its failure to reinstate the striker, to say nothing of not having given her an articulated reason at the time of the act. With the law being, clearly, that a returning economic striker is entitled to reinstatement on demand, this means the prima facie case in support of the unfair labor practice alleged in the complaint as to this woman has not really been rebutted.

The Respondent called Brenda Black, an employee who had signed a union card but did not join in the strike. She testified that sometime in June or July she met Mayes in the parking lot of a fast food place some distance from the plant, where Mayes asked her why she was crossing the picket line. When Black answered it was because she needed the money, still according to her testimony, Mayes patted her purse on the seat next to her and said she had a gun and was not afraid to use it. It was this threat of physical violence that, the Respondent now contends, justified its refusal to rehire Mayes.

Mayes' version of that talk between the two at the parking lot is that Black asked her why she was being harassed when crossing the picket line, and that Mayes' answer was they were not picking on Black but simply wanted to know why she had "reneged" after signing a card for the Union. Mayes said she never owned a gun and denied ever having threatened the other woman at all. I credit her against Black. There were young women in Mayes' car, her daughter and another girl. Black said she thought she had told DuPriest, the kitchen manager, about the incident, but DuPriest was not called as a witness. Black also said she herself used to carry a gun, and "it didn't upset me that much." She closed by saying she really did not recall who she told about the incident within the Company.

Another witness, Rebecca Ramsey, testified that she worked at the start of the strike. She said that on June 1 a "bunch" of pickets were "screaming and hollering at me and threatening me," "calling me names and stuff," and saying that when they returned she would not have a job. As she continued the witness listed no less than four different strikers by name as having participated in whatever happened to her that day. An example of her generalized testimony: "I think it happened the very next day, like some—like they'd go weeks without saying nothing to you and then there all of a sudden they would just start saying stuff for a couple of days and then they would stop again."

The strikers who testified admitted there was rough talk on the picket line, but then, as the Board has often said, industrial strife of this kind is not to be likened to a tea party. *Machinists District 34 (Wolf Machine Co.)*, 254 NLRB 282, 286 (1981).

I find the Respondent has not come forth with sufficient evidence of wrongdoing on the part of Mary Mayes to justify its refusal to reinstate her when she asked to abandon the strike, and that therefore by denying her reinstatement it violated Section 8(a)(3) of the Act.

2. Lilli Toney

Like Mayes, Toney wrote a letter to the Company on September 21, 1982, offering to return unconditionally. She never received an answer. It was only at the hearing that the Respondent first advanced, as a reason for not reinstating her, that she had misconducted herself during the strike. Again, insofar as this record shows, it was Baker who made that decision. At one point in her testimony Meadows, for the Respondent, said, "I guess it was a mutual decision" not to rehire Mayes and Toney. But there is also the following:

> Q. Did you decide not to hire her?
>
> A. Well, no. Not actually, no.
>
> Q. Well, how do you know why—who decided not to take her?
>
> A. I was in the . . . Bud Baker's office, the general manager, when the decision was made.

What this means is that it is questionable, at the outset, whether the Respondent really gave any thought to Toney's or Mayes' behavior on the picket line as a reason for not returning them to work. Baker was a witness for the Respondent in this case, but never once referred to the issue as to the refusal to rehire either Mayes or Toney.

In any event, there is more testimony by the witness Ramsey, who chose to work during the strike. She said that on June 1, at the start of the strike, when she arrived at the plant Toney "was yelling at me 'Fuck you, bitch.' And just calling me names and stuff like that." Ramsey several times described the incident, and some others like it, each time repeating herself generally and painting a picture of bad words exchanged back and forth, with people "yelling and screaming" on the picket line. She said there were many other pickets involved, doing the same thing. It was the same old story of people not liking one another when one group chooses to improve conditions of employment by striking and the other chooses not to do so. It is in the nature of human beings to become very vociferous, even dirty mouthed, at such times. But such course of conduct, to be expected, is hardly reason for denying reinstatement to a returning striker.

Another witness for the Respondent, Dennis Blackwell, used to drive his wife and another woman to work across the picket line. He spoke of an incident when he was bothered by the pickets:

> Q. Did anything unusual happen when you were transporting them to work?
>
> A. Yes, sir, a bit of an altercation when we came in . . . . In a nutshell, as we came off 3 strikers strung themselves across the mouth of Glade out by the highway and in order to get by them, the strikers, with the car, I had to nudge them aside with the Toyota. Somebody kicked the back of the car as we were driving through. I didn't see who it was. I just heard the thumps.

Blackwell continued that when he was leaving the premises:

> I went through the guard house. I came out to the highway. And Lilli Toney, a big, heavy blond girl, ran over and I was waiting for traffic. I couldn't get

> out. So I stopped there. And she said . . . "we're going to kick your wife's ass when we catch her." And I looked away for a second. I looked back and she threw some fluid in my face out of a can, pop or beer . . . . And I said, "Listen, Lilli." And she threw something in my face again. I turned off the car and got out of the car. I started to walk over to her and tell her not to threaten my wife, and the next thing I knew I was surrounded by the strikers. The strikers were screaming and yelling and for just a few minutes I tried to talk to them . . . and all of a sudden somebody pushed me from behind. Put their hands in the small of my back and pushed me. I turned around to see who it was and it was just more faces. I said, . . . I better get back in my car. I walked back to my car. Nobody touched me. They were all just screaming and yelling . . . I waited for traffic to clear and all of a sudden I heard a loud thump on the back of my car. I leaned out of my window and looked back. I would see over my left shoulder and a couple of people had sticks, clubs if you want to call them that, with knobs on one end and sharp stakes on the other.

The witness' testimony continued in this general fashion, and then he started to speak of another person, one Robert Flynn, who he said struck his car, put a crease in it, etc. His testimony ended at that point. Before closing, he explained that he was held up "probably" about a minute "so just very slowly in first gear pushed them aside with my car."

> Q. And this time you stopped the car because the traffic was built up?
>
> A. Correct.

Blackwell closed his testimony by first saying he told Baker about what happened, and then saying "I don't know" whether he told him or not.

Toney, called to rebut all this, later recalled seeing Blackwell drive his car into work once or twice, but denied ever touching his car, or telling him she would kick his wife. She did say she once approached his car to tell him not to bring his wife in to work across the picket line; she even added that when she did that he pointed his finger at her face and called her a "bitch," and that when he opened his car door to get out, a pop bottle in her hand spilled and some of it fell on Blackwell.

These differing versions of picket line stress, typical of the start of any strike, told long after the events, are to be expected. There is an understandable tendency on each side to exaggerate in both directions. If I decide the issue halfway between the two, all that emerges is the usual picture of disagreement that by the nature of things characterizes all enthusiastic picket lines. Clearly there was a crowd there, and the attempt to single out one picket as a special culprit will not do to justify the outright refusal to reinstate a particular striker much later.

On this whole record I find that the refusal to reinstate Toney was an unfair labor practice in violation of Section 8(a)(3) of the Act.

D. *Refusals to Offer Proper Reinstatement*

Seven other strikers made unqualified offers to return to work in writing: five on August 5, 1982, one on August 6, and one on August 12. During the early part of the hearing, in March 1982, all seven of these employees testified for the General Counsel, where four said they had been reinstated late in August or early in September. The other three—Ethel Edwards, Shirley Walton, and Lucy Ramieh—were still waiting for their jobs. Meadows, the office comptroller, testifying later for the Respondent in May when the hearing was resumed, said, as to Ramieh, that she "is employed with Glade now," as to Walton, that she was "recently . . . called back," and as to Edwards, that "she was hired back as a cook recently." Of the three, only Ramieh was called in rebuttal after Meadows' testimony, and she said she was recalled to work in April 1983. I have no reason not to accept Meadows' statement that Walton and Edwards have also been given jobs.

1. The four waitresses

Emma Genoble, Deborah Ledger, Rebecca Gilkerson, and Margaret Flynn were waitresses; they were paid in part an hourly rate by the Respondent and in part by tips from the customers. For some time before the strike Genoble had been paid $4.50 per hour, Ledger $3.25 per hour, Gilkerson $3 per hour, and Flynn $2.60 per hour. When offered reinstatement, which they accepted, they were told they were being relegated to the status of "new" employees, on 90-day probation, and that for each of them the hourly rate would be reduced to $2.10 per hour. In consequence each lady lost her accumulated seniority, varying from 3 to 7 years, and the accumulated vacation benefits flowing from seniority; each lady also lost the previously enjoyed medical insurance for a period of 3 months, the newly established probationary period.

The law is clear. To condition the reinstatement of economic strikers as new hires, with deprivation of previously enjoyed economic benefits, is a straight discrimination in retaliation for protected concerted activities, and a violation of Section 8(a)(3) of the Act. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The Respondent here did not even suggest any justification for striping these particular employees of their accumulated vacation benefits and company seniority. I find that with respect to Genoble, Gilkerson, Ledger, and Flynn the Respondent violated Section 8(a)(3) when it accepted their unconditional offer to abandon the strike by taking them on as new employees.

As to the reduction in pay, which the Respondent also imposed on them as a condition of reinstatement, the Company contends that it had decided, for economic reasons, to lower the hourly rate of all its waitresses before the strike started, and that therefore it had a right to reduce their pay also. The contention is belied by the facts, as the record clearly shows. Whatever the Company may have decided about the hourly rate for newly hired, or inexperienced waitresses, the fact is it did not reduce the hourly rate of these four before the strike. It

does appear that one or two waitresses were hired before the strike and paid at $2.10 an hour. Whatever the reason—probably because of their seniority and therefore greater skill on the job, these four continued to receive their established pay scale. In the circumstances, the only explanation for the reduced pay given them on return was the fact the Company considered them new hires, which it may not do to returning economic strikers. They were more deserving than new hires before the strike, and they remained more deserving at the higher rate of pay when they returned.

The collateral defense to this reduction in pay in the reinstatement of these strikers—that business considerations required the reduction—is equally unconvincing. The business continued as usual during the strike, and there was need for waitresses, as proven by the fact the women were in fact put to work. Conclusionary statements by a defense witness will not do to offset a clear and direct discriminatory treatment of economic strikers on their abandonment of the strike. Meadows testified the decision to reduce the hourly rate was made previously by General Manager Baker. But Baker, as a witness, never talked about it at the hearing. At the hearing Meadows said the new policy was to pay food waitresses only $2.10 and to continue to pay cocktail waitresses $2.60. Flynn, one of the returning strikers, was a cocktail waitress, but she too was reduced to $2.10. Moreover, Meadows' pretrial affidavit says the new policy was to pay all waitresses only $2.10, including cocktail waitresses. She was not a very convincing witness.

I find that the reduction in pay imposed on these four returning strikers was but another aspect of the impermissible conduct of treating them as new hires, instead of returning them to their established, prestrike status.

2. Ethel Edwards and Shirley Walton

Edwards, also a striker, was a cook. On August 5, 1982, she wrote a letter to Baker, saying she wanted to return to work. She never received any response. She was recalled, according to Meadows, as of May 24, 1983, "recently." The only explanation for this lady waiting 11 months for any answer to her offer is a statement by Meadows at the hearing. Asked "Were there any cooks hired prior to her coming back?" she answered: "We promoted within. If we had a dishwasher or a utility person and, you know, we train them to be cooks and then at that time they would perform cooking duties."

Shirley Walton, another striker, was a janitor-housekeeper. She wrote a letter to Baker on August 5, saying she "will be happy to return to my job." Not hearing from anyone she called in, still during August, and was told to talk to one Lisa Williams. All she was told is "they wasn't hiring any housekeepers." On September 20 she went to the company office and filed a regular employment application. No one from the Company ever contacted her thereafter. At the resumed hearing in May 1983 Meadows said only—with respect to this employee—"We had no position in that field until recently when a position did come open, and she was the one that was called back to that."

I do not consider these passing phrases by one company witness sufficient basis to explain the failure to reinstate these two women for over 10 months. The Respondent's brief does not add anything to Meadows' brief comment. The Respondent offered nothing tangible, no records of any kind, that might conceivably support a contention that these two women had been replaced by permanent employees when they applied for jobs, or that during that long interval there were no openings to which they could have been reinstated. Rather, elsewhere in her testimony, Meadows gave herself away.

> Q. [By Respondent's counsel] Were there any employees who offered to come to work after the strike was over and who had been on strike who were not returned to their jobs they were capable and able to do before someone outside the facility was hired to take their places?
>
> A. To the best of my knowledge there were two employees.
>
> Q. And those were who? . . .
>
> A. Shirley Walton and Ethel Edwards.

The duty is on the employer to come forth with some persuasive evidence that its refusal to take back an economic striker was because she had in fact been replaced. The Respondent has not done that. In *NLRB v. Fleetwood Trailer*, supra, a lead case, the Court said: "[U]nless the employer who refuses to reinstate strikers can show that his action was due to legitimate and substantial business justification, he is guilty of an unfair labor practice." Certainly the same logic applies where the employer refuses to reinstate a striker on the ground he has been permanently replaced; he has to show that the assertion has a reasonable basis. Furthermore, see *Laidlaw*, supra, where the Board said "that the right to the job does not depend on its availability at the precise moment of application . . . and that strikers retain their status as employees who are *entitled to reinstatement* absent substantial business justification, and regardless of union animus." "[T]he burden of proving such justification was on the employer." The Board's final holding in *Laidlaw*, I think, determines the question here.

I find that on August 12, 1982 (I will set the date one week after receipt of the two strikers' letters offering to return to work) the Respondent refused to reinstate Edwards and Walton because they had engaged in an economic strike and thereby violated Section 8(a)(3) of the Act.

3. Lucy Ramieh

Ramieh was a cook, and her letter, offering to return to work forthwith, is also dated August 5. She heard from no one until Meadows telephoned her on September 14 and told her to come to talk to a Mr. Finch "about my return to the job." She did. Finch asked her how much she was paid when she went on strike, and she told him, correctly, it was $6 per hour. He came back with "I can get young boys for $3.25." When to this Ramieh said that might be true but they would not be experienced, Finch offered to pay her $5 an hour instead of the $6 she had been receiving. Ramieh agreed to return at that rate, and Finch closed the conversation with saying he would let her know. Between that date

and April 1983, when she was recalled and paid only $4.25 per hour, she heard nothing from the Company.

I believe every word Ramieh gave as a witness in this case. Finch was not called to testify. And again, Meadows was offered instead as an offset to the case in support of the 8(a)(3) allegation as to this returning striker. She spoke of what Finch told her was the reason why he did not rehire Ramieh that day. If ever there was a situation where the hearsay rule of evidence absolutely applies, this is it. In place of Finch, Meadows contradicted Ramieh, and said the reason Finch did not rehire Ramieh that day was because she insisted on being paid $5 an hour, while the Company was paying other cooks $3.75 and $4 an hour. I do not accept her story as true about what happened between Finch and Ramieh.

There were jobs available when Ramieh offered to return to work. That is why Finch called her in to talk to her. He quarreled with her as to price; why would he do that if he did not have a job for her to do then and there? Although I do not know it for a fact, the chances are he counted on her refusing to work for less than her established rate of pay, and when she surprised him by saying she was willing to work for less, he avoided hiring her at the lesser rate by stalling, just saying he would get in touch with her later. This just proves the Respondent did not want to reinstate her. And I can suppose the Respondent took her back, during the recess in the hearing in this proceeding, simply in order to reduce its backpay liability in the event it lost the case.

I find that by refusing to reinstate Ramieh, again, on August 12, 1982, 1 week after she wrote her August 5 letter to return, the Respondent violated Section 8(a)(3) of the Act. And when she was recalled to work in April of 1983, she was paid only $4.25 per hour instead of the $6-per-hour rate she received before the strike. I therefore also find that by reducing her pay because of her having joined the strike, the Respondent violated Section 8(a)(3) of the Act.

On June 1, 1982, the Respondent sought a court injunction limiting the number of pickets in front of its property. After a conference in the judge's chamber, when the number of pickets was limited by court order, the parties emerged into the corridor of the building where many strikers were gathered. Three of them who were then present, and who testified at the hearing, said they heard Robert McLean, the president of the Respondent, exclaim he would close the plant before having a union represent his employees. By McLaughlin: "He said, 'they're will not be no—Mother fucking Union in here. He would close it down first.'" By Mayes: "I'll close the mother fucking place down before I let a union come inside." By Ledger: "He said he would close the m–'fer down before it went union." Genevive Sphinx, the union organizer, was also present. From her testimony: "McLean made the statement . . . he would close the mother fucking place before he'd see a union come in."

There was no denial of this damaging antiunion threat by McLean; he did not appear as a witness. Dennis Adkins, a maintenance supervisor, and Plant Manager Baker were also present in the corridor that day. They testified they did not hear the president say anything to the witnesses about closing the plant or disliking the Union at all. Maybe they did not hear it, but, in the circumstances, I do credit the employees and the union organizer, and I find that by the Respondent's statement in the presence of the employees that it would close the business if the organizational campaign succeeded, the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

The Respondent must be ordered to cease and desist from again committing the unfair labor practices found herein. Mary Mayes and Lilli Toney must be reinstated to their former positions, under the same conditions of employment they enjoyed at the start of the strike, and they must be made whole for any loss of earnings they suffered in consequence of the illegal discrimination against them. Shirley Walton, Ethel Edwards, and Lucy Ramieh must be made whole for any loss of earnings they suffered in consequence of the Respondent's refusal to reinstate them from August 12, 1982 (1 week after their letters offering to return to work), to the day they were in fact fully reinstated to their proper positions. In the event Walton and Edwards have not been reinstated, they must be restored to the same positions they held before the strike and given backpay to the day of adequate reinstatement.

As to the four waitresses—Genoble, Gilkerson, Ledger, and Flynn—they must be restored to the seniority status they held at the start of the strike, they must be compensated for any loss of vacation benefits and medical insurance they suffered in consequence of the illegal reinstatement, and their hourly rate of pay must be returned to the level they enjoyed at the start of the strike. These four employees must also be paid the difference between their current hourly rate and their old rate, for the entire period from the date of their return to work to the day the Respondent correctly adjusts their hourly rate in accordance with this Order. Like the waitresses, Ramieh, the cook, who is being paid much less than she earned before the strike, must also be raised to the $6 per hour which was her pay before striking, and be made whole for the difference in her pay from the time of her recall until the Respondent conforms with this Order.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By refusing to reinstate economic strikers Mary Mayes and Lilli Toney, on August 12, 1982, and on September 28, 1982, respectively, by refusing to reinstate economic strikers Walton, Edwards, and Ramieh when they made unconditional offers to return to work, by changing the conditions of employment of Ethel Ed-

wards, Rebecca Gilkerson, Debbie Ledger, and Emma Genoble upon their return to work as economic strikers, and by reducing their hourly pay because they had engaged in concerted protected activity, the Respondent has violated and is violating Section 8(a)(3) of the Act.

2. By the foregoing conduct, and by threatening to discontinue its business in retaliation for the employees' union activities, the Respondent has violated and is violating Section 8(a)(1) of the Act.

3. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Burner Systems International, Inc. *and* Allied Industrial Workers of America, AFL-CIO, Local No. 613. Case 10-CA-18558

14 December 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 8 September 1983 Administrative Law Judge Robert A. Gritta issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed cross-exceptions and a supporting brief, and all parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Burner Systems International, Inc., Rossville, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

MEMBER ZIMMERMAN, concurring and dissenting.

I agree with the judge and my colleagues that the Respondent violated Section 8(a)(5) by refusing to allow the Union to see the Respondent's financial records and by withdrawing recognition from the Union, and violated Section 8(a)(3) by refusing to reinstate six striking employees. However, contrary to the judge and my colleagues, I find that the strike which commenced on 3 August 1982 was an unfair labor practice strike.

It is undisputed that on 20 July or 30 July 1982 the Union asked to see the Respondent's books following the Respondent's negotiating proposal of no wage increases during the first year of the new contract, and the Respondent refused. The judge found, and my colleagues and I agree, that this refusal constituted an unfair labor practice.

It is also undisputed that on 2 August 1982 the Union held a membership meeting at which Union President Brogdon read to the membership the Respondent's proposal and informed them of the Respondent's alleged financial inability to pay a wage increase during the first year of the contract. Brogdon also stated that the Respondent had refused the Union's request to see the Respondent's financial records. The membership then voted to reject the Respondent's proposal and to strike the next day.

Under these circumstances, I find that the 3 August strike was initiated at least in part in response to the Respondent's unlawful refusal to allow the Union to examine its financial records. Having claimed financial inability to increase wages while at the same time refusing to substantiate the claim, the Respondent unlawfully left the employees the alternatives of accepting the Respondent's contract offer without any justification or to reject the offer and to strike. In this posture, it is apparent that the Respondent's unlawful refusal to give the Union the information necessary to evaluate its offer played a part in the employees' decision to reject the offer and to strike. As the employees were notified of the Respondent's unfair labor practice immediately prior to their vote to strike, my colleagues' position that the strike bore no relationship to the unfair labor practice is untenable. See *C & E Stores, Inc.*, 221 NLRB 1321 (1976); *I. W. Corp.*, 239 NLRB 478 (1978). Accordingly, I find the strike to be an unfair labor practice

[1] The undisputed evidence reveals that 53 employees—new hires plus those returning from layoff or abandoning the strike—worked during the strike, and 54 employees—strikers plus those on layoff—refrained from working during the strike. Thus, under any view of the law, we agree with the judge that the Respondent's withdrawal of recognition from the Union on 24 August 1982 violated Sec. 8(a)(5) and (1) of the Act.

Contrary to our dissenting colleague, there is no evidence to show that the employees' decision to strike was motivated by anything other than a dissatisfaction with the terms of the Respondent's contract proposal.

At the membership meeting of 2 August 1982 during which the strike vote was taken, there was only passing reference to the fact that the Respondent was claiming financial inability to pay, but refusing to permit the Union to examine its books and records. The discussion at this meeting centered around the Respondent's final contract proposal and, in particular, the Respondent's wage offer, which was for no wage increase the first year of the contract and for increases of 25 cents and 30 cents an hour in the second and third years, respectively. Union representative Smith explained the Respondent's proposal to those at the meeting and suggested that no action be taken for 20 days in the hope that "things" could be worked out between the Respondent and the Union. However, those in attendance at the meeting voted to reject the Respondent's final offer and to strike immediately. The strike commenced the next day with signs reading: "Local 613, AIW, AFL-CIO, on strike for fair wages."

As indicated, the Respondent's refusal to make its financial records available to the Union was given only the briefest mention at the meeting, and it prompted no questions or discussion. When the time came to vote on whether to go on strike, the question was framed in terms of whether to accept or reject the Respondent's last contract proposal, and nothing else. Thus, it seems clear that those in attendance at the meeting were voting on the Respondent's economic proposals, and this conclusion is reinforced by the language which appeared on their picket signs the next day protesting the Respondent's failure to pay "fair wages."

Accordingly, we adopt the judge's finding that the strike was economic from its inception and that the Respondent's refusal to permit the Union to examine its financial records was not a direct or contributing cause of the strike.

[2] We shall revise the notice to conform to the judge's recommended Order.

strike from its inception and dissent from my colleagues' dismissal of that complaint allegation.[1]

[1] In light of this finding and the judge's finding, with which my colleagues and I agree, that the Respondent refused to bargain with the Union by unlawfully withdrawing recognition from the Union, I find it unnecessary to pass on whether the Respondent refused to bargain with the Union 2 August 1982.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the Union by refusing its request to see our financial records and by withdrawing our recognition from the Union.

WE WILL NOT refuse to reinstate striking employees following their unconditional application to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively in good faith with the Allied Industrial Workers of America, AFL–CIO, Local No. 613, and will disclose to them our financial records to further this bargaining obligation.

WE WILL offer to reinstate striking employees Margaret Brogdon, Henry Percy, Wanda Creekmore, Edna Watt, Lamar Scott, and Renee Wyatt to their prestrike positions and will make each whole for any loss of earnings suffered as a result of our unlawful discrimination against them, plus interest.

WE WILL remove from our files any references to the failure to reinstate, and the reasons therefor, for each of the above-named employees and notify each in writing that this has been done and that evidence of the failure to reinstate or the reasons therefor will not be used as a basis for future personnel actions against them.

BURNER SYSTEMS INTERNATIONAL, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on February 22 and 23, 1983, in Chattanooga, Tennessee, based on a charge filed by Allied Industrial Workers of America, AFL–CIO, Local No. 613 (the Union) on September 22, 1982, and a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board on November 2, 1982.[1] The complaint alleged that Burner Systems International, Inc. (Respondent) violated Section 8(a)(1), (3), and (5) of the Act by refusing to cooperate with the Union during negotiations culminating in withdrawal of recognition and refusal to bargain further. The General Counsel also alleged that Respondent refused to reinstate employees who engaged in an interim strike and permanently replaced its employees without regard for the alleged unfair labor practice nature of the strike. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel, Respondent, and the Charging Party. All briefs were duly considered.

On the entire record[2] in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Burner Systems International, Inc. is a Georgia corporation engaged in the manufacture of heating products in Rossville, Georgia. Jurisdiction is not in issue. Burner Systems International, Inc., in the past 12 months, in the course and conduct of its business operations shipped products from its Rossville facility, valued in excess of $50,000 directly to points located outside the State of Georgia. I conclude and find that Burner Systems International, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein are in 1982 unless otherwise specified.

[2] The General Counsel filed a posttrial motion to admit certain evidence which was not available at the close. G.C. Exh. 13 was reserved for such later submission. Neither Respondent nor Charging Party opposed the General Counsel's motion and therefore, I shall receive the evidence into the record as G.C. Exh. 13. At the trial I rejected Respondent's offer of Exh. 8. I now reverse that ruling and receive into evidence R. Exh. 8.

II. BACKGROUND

Respondent operates a plant in Rossville, Georgia, where it manufactures burner elements for suppliers of heating products. The plant operates one shift from 7 a.m. to 3:30 p.m. with a probationary period of 60 days for all employees. During 1982, the maximum complement of employees was 60-odd with approximately 13 employees being laid off prior to August. On December 28, 1971, the Board certified the Union as the exclusive collective-bargaining representative of all the production and maintenance employees employed by Respondent at its Rossville, Georgia plant. Office clerical, professional employees, guards and supervisors as defined in the Act were excluded from representation. Thenceforth, the parties have negotiated successive collective-bargaining contracts with the latest terminating August 2. Negotiations began in mid-July prior to expiration of the contract. Proposals from both parties were tendered in writing during the three meetings held. The Union went on strike August 3 when the work force numbered 53 employees. Although some violence occurred on the picket line, Respondent could not assess culpability to any individual striker for such misconduct. Indeed, Respondent stated at trial that such violence was not considered in its procedure for recalling striking employees. Replacement employees were hired during the strike and no dispute exists between the parties as to the permanent status of those replacements when hired. Respondent admitted and the parties stipulated that recognition of the Union as representative of the employees in the bargaining unit was withdrawn by Respondent on August 24 following the return to work, across the picket line, of 5 striking employees and the hiring of some 32 replacement employees. Two days later on August 26 the Union made an unconditional offer to return to work for all striking employees. Respondent, based on the Union's failure to give proper notice to the Georgia Department of Labor of its intent to strike, assumed that all striking employees lost their status as employees under the Act but at strike's end disciplined only six of the strikers by refusing them their reinstatement rights. All other strikers were reinstated. The negotiations, the strike, and the reinstatement of strikers give rise to the issues to be determined herein. Supervisory and rank-and-file employees testified at the trial, and the pertinent portions of their testimony are detailed below.[3]

III. ALLEGED UNFAIR LABOR PRACTICES

Charles H. Dickas, owner and president of Respondent, testified that the most recent contract with the Union was dated August 2, 1979, and terminating August 2, 1982. Just prior to termination the parties met to negotiate a new contract. Three such meetings were held beginning July 13 with the last occurring on July 30. Respondent's representatives at all three meetings were Dickas, Executive Vice President Joe Ferguson, and Plant Manager Jim Coogler. (The parties stipulated to the supervisory capacity of Ferguson and Coogler.) The Union was represented by Bill Smith, International representative; Margaret Brogdon, employee president of the local union; and employees Ann Allen, Sue Pollard, and Greg Gilstrap. The Union submitted written proposals at the first meeting. The parties discussed the union proposals then adjourned. At the second meeting on July 20 Respondent submitted written counterproposals to the Union. Included in Respondent's proposals were specified rejections of each of the Union's prior economic proposals. Dickas stated that he told the union negotiating committee in each meeting that there was no possible way the Company could economically make any concessions this year. The Company was not in a position to make any monetary concessions or give the Union what it was asking for. Dickas explained to the Union that anything that was going to cost the Company money was out of the question because the Company was engaged in a life-and-death struggle to stay alive.

At the second meeting, Smith asked Dickas if the Union could look at the company books. Dickas replied that the Company was private with him owning practically all the stock. Since he was a very personal person, he did not see where it would do any good for the Union to see the books, especially in view of the Company's prior explanation of its financial condition and position in the market place. Dickas told the Union that "Coogler doesn't get to see the books." Only the CPA and the officers of the Company see the books. The Company did not show the books to anybody. Smith did not repeat his request nor was the request discussed any further. Dickas stated that had he known that he could avoid a strike by showing the company books to the Union he would have done so.

Dickas learned of the strike vote from Brogdon on the evening of August 2. After Brogdon told him the employees voted to strike Dickas told her, "If y'all struck, I guess that's it then." Brogdon said she would like to talk. Dickas asked, "What is there to talk about?" He then stated, "You all have struck, apparently you're through." Some 42 employees did go on strike with several employees continuing to work. About 3 of the 13 employees who had been on layoff or on leave returned to work during the strike.

Several days after the strike started Tipple, from the Federal Mediation and Conciliation Service, called to verify that employees were on strike. He said he had no official information of a strike. Later, Tipple called and asked Dickas if the Company was willing to meet with the Union. Dickas informed Tipple to work through the Company's lawyers. A third call from Tipple informed Dickas that the Union wanted to meet. Again Dickas told Tipple to call the lawyer and make arrangements. Dickas could not recall the dates of the three calls from Tipple.

On August 14, Respondent sent a letter to all strikers asking them to return to work and setting a deadline of August 18. After August 18, Respondent advertised for and hired some 34 replacement employees between August 23 and 25. On August 26, Respondent received from the Union an unconditional offer for all strikers to return to work. As needs increased or vacancies oc-

[3] The above comes from admissions in pleadings, stipulations on the record, or the uncontroverted testimony of credible witnesses.

curred, the striking employees were returned to work. Eventually all but six employees were returned to work. The six employees not reinstated are: Margaret Brogdon, Edna Watts, Wanda Creekmore, Henry Percy, Lamar Scott, and Renee Wyatt.

Dickas testified that during the strike several employees phoned him at the plant indicating a willingness to return to work and a disenchantment with the Union. One employee, he recalled, stated that she did not want to go on strike in the first place.

Margaret Brogdon, president of the local union, testified that she was employed by Respondent from October 16, 1972, to August 2, 1982, as a porting machine operator. Brogdon represented the Union at all three negotiating sessions held July 13, 20, and 30. Each of the Union's proposals on economic matters sought some kind of increase. In each instance Respondent replied that the Company could not afford any increased cost. Specifically, on the wage proposals of $1 an hour for each of the 3 years the Company said they could not give any more wages for the first year in view of the bad economy. Business had been bad with orders reduced from past years so the Company just did not have the money to give. The Union proposed extending the present contract, as is, with no wage increase the first year and a wage reopener for the second and third years. The Company rejected any extension stating that the Company needed fixed costs to project ahead and commit to future orders.

The Company's final proposal on wages at the last meeting was for no increase the first year and 25 cents and 30 cents for each of the next 2 years. During the discussion of wages the Company again stated that it did not have the money for the first year but was willing to take a gamble on the second and third years. Although the Union did not distrust the Company they asked to see the company books. Brogdon testified, "We needed to see some proof for our people, and we could understand if they didn't, but we needed something to see." Dickas responded, "Nobody sees his books." Ferguson said, "Absolutely not." Dickas added, "Jim Coogler there don't even get to see our books." The meeting then ended. There was no contact between the parties concerning another meeting.

On August 2, after work hours, the Union held a membership meeting with approximately 45 employees attending. Brogdon read the entire proposals to the employees word-for-word. She reported the financial condition as expressed by the Company during negotiations and told the employees that the Company had refused a request to see the financial records of the Company. Smith then suggested to the members that they work for 30 days to see if things could be worked out. Smith said it was a bad time to strike. Following this the employees had two votes. One, whether to accept or reject the Company's final offer and two, whether to strike now or not. The employees voted to reject the final offer and to strike now. Later that evening Dickas called Brogdon and asked what the membership had decided to do. Brogdon told Dickas that the employees voted to strike but the Union was still willing to bargain. Dickas replied, "No, we're through and you're through." The Union did not at this time offer or suggest that the strike could be averted if the Union was allowed to see the books. The first day of the strike Brogdon told Dickas that anytime the Company wanted to talk, the Union would do so. Dickas responded, "Okay." Of the 51 employees in the plant prior to the strike about 45 were union members and of that number 34 went out on strike August 3. The picket signs carried by strikers read, "Local 613, AIW, AFL–CIO, on strike for fair wages." During the strike the Union did not contact the Company to set up any additional negotiating meetings. However, after replacements started going in to work, the union committee through Representative Smith, did discuss future meetings with Federal Mediator Tipple. The striking union members did not discuss the filing of unfair labor practice charges against the Company during the course of the strike. The strike continued until August 26 at which time the union members still on strike voted to accept the Company's last offer and abandon the strike. The Union notified the Company of its willingness to accept the Company's last offer and submitted a written unconditional offer for all striking employees to return to work. Sometime later the Union filed an unfair labor practice charge against Respondent.

Lynda Childress testified that she has been employed by Respondent for 3-1/2 years. Childress attended the union meeting of August 2 sitting in the front row. Smith and Brogdon spoke to the assembled employees. Brogdon read the content of each proposal from the Union and the Company. She stated that the Company was standing firm on its last proposal. Brogdon also stated that the committee had asked to see the books but the Company rejected the request and said under no circumstances would they show anyone the books. Childress did not recall any employees asking any questions during the meeting. Smith asked the employees to give him more time to negotiate by delaying any strike action. Smith suggested that the employees give the Company time to think about it, partly because it was a bad time to strike with poor economic conditions everywhere. Childress did recall that, following the presentation, the employees voted whether to accept or reject the Company's last offer and to strike. The vote on the Company's last offer was by a show of hands with a majority voting to reject. Smith then said to Brogdon, loud enough for the employees to hear, "Let's just vote, Margaret. These people have their minds made up." Paper ballots were distributed and the vote was taken in secret. A majority voted "yes" to go on strike. Smith told the group he would call to get the strike sanctioned and the meeting ended.

Pamela Waters testified that she is a reporter for "The Busy Shopper." She authored the article admitted into the record. Waters stated that the only sources for the article were Brogdon and several strikers present at the time. Brogdon told her about the strike including the employees' reasons for striking. Waters recorded what Brogdon told her and included "all" in the article. Brogdon also gave Waters copies of the union proposals and company responses to those proposals. Waters stated that the article, as written, accurately reported what Brogdon

told her. When quoting a person for inclusion in an article Waters takes it word for word in her notes and places quotes around the substance. In addition, Waters stated that the contents of the article were not questioned by Brogdon or the Union nor was any retraction demanded by either.

Joe Ferguson testified that he is executive vice president of Respondent and has been with it for 4-1/2 years. He served on Respondent's negotiating committee for all three meetings. Respondent's economic condition was presented to the union committee at the start of the first meeting. The Union then presented its contract proposal containing a $1-an-hour increase for each of the 3 years. At the second meeting Respondent presented its response to the Union's contract demands. The general response was that economic demands could not be entertained. The company committee stated to the union committee that this was the second year of declining sales and the plant was not making any money. The Union then proposed a 1-year extension of the current contract. The Company rejected the proposal explaining to the Union the need for firm costs when quoting prices to customers over a period of production time which could possibly consume several years. Ferguson specifically mentioned Lennox and Singer as examples of large gas appliance manufacturers that require several years to consummate an order for Respondent's product. Ferguson also mentioned that the customers were constantly seeking a price reduction in the burners. At the third meeting the Company submitted its proposal of no wage increase the first year, 25 cents the second year, and 30 cents the third year. Other, partially economic, proposals made by the Union were accepted by the Company. The meeting lasted only 15 minutes with very little discussion by either side. The last thing the Union said, through Smith, was "Let us talk about this, and I'll get back to you." Smith never contacted the Company after that meeting.

Ferguson could not remember in which meeting it occurred that Smith asked if the Union could take a look at the company books. The Company responded basically that it was a private company and did not make its records available to outside sources. No further request for access to the books was made by the Union.

The Union did contact the Company on August 26 by letter. The letter offered the striking employees return to work and indicated acceptance of the Company's last contract offer. At that time the plant manning level had been attained by new hires. When vacancies occurred or production required more employees, the striking employees were recalled by classification and seniority. With the exception of the three laid-off employees recalled early in the strike, no other employees in laid-off status have been recalled to work. All vacancies were filled by recalling striking employees until all striking employees had been returned to work, excepting six. The six employees have not been reinstated and they were not considered for reinstatement without regard to their classification or seniority position. The six employees were not taken back because they had obviously and deliberately flouted the state judge's order on picket line procedure. Several striking employees were recalled but they declined to return to work.[4]

IV. ANALYSIS AND CONCLUSIONS

A. *Union Request to See Financial Records*

Although some confusion exists as to which of the three meetings generated a union request to "see the company books," it is undisputed that Union Representative Smith did ask to "see the books." Further, there is no dispute that the request immediately followed Respondent's proposal of no wage increases during the first year of a 3-year contract. Respondent's response to the request is equally undisputed and considerably more than a terse "no." All witnesses testifying agreed that the response to the Union was "This is a private company. We don't even show our books to the bank. Jim Coogler, plant manager, doesn't get to see the books. Only the officers of the company can see the books. No one can see our books."

Respondent contends that Smith's request was casual and, therefore, did not require an affirmative response and the Union failed to continue its request or in some way communicate to Respondent the gravity of its negative response. Such a contention presumes several factors that do not exist. A union's request to see the company books following a position of *inability to pay* need not be formal. So long as the intent behind the request is clear it must be honored. Nor does it have to be repeated or in some way kept viable particularly in the circumstance where the Company's response leaves no room for movement in the direction of "seeing the books" which is precisely the circumstance herein.

Respondent's alternative contention is that the request need not be honored because the Union was treated to a substantial discourse on the national economy and the financial status of Respondent supported by the obvious loss of purchase orders and the impending loss of its "patented burner" within a year. It argues that the Company's financial condition was thus *otherwise substantiated*, leaving Respondent free to deny the Union's request. Counsel asserts, and the record evinces, that the union bargaining committee agreed to and accepted Respondent's appraisal of the general economic conditions extant during negotiations precluding the need for further discussion or disclosure. In my view, even if the union committee did accept Respondent's appraisal it was still entitled to "see the books" upon its request. Respondent's disclosure was too general in nature and containing nothing specific of Respondent's then financial condition. Respondent could have produced records of declining orders, records of lost customers, records of unusual attrition of employees, and records of declining sales but it chose only to allude to such. I conclude that Respondent did not *otherwise substantiate* its poor financial condition and, therefore, its denial to the Union to "see the books" was unfounded, more particularly, since the Union's request immediately followed Respondent's contract pro-

[4] Diane Stewart, Joyce Medaris, and Rick Paqleno.

posal of no wage increase in the first year of a 3-year contract.

Contrary to Respondent's further argument, there is no obligation on the Union to attempt any voluntary re dress of a prior refusal to see the books. Moreover, whether or not the Union presses such request further, upon abandonment of a subsequent strike, can have no bearing on the consideration of the refusal of the Union's prior request. Respondent's refusal of the request stands alone.

I find Respondent's self-serving testimony of its president that, to avoid a strike, he would have shown the books to the Union instructive of Respondent's intent to exercise its control over negotiations without regard for the statutory language of Section 8(d).

Based on the above, I conclude and find that Respondent's professed privacy of its Company precluded the Union from "seeing the books" no matter what the economic circumstance. Such an adamant stance by an employer in collective-bargaining negotiations is completely without the language of Section 8(d) of the Act and falls squarely within the law of the cases wherein the Board holds an employer's refusal to allow the union access to its books is bad-faith bargaining violative of the Act and I so find.[5]

Since the time lapse before filing a charge is subject to several inferences and the probative value of each is questionable, I do not draw any negative inferences from the Union's choice of when to file its charge. Further, I do not draw any negative inferences from the General Counsel's failure to produce notes of bargaining sessions kept by Brogdon or the minutes of the Union's strike-vote meeting prepared by the Union's secretary-treasurer. I am satisfied that the affirmative evidence in the record, both corroborated and uncontroverted, is substantial without the introduction of the notes or minutes.

B. *Alleged Refusal to Bargain—August 2*

The General Counsel argues that Respondent when it learned of the Union's strike vote on August 2, refused to negotiate further with the Union, constituting an unlawful refusal to bargain. Although there is little dispute over the substance of the conversation between Dickas and Brogdon, an ambiguity does exist as to what was said by the parties at the last meeting on July 30 pertaining to further negotiations. Respondent claims that the Union on July 30 stated it would consider the last offer and get back to the Company but never did. The contention is the ball was in the Union's court. The General Counsel claims that Respondent's response to the union strike vote was a flat refusal to meet further, placing the Union in a "wait and see" posture. Neither contention is completely supported in the record. Collective bargaining is a two-way street. Both parties must exhibit the volition to bargain. In this case neither party affirmatively moved to negotiate further. The Union did not after July 30 and Respondent did not after August 2. When final offers are made and strike votes are taken emotions run high on both sides. In such an atmosphere, parties' intents are best evidenced by actions not words. If the Union truly wanted bargaining to continue during the strike, more than "We are ready to talk when you are" would have been offered. The record evidence of the Union's strike vote meeting is somewhat meaningful to evince the Union's stance on August 2. Smith at the meeting recognized the preconceived notion of the members to strike and in effect was voted down when he asked for more time to bargain. It is not unreasonable to conceive that Smith simply decided to let the employees have their strike and then later proceed in a more reasonable fashion at the bargaining table. The General Counsel relies on Dickas' statement to Brogdon during the phone conversation of August 2 to show Respondent's negative attitude toward further bargaining. However, the following day, while pickets were in place, Brogdon again told Dickas that the Union "is ready to talk when the Company is." Dickas' response to Brogdon was "okay." When the Union did make an affirmative move to set further negotiation meetings they did so through Federal Mediator Tipple, not directly to Respondent. In my view each party exhibited an identical attitude of "wait and see," not an unusual circumstance in such an atmosphere and certainly not one in which culpability can be assessed against only one party. As I view the record evidence in light of the language of Section 8(d) and the Board's reasoning in refusal-to-bargain cases, I am unable to conclude that Respondent refused to meet further with a union that was demanding further bargaining without regard for the strike in progress. Accordingly, I find that Respondent did not refuse to bargain with the Union as of August 2.

Respondent's argument that Dickas could presume an impasse, precluding further bargaining, existed on August 2 when Smith failed to get back to the Company is not only premature in point of time but misses the mark as a legal conclusion. Impasses are not presumed but rather have a factual existence. The facts relied on by Respondent in this case completely negate the existence of an impasse at any time and in the last analysis a strike by employees breaks an impasse setting the stage for further negotiations.

C. *Unfair Labor Practice or Economic Strike*

The strike which began on August 3 is alleged to be an unfair labor practice strike. The General Counsel relies on the uncontroverted testimony of several employees present at the union meeting when the strike vote was taken. It is crystal clear that the employees had two votes. The first was to decide whether to accept the employer's last offer and the second was to decide whether to strike or not. There was no preliminary explanation of the voting question nor was there any discussion of the factors to consider before casting a ballot. The evidence does show that the employees heard the complete proposals made by both sides during bargaining and that the union negotiating committee had requested to inspect the company books but the request was denied. There was no further explanation of the bargaining circumstances or their relationship to the employees about to cast ballots. In particular, there were no ques-

[5] My determination as well as the arguments of all three parties is based on *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

tions nor discussions relating to the status of prospective strikers, if and when the employer hired new employees, assuming a strike was called for. As noted earlier, the questions put to the voting membership were simple and direct. The members voted to reject the Company's last offer and to go on strike as of midnight August 2. The picket signs carried during the strike read simply, "AIW, AFL–CIO, On Strike for Fair Wages." The legend on the signs never changed during the course of the strike.

The General Counsel argues sufficiency of the evidence to support her allegation that the strike was caused, at least in part, by Respondent's unfair labor practices. Respondent, of course, argues the contrary. I conclude and find that the strike was economic in nature from its inception. The mere disclosure to the union membership of circumstances that may constitute a prior unfair labor practice, without more, even though just prior to the membership's vote on the question of "strike" is insufficient to establish that the resultant strike was caused by the unfair labor practices. There must be a causal relationship between the commission of the unfair labor practices and the incidence of the strike. The Board has held repeatedly that the occurrence of prior unfair labor practices, standing alone, is not sufficient to establish an unfair labor practice strike. Here, the facts evince nothing more to me. Brogdon's verbal revelation to the union members was simply a report of an occurrence. No assessment, discussion, or characterization of the event ensued. As Smith put it to Brogdon, "Let's vote, they already have their minds made up." I place no more emphasis on the reported occurrence than Smith did and apparently the union membership did. I, therefore, conclude and find that Respondent's refusal to allow the union negotiating committee to see the books during negotiations was not a direct cause of the strike nor was it a contributing cause to the employees' decision to go out on strike. Thus, the strike called for by the union membership on August 2 was an economic strike.[6]

1. Threat to permanently replace strikers

The General Counsel alleges further that Respondent's letter of August 14, circulated to striking employees during the strike, constituted an unlawful threat to permenantly replace the strikers, and prolonged the strike beyond its reasonable endurance. Further, the General Counsel alleges that the resultant hiring of replacement employees, subsequent to the letter and while the strike ensued, was an unlawful act and contributed to and additionally prolonged the strike.

The letter on its face does not state that any replacement employee will be a permanent replacement nor does it describe or characterize the status of those employees failing to respond to the letter's plea. The letter is couched in terms of Respondent's rights during a strike. The strike was 2 weeks old by the time the employees received the letter and replacements were not actually hired until 10 days to 2 weeks after the letter was sent. Respondent's actions were not hurried nor equivocal. I cannot, on the basis of all the facts, conclude that the language of Respondent's letter contained a threat to the striking employees. In my view, Respondent did what it has a legal right to do. Granted, whenever employers communicate with striking employees they may do so at their peril and the General Counsel is correct in restating case law that employers may not permenantly replace unfair labor practice strikers nor threaten to do so. But the record shows that, excepting six strikers, all strikers were returned to work after the strike. Therefore, Respondent did not permanently replace strikers no matter what the nature of the strike. I find Respondent's subsequent actions partially instructive of its prior intent when issuing the letter and probative of the implicit nature of the letter. I find some difficulty in following the General Counsel's argument of prolongation in that the strike, rather than being continued, was abruptly abandoned as a result of Respondent's hiring of replacement employees. The inconsistency is fatal in my view. Accordingly, I conclude and find that Respondent's letter of August 14 was not a threat to permanently replace striking employees and did not, standing alone or in conjunction with the actual hiring of replacement employees, contribute to the length of the strike.

2. Withdrawal of recognition and refusal to reinstate strikers

Owing to Respondent's proffered defense at the trial in conjunction with arguments in brief and the rather short chronology of the events, I shall consider the withdrawing of recognition and the refusal to reinstate strikers together. As previously noted, the record is unclear on the actual date that Respondent withdrew recognition but the parties were able to stipulate and Respondent did admit to the "on or about" date alleged by the General Counsel.

The General Counsel contends, correctly so, that upon the expiration of the certification year there exists a rebuttable presumption of the Union's continued majority status; Respondent may only rebut this presumption by establishing that the Union, in fact, lost its majority status on the date that it withdrew recognition. She relies on *Pennco, Inc.*, 242 NLRB 467 (1979),[7] and *Burlington Homes*, 246 NLRB 1029 (1979) (citing *National Car Rental System*,[8]) for support of her restatement of the law. With regard to the reinstatement-of-strikers issue, the General Counsel is only contending that the six named strikers were refused reinstatement as returning strikers. There is no issue of reinstatement to the prestrike position of those strikers previously reinstated. Neither is there an issue of replacement of economic strikers at the time of the application to return to work on behalf of all strikers. The uncontroverted testimony in the record establishes that following the Union's application for all strikers to return to work, each returning striker was recalled to his prestrike position, immediately if the position was available, or whenever a vacancy occurred which required filling. Without a doubt, all vacancies ex-

[6] See *Capital Rubber & Specialty Co.*, 198 NLRB 260 fn. 1 (1972); Respondent's 8(d) defense is considered infra.

[7] Reconsidered and affirmed by the Board in a Supplemental Decision, *Pennco, Inc.*, 250 NLRB 716 (1980).

[8] Infra.

isting were filled by seniority and classification of the strikers alone, excepting the six named strikers who were denied reinstatement.

Respondent's defenses are contained in objective evidence in the record, representations of counsel at trial, and arguments in brief. To recap, the objective evidence discloses the employees on the payroll prior to the strike; the employees not reporting for work the day of the strike; the new hires and returning strikers during the strike; what employees, if any, were in a status other than working or striking at the time and a statement of position submitted to the Regional Office on September 30, 1982.

The earliest date of Respondent's proffer of evidence to support its objective considerations forming a good-faith doubt of the Union's continued majority status is September 30, 1982. In that statement of position Respondent explicates that on August 18 it was in possession of facts that led it to doubt the Union's majority status under the doctrines expressed in *Titan Metal Mfg. Co.*, 135 NLRB 196 (1962), and *National Car Rental System v. NLRB*, 594 F.2d 1203 (1979). The position paper then details the facts: 37 of the 51 hourly employees are permanent striker replacements; 10 employees did not go on strike but continued working; 7 employees were either strikers who returned to work across the picket line or were in layoff status and reported back to work during the strike; all employees crossed the picket line each day in the face of harassment and abuse and many employees employed during the strike voluntarily expressed no support for the Union. The position paper was directed to the withdrawal of recognition and Respondent's subsequent refusal to bargain. Striker reinstatement was not broached.[9]

At trial and in brief Respondent augmented its defense to withdrawal of recognition, labeling the strike in progress at the time of withdrawal as unlawful and unprotected. The attack on the strike's validity was based on the Union's alleged failure to notify the state mediation agency as required in Section 8(d) of the Act. Additionally, Respondent contends that the striking employees have lost their status as employees due to the notice failure of Section 8(d) and, therefore, Respondent is not obligated to reinstate the striking employees.

Respondent's *National Car Rental* defense is bottomed upon the circuit court's refusal to enforce the Board order. The court disallowed the Board's use of its presumption that new employees support the union in the same ratio as those employees replaced, because all strikers were replaced. The court stated that the Board-created presumption does not rise to the level of substantial evidence. The two Board cases cited by the General Counsel were decided subsequent to the court decision in *National Car Rental* and reaffirm the Board's use of its presumptions and what proof is required to rebut those presumptions. The Board test of proof remains the same and I am bound by the Board law. The Board requires affirmative evidence that is not subjective or speculative. Thus, if Respondent is relying on the fact that replacements do not support the Union there must be more than the mere employment during a strike. Likewise, strikers who abandon the strike and cross the picket line to return to work or employees who chose to remain on the job evince only disdain for the strike rather than nonsupport for the bargaining representative. (There is always a *minority* of union employees who disfavor a strike but the strike is called because a *majority* favors striking.) Also, employees in layoff status at the time of the strike and who apparently took no part in the strike action cannot be presumed by Respondent to no longer support the Union simply because they returned to work during the strike. Respondent contends that all employees who crossed the picket line to work endured harassment and abuse but the record does not contain any evidence that the conduct on the part of strikers was any different from that normally experienced in a strike situation. Respondent must show strike conduct inimical to the replacement employees' subsequent support for the Union. This, Respondent's evidence does not do. Moreover, the time period expressed in Respondent's position paper is in error. August 18 is not the date Respondent possesed its evidence. The objective evidence in the record shows prior to August 18 only seven employees returned to work across the picket line. Five abandoned the strike and two returned from leaves of absence. In addition, replacement employees were not hired until August 23 when 14 reported; August 24 when 18 reported; and August 25 when 2 reported. Of these 34 replacements, Dickas only recalled that 3 or 5 indicated to him that they did not support the Union and the recalled "indications" were less than specific. Such falls far short of the statement "many employees employed during the strike voluntarily expressed no support for the Union." Although not controlling, the fact that neither party can specifically place the date that Tipple was conversed with and thereby solidify the date that Respondent first voiced its withdrawal of recognition, it does cause an emphasis to be placed on the narrow chronology of events which influences the determination. E.g., from August 25, the last day that a replacement employee was hired and one day before the Union's unconditional offer to return, the ranks of the replacement employees began a steady decline resulting in only 14 replacement employees remaining on the payroll.

As previously noted the position paper did not include any 8(d) defense. Indeed, the alleged notice failure was not known to Respondent at the time it withdrew recognition from the Union nor was it known at the time the Union made application to return the strikers to work or when the majority of the strikers was actually reinstated. Although the date that Respondent did suspect the notice failure is not specifically found in the record, it is clear that Respondent had no awareness until just before the state proceeding on unemployment benefits very late in 1982 or in early 1983. As Respondent states in its brief, 'It turns out, however, that the Union had been derelict in its compliance with Section 8(d)." The only direct evidence to establish a date is Respondent's affidavit exhibit dated February 16, 1983. However, counsel did represent that the exhibit was the second of two affi-

[9] There was a change of counsel between the statement of position and the trial.

davits secured from the state offices. In any event, Respondent cannot now be heard to defend its act of withdrawal of recognition from the Union with a circumstance unknown to it at the time it acted. To even consider such a defense would make a mockery of the "objective considerations" required by the Board. Albeit Respondent expressly denied any reliance on the picket line conduct of some strikers, it is interesting to note that the temporary restraining order obtained on August 5 was implemented by interlocutory order on August 20 and 4 days later the court found several strikers in contempt of its order and fined and/or jailed several. Approximate to this day Respondent informed the Federal mediator that it was withdrawing recognition from the Union. In fact, Ferguson testified that the reason the six named strikers were not reinstated was their picket line conduct resulting in their contempt citation by the state court. Further chronological and substantive inconsistency is found in the fact that, notwithstanding admitted withdrawal of recognition from the Union on August 24, Respondent did, 2 days later, honor the Union's application to return the strikers to work and ceased hiring new employees. All but the six strikers named were returned to their prestrike position. I, therefore, conclude that the record facts do not sustain Respondent's defenses to the alleged unlawful withdrawal of recognition nor its refusal to reinstate the six named strikers following the Union's unconditional offer to return all strikers back to work. I further conclude and find that Respondent's reason for denying reinstatement to the six named strikers was impermissible under the statute. Accordingly, the General Counsel has sustained her burden of proof that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on August 24 and further violated Section 8(a)(3) of the Act by failing and refusing to reinstate the six named striking employees.

Respondent's further reliance on the unknown circumstance of the suspected failure of the 8(d) notice to defend its refusal to reinstate the six named strikers succumbs as well. Such a defense applies to all employees engaged in the strike and their representatives. Respondent reinstated some 31 strikers before it knew of any notice failure prospect, which means that the notice failure was not a consideration for how and when the strikers returned. Since it was not a consideration at the time of the return it cannot be a consideration for the refusal to return. Such a generic defense must be a defense to all or none. Respondent cannot be allowed to pick and choose those strikers to whom it would apply such a defense and others to whom it would not. Only when Respondent's defense is the individual conduct of strikers may Respondent pick and choose, but even then Respondent must be uniform and nondiscriminatory in its discipline. There is evidence on the record to suggest that Respondent's real reason for refusing to reinstate the six named strikers was picket line conduct found contemptuous by the state court. Later, Respondent realized the futility of such a defense due to the lack of identification of known strikers with the known conduct and shifted its defense to Section 8(d). In my view, such a shift is fatal since Respondent's refusal must be based on facts it considered when its decision not to reinstate was made.

Moreover, Respondent's evidence to support the existence of its 8(d) defense is not completely adequate. As contended by the General Counsel and the Charging Party, the evidence does not establish that the search indicated by the affidavit was exhaustive nor does it establish that the use, if any, made of the notice forms was as envisioned by the Act's Section 8(d). The cases cited by all parties in support of their respective positions evince a more substantial proof than that offered by Respondent. Additionally, Respondent's defense relies heavily on several inferences which I am unable to draw from the facts proffered in the record. Further, the uncontroverted testimony from both sides shows that the Union did solicit the services of the Federal Mediation and Conciliation Service and apparently with proper notice since no question was raised by any party or the FMCS. If I were to draw any inference from all the record facts it would simply be "propriety begets propriety." In view of the above, I reject Respondent's 8(d) defense on the two grounds. One, I conclude and find that Respondent's proof is insubstantial to verify the Union's failure to give notice to the State Labor Department; and two, even if Respondent's proof was substantial to prove failure of notice, Respondent's knowledge and use of such knowledge does not prevail within the necessary chronological sequence of availability of defenses.

CONCLUSIONS OF LAW

1. All production and maintenance employees employed by Respondent at its Rossville, Georgia plant, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times since December 28, 1971, the Union has been, and is, the representative of a majority of the employees in the appropriate unit and by virtue of Section 9(a) of the Act has been, and is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

3. By refusing the Union's request to see its books on July 30, Respondent has engaged in an unlawful refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

4. By withdrawing recognition from the Union about August 24, Respondent has engaged in an unlawful refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

5. By refusing to reinstate six of its striking employees, Respondent has engaged in unlawful discrimination against its striking employees in violation of Section 8(a)(1) and (3) of the Act.

6. The General Counsel has not sustained her burden of proof for any other allegations in her complaint.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to [illegible]

spondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily refused to reinstate Margaret Brogdon, Henry Percy, Wanda Creekmore, Edna Watt, Lamar Scott, and Renee Wyatt, its striking employees, I find it necessary to order it to offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, with backpay computed on a quarterly basis and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977),[10] from the date they would have been reinstated by seniority and classification to the date of proper offer of reinstatement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Burner Systems International, Inc., Rossvile, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by refusing the Union's request to see the financial records of the Company and by withdrawing recognition from the Union.

(b) Refusing to reinstate its striking employees following their unconditional application to return to work.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, bargain collectively with it as the exclusive representative of Respondent's employees in the unit described above and disclose to the Union its financial records to further the bargaining obligation.

(b) Offer to reinstate Margaret Brogdon, Henry Percy, Wanda Creekmore, Edna Watt, Lamar Scott, and Renee Wyatt to their prestrike positions and make each whole in the manner provided in the remedy section herein.

(c) Expunge from its files any references to the failure to reinstate and the reasons therefor, for each of the employees named above and notify each in writing that this has been done and that evidence of the failure to reinstate or the reasons therefor will not be used as a basis for future personnel actions against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its plant in Rossville, Georgia, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc. *and* Road Sprinkler Fitters Local 669, United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO. Case 7-CA-12659

14 December 1984

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 June 1980 the National Labor Relations Board, on remand from the United States Court of Appeals for the District of Columbia,[1] issued a Supplemental Decision and Order in this proceeding,[2] reaffirming its prior Decision and Order[3] finding, inter alia, that the Respondent, A-1 Fire Protection, Inc. (A-1) and Corcoran Automatic Sprinklers, Inc. (CAS), also referred to as "Corcoran," did not violate Section 8(a)(5) and (1) of the Act by refusing to apply the 1975–1977 collective-bargaining agreement between CAS and the Union to employees of A-1 and/or by transferring unit work from CAS to A-1.[4]

On 27 April 1982, on the Union's petition for review of the Board's Supplemental Decision and Order, the court of appeals again remanded the case to the Board, specifically "for explanation and application of the proper legal standard" on the transfer-of-work allegation.[5] On 4 August 1982 the Board accepted the court's remand and notified the parties that they could file statements of position on the issues raised by the remand. On 14 February 1983 the Board, after considering the statements of position, the court opinions, and the entire record, issued an Order remanding the proceeding for a further hearing before Administrative Law Judge Phil W. Saunders.[6] The Board's Order directed the judge to make findings of fact concerning, but not limited to, certain questions specified in the Order, and to issue a supplemental decision limited to findings of fact on the issues raised by the court's remand.

On 26 July 1982 Administrative Law Judge Phil W. Saunders issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Union filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings and findings.[7] Based on those findings, described below, the Board makes the following further findings and conclusions, and issues the following Supplemental Order.

As indicated above, the Board in its supplemental decision concluded that the Respondent did not violate Section 8(a)(5) and (1) by refusing to extend the CAS contract to A-1 or by transferring work from CAS to A-1. Regarding the transfer-of-work allegation, the Board, although noting that the work of CAS has decreased while that of A-1 had increased during 1975 and 1976, relied on its previous findings that the Union was aware of A-1's existence as early as January 1975 and had assented to the Respondent's use of CAS employees for A-1 jobs; and that no jobs bid for and performed by CAS were transferred to A-1.[8] Regarding the extension-of-contract allegation, the Board again relied on its previous findings that the Union had "assented, however grudgingly, to the Respondent's 'double-breasted' operations and that the Union had 'acquiesced' to the existing conditions during the negotiations for the 1975 CAS contract."[9] The Board thus found that there was a voluntary agreement on a bargaining unit limited in scope to the CAS employees and that the Union therefore did not have any statutory right to repre-

[1] *Road Sprinkler Fitters Local 669 v. NLRB*, 600 F.2d 918 (1979).

[2] 250 NLRB 217.

[3] 233 NLRB 38 (1977).

[4] The court of appeals had remanded the 8(a)(5) portion of the case for a fuller explication of the Board's rationale in dismissing the 8(a)(5) allegations. At the same time, however, the court affirmed the Board's finding that the Respondent violated Sec. 8(a)(3) and (4) by discharging and/or refusing to hire Michael Nunn, and it enforced the Board's Order in that regard.

[5] 676 F.2d 826 (1982). Regarding the extension-of-contract allegation, the court found that the Board's supplemental decision stated satisfactory grounds for finding that the Union had no "independent" statutory right to have its contract with CAS extended to A-1. The court cautioned, however, that its affirmance of the Board on this issue "must be read narrowly" and that the extension of the CAS contract to A-1 might still be warranted as a "prophylactic remedy" for the Respondent's violation of another statutory obligation. Id. at 830.

[6] Not published in Board volumes.

[7] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[8] 250 NLRB at 219. The Board relied on the absence of evidence of deception or transfer of work to distinguish the instant case from *Burgess Construction*, 227 NLRB 765 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), which was cited by the General Counsel.

[9] Id. at 221.

sent or otherwise have its contract extended to A-1 employees.[10]

Reviewing the Board's disposition of the transfer-of-work allegation, the court observed that the Board still had not confronted the central issues raised by the Union's claim, which the court set forth as follows: "[W]hether Corcoran changed the scope of CAS' activities or changed the method of allocating work between CAS and A-1 so as to have caused the CAS bargaining unit to lose work which, in light of Corcoran's past practices, CAS would otherwise have been expected to perform."[11] The court found, in this regard, that in neither of its decisions had the Board made any findings as to the actual practices by which the Respondent solicited work for CAS and A-1, nor had the Board "confronted the ALJ's conclusion, based in part on credibility determinations left undisturbed by the Board, that Corcoran did indeed disturb the status quo . . . by 'chang[ing] work arrangements' so as to divert work from CAS to A-1."[12]

Thus, in remanding the case to the Board for the second time, the court included the following specific instructions:

> The Board should determine whether Corcoran engaged in conduct that deprived CAS of work which, in light of Corcoran's past practice, CAS would otherwise have been expected to perform. If the Board finds that Corcoran did engage in such conduct, it should either apply the "clear and unmistakable" standard to test whether the union agreed to that conduct, or explain why a different standard is appropriate. If it concludes that there was an unwaived denial of the union's statutory rights, it should devise an appropriate remedy, which may, if warranted, include extension of the CAS collective-bargaining agreement to employees of A-1.[13]

The court made several additional points for the Board's consideration on remand. It stated that the absence of evidence that the Respondent engaged in deception or misrepresentation in obtaining work for A-1 should not be dispositive;[14] that the Board's reliance on the absence of evidence that the CAS unit ceased to exist was not consistent with precedent;[15] and that the transfer-of-work allegation was not so narrow as to encompass only work already awarded to CAS and later reassigned to A-1.[16]

As indicated above, after accepting the remand and receiving statements of position from all of the parties, the Board found that a further hearing was necessary to resolve the issues of fact raised by the court's remand. In its Order remanding the case to the judge, the Board included directions for the judge to make findings of fact concerning, but not limited to, the following:

> [W]hether CAS bid only on jobs requiring union labor or also bid on other jobs; if the latter, on what basis did Corcoran submit bids from CAS rather than from A-1; whether, during 1975, Corcoran stopped submitting bids from CAS or continued to submit bids but was no longer successful; whether A-1 performed any work originally bid from and awarded to CAS; and whether A-1's performance of work for former customers of CAS occurred at the suggestion of such customers or of Corcoran.

The Board also stated that the parties would be permitted to adduce evidence at the hearing about relevant events that occurred since the August 1976 hearing, including the alleged cessation of operations by CAS.[17]

In his supplemental decision the judge stated that he found nothing in the remand hearing to change his initial findings that the Respondent "changed work arrangements so as to reduce the amount of work for the employees of [CAS] and that since early 1975 George Corcoran operated A-1 with the apparent purpose of ultimately dissolving [CAS]." The judge reiterated his previous findings, which were based on credibility resolutions, that in the fall of 1975 Corcoran stated, inter alia, that he generally only laid off union members but that nonunion members of A-1 were never laid off; that he would shortly "phase out" CAS and that A-1 would take over the sprinkler work; and that in a 6-month period there would be less people working for CAS. The judge also reiterated his findings, inter alia, that in 1976 CAS obtained only one job; A-1 had begun performing installations for former customers of CAS; and the Alma College job,

[10] Id. at 220. Then-Chairman Fanning, dissenting, found that the judge's factual findings—which were undisputed by the majority—supported the conclusion that the Respondent employed its double-breasted operations in a manner which unlawfully undermined the CAS bargaining unit. Thus relying, inter alia, on credited statements by the Respondent indicating an intent to "phase out" CAS, the former Chairman observed that although the Union may have consented—after the fact—to the Respondent's double-breasted operations, "it certainly did not consent to the one it got." 250 NLRB at 222.

[11] 676 F.2d at 831–832.

[12] Id. at 833–834.

[13] Id. at 834.

[14] Id. at 833.

[15] Id. at 834 fn. 21. The court also indicated, in this regard, that the Board was "free to decide in the first instance whether anything in our present opinion should cause it to allow the record to be reopened." Id. at 829 fn. 10.

[16] Id. at 833 fn. 19.

[17] See fn. 15 above.

which had been transferred from A-1 to CAS, was retransferred back to A-1 immediately after the Union filed the instant unfair labor practice charge. The judge further noted Corcoran's 15 November 1975 letter to the Union rejecting the Union's request that A-1 be covered by the contract, in which Corcoran stated that A-1 was performing "the small jobs that were being done by other company's then sprinklers company's [sic]."

The judge found, based on the new evidence adduced on remand, that the bidding process under which the Respondent obtained all of its sprinkler installation jobs was open to union and nonunion contractors alike; that union sprinkler contractors sometimes obtained jobs through direct subcontracting with nonunion general contractors; and that nonunion sprinkler contractors sometimes obtained jobs directly from union general contractors. The judge thus found that there were no market conditions requiring the Respondent to "phase out" CAS and no external economic circumstances mandating the takeover of work by A-1. The judge also found that after performing only two "significant" jobs in 1975 A-1 performed 24 jobs in 1976, 8 of which were for a substantial amount of money and 7 of which were for former customers of CAS, while CAS obtained only 1 or 2 small jobs in 1976 and by November 1976 was inactive.

The judge rejected each of the Respondent's explanations for ceasing to bid jobs for CAS in November 1976 and thereafter bidding solely for A-1. Regarding the asserted lack of employees, the judge found that CAS had no employees because the Respondent had laid them off and never called the Union or otherwise advertised for new CAS employees. Regarding the alleged "harassment" by the Union, the judge found that the Union peacefully picketed only A-1 jobs, not CAS jobs, and that the Union took internal disciplinary actions only against union members who worked with nonunion A-1 employees in violation of the Union's bylaws. The judge also found that the Respondent's reliance on A-1's lower labor costs was undermined by the fact that A-1 also performed "prevailing wage" jobs which required payment of the union wage scale.

The judge also made factual findings on the issue of whether the Union agreed to a diversion of unit work or waived its rights, if any, to protest the diversion of work from CAS to A-1. The judge found that the 1975 CAS contract did not reflect any such agreement or waiver inasmuch as it prohibited "any sale [or] transfer . . . to evade the terms of this agreement" and further prohibited signatory contractors from subcontracting unit work to nonsignatory contractors. The judge further found no evidence that the subject of transferring or diverting unit work was discussed during the 1975 or 1977 contract negotiations.

In answer to the specific questions contained in the Board's remand order, the judge found that until late 1975 CAS performed all jobs of significant size; that CAS did not bid on nonunion jobs; that in 1975 CAS still submitted numerous bids, but from about mid-1975 onward A-1 took over more and more of the Respondent's installation work until the Respondent completely stopped bidding for CAS in November 1976; that in addition to retransferring the Alma College job from CAS to A-1 the Respondent obtained another job for A-1 by submitting a lower bid than for CAS; and that there was no evidence that any CAS customers expressly requested bids from A-1.

Finally, regarding the Respondent's contention that it had not been shown that any work performed by A-1 would have been awarded to CAS if A-1 had not bid on it, the judge found that CAS would have obtained some jobs, at least from its former customers, had A-1 not bid. In so finding, the judge relied, inter alia, on the Respondent's statements and conduct, described above, as showing hostility toward the Union, and on evidence that other union contractors were successful in obtaining jobs in competition with nonunion contractors.

Applying the court's opinion as the law of the case, and based on the judge's factual findings, with which we agree, we find that the Respondent deliberately diverted unit work from CAS to A-1 in violation of Section 8(a)(5) and (1).[18] As formulated by the court, the allocation of work to a bargaining unit is a term or condition of employment which cannot be changed without bargaining with, or waiver by, the employees' collective-bargaining representative. We are now persuaded, based on the judge's factual findings, that the Respondent unilaterally changed its method of allocating work between CAS and A-1 so as to have caused the CAS unit to lose work which it otherwise would have performed.

We particularly rely on the judge's findings that the change in the relative economic fortunes of CAS and A-1 was not due to external economic circumstances, but rather was due to a change in the Respondent's bidding practices. As found by

[18] Although we note that the 1973 collective-bargaining agreement between CAS and the Union was a "prehire" contract, for the purposes of this decision we find it unnecessary to pass on the effect of Sec. 8(f) on the Union's status as collective-bargaining representative at the time of the alleged unlawful diversion of unit work. We further note that the Board's previous disposition of this issue is not within the scope of the court's remand.

the judge, from its inception in 1973 to the fall of 1975, CAS was a successful union firm performing sprinkler installation jobs of significant size, while A-1 primarily was performing inspections, repairs, and some small installation jobs. From about mid-1975 onward, however, while it was still bidding jobs for CAS, the Respondent was now bidding and obtaining more and larger installation jobs for A-1, including from former customers of CAS, until it eventually stopped bidding altogether for CAS.

As the judge recognized, these changes in the Respondent's bidding practices must be considered in the context of the Respondent's statements and conduct in late 1975-early 1976 which indicate a deliberate intent to divert work from CAS to A-1. In this regard, we particularly note Corcoran's statements in November 1975 that he would "phase out" CAS and have A-1 take over the sprinkler work and that in 6 months there would be fewer employees working for CAS. We also rely on Corcoran's conduct in retransferring the Alma College job from CAS to A-1 after the instant charge was filed in January 1976.

Further, unlike in the Board's prior decisions in this proceeding, we view the Respondent's November 1975 letter to the Union as indicating an element of deception in the Respondent's use of A-1. In that letter the Respondent advised the Union that A-1 was performing small jobs other than those done by sprinkler companies, while at that time A-1 was beginning to perform more and more of the kinds of jobs previously performed only by CAS. Moreover, Corcoran's letter was in response to the Union's request that A-1 be covered by the CAS contract on the grounds that it was performing unit work. Thus, it appears that the Respondent deliberately was attempting to mislead the Union as to the true nature of A-1.[19]

Having found that the Union had a statutory right to bargain about the Respondent's diversion of unit work from CAS to A-1, we turn now to the question of whether the Union waived its bargaining rights. In *Metropolitan Edison Co. v. NLRB*,[20] the Supreme Court reaffirmed the longstanding principle that a waiver of statutory rights must be "clear and unmistakable."[21] The Court also recognized that assessing the clarity of a waiver required consideration of the specific circumstances of each case.[22] Considering the specific circumstances of the instant case, we find that the Union did not clearly and unmistakably waive its statutory right to bargain about the diversion of unit work from CAS to A-1.

In this regard, we particularly rely on the judge's finding that the 1975 collective-bargaining agreement between CAS and the Union explicitly prohibited "any transfer . . . to evade the terms of the agreement." Moreover, it is undisputed that the subject of diversion of work was not raised, let alone discussed, either at the 1975 negotiations which resulted in a contract or at the 1977 negotiations which did not. Finally, although the Union may have assented to Corcoran's January 1975 request that employees of CAS be allowed to work for A-1, there is no support in the record for finding that the Union agreed at that time, or at any other time, to what amounted to the wholesale diversion of unit work from CAS to A-1 until CAS ultimately became inactive.

Based on all of the above, we conclude that the Respondent's failure and refusal to bargain regarding the transfer or diversion of unit work from CAS to A-1 was violative of Section 8(a)(5) and (1). Accordingly, we vacate our 27 June 1980 Order dismissing the 8(a)(5) and (1) allegations of the complaint, and we shall issue the appropriate remedy for the violation found herein.

THE REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain about the diversion of unit work, we shall order the Respondent to cease and desist from unilaterally diverting work without providing the Union an opportunity to bargain thereon.[23] In order to ensure that genuine bargaining takes place regarding any diversion of unit work, we shall order the Respondent to restore the status quo ante by resuming bidding jobs for CAS in the same manner as it bid jobs for CAS prior to the unlawful diversion of unit work. We also shall order the Respondent to make whole former CAS employees for any losses of earnings and other benefits resulting from the unlawful diversion of unit work.[24]

[19] We therefore find that the instant case is more akin to *Burgess Construction*, above, than we initially believed.

[20] 460 U.S. 693 (1983).

[21] Id. at 1477.

[22] Id. at 1478.

[23] We also find that the broad injunctive language "in any other manner" is appropriate in view of the court of appeals' affirmance of the Board's Order in 233 NLRB 38 insofar as it remedied the 8(a)(3) and (4) violation and included the same injunctive language.

[24] Any determinations necessitated by this remedy shall be left to compliance.

Member Hunter, however, would not provide a make-whole remedy in light of the evidence adduced on remand indicating that the CAS employees employed at the time of the diversion of work were not laid off but rather voluntarily quit their employment, and there is no allegation of unlawful constructive discharge.

Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[25]

We, however, do not find it appropriate here to order the extension of the CAS collective-bargaining agreement to the employees of A-1 as a "prophylactic" remedy or otherwise. The 1975 collective-bargaining agreement expired in 1977 without a successor agreement having been reached. Moreover, as we previously have found, and the court of appeals has affirmed, CAS and A-1 did not constitute a single appropriate unit although they constituted a single employer.[26] In these circumstances, we find that the order provisions described above will adequately and fully remedy the violation found herein.

ORDER

The National Labor Relations Board orders that the Respondent, A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc., Clio, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Road Sprinkler Fitters Local 669, United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL–CIO by diverting unit work from Corcoran Automatic Sprinklers, Inc. (CAS) to A-1 Fire Protection, Inc. (A-1) without affording the Union an opportunity to bargain thereon.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request resume bidding jobs for CAS under bidding practices as they existed prior to the unlawful diversion of unit work.

(b) Make whole former CAS employees for any losses of earnings and other benefits resulting from the unlawful diversion of unit work, in the manner set forth in The Remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Clio, Michigan, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[25] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[26] Cf. *Burgess Construction*, 227 NLRB 765 (1977), in which the Board's remedy provided for the extension of a still-current collective-bargaining agreement to the nonunion side of a double-breasted operation which was found to constitute a single appropriate unit. Also cf. *Appalachian Construction*, 235 NLRB 685 (1978), in which a single employer/single appropriate unit finding provided support for the Board's extension-of-contract remedy.

[27] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Road Sprinkler Fitters Local 669, United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL–CIO by diverting unit work from Corcoran Automatic Sprinklers, Inc. to A-1 Fire Protection, Inc. without affording the Union an opportunity to bargain thereon.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, resume bidding jobs for CAS under bidding practices as they existed prior to the diversion of unit work from CAS to A-1.

WE WILL make whole former CAS employees for any losses of earnings and other benefits result-

ing from the diversion of unit work, less any net interim earnings, plus interest.

A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc.

SUPPLEMENTAL DECISION

Phil W. Saunders, Administrative Law Judge. This matter has considerable background and history and, therefore, I will outline below some of the major procedural and factual aspects of this prolonged dispute.

Based on an original charge filed on January 13, 1976, by Road Sprinkler Fitters Local 669, United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO (Local 669, the Charging Party, or the Union) an amended complaint against Corcoran Automatic Sprinklers, Inc. (Respondent, Corcoran, or CAS), and A-1 Fire Protection Inc. (A-1), and collectively called Respondents or Employer, was issued on May 18, 1976, alleging violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act.

In 1973, as the records, Board, and court decisions in this case duly reflect, George Corcoran formed two corporations, CAS and A-1, to install fire sprinklers. Corcoran intended to carry on a "double-breasted" operation, which would allow the nonunion company, A-1, to bid on installation jobs that did not require union contractors, and allows CAS to bid on jobs that required union contractors.[1] Soon after the corporations were formed, Corcoran, the owner and president of both corporations, entered into a contract with Local 669 covering CAS's employees who install and maintain fire protection systems. The Union was not aware of the existence of A-1 when it signed the CAS contract. Later that year, however, Roy Pantall, then Local 669's business agent, learned of A-1 and advised George Corcoran that A-1 could not bid on nonunion work because such work belonged to the Union and CAS.

In 1975, A-1 began hiring employees to install and maintain fire protection systems and, in January 1975, George Corcoran told Roy Pantall that he was forced to lay off CAS employees, but could hire them to work for A-1. After Pantall grudgingly assented to this arrangement, Corcoran employed a few men to work for A-1 and, although Corcoran paid them union scale wages, he did not compensate them for union benefits. Later in the same month, Pantall left his position as business agent for a new job with the Union.

In late April 1975, Michael Johnson became the new union business agent. On May 1, 1975, George Corcoran entered into a second contract with Local 669 covering CAS employees, but before signing the agreement, the Union did not request that the contract cover A-1 or its employees. Johnson later testified that Pantall had not told him that A-1 was only engaged in installation work. However, by late fall it was apparent that the Union had some knowledge that A-1 was operating as a nonunion company installing fire protection systems. In November 1975, the Union demanded that CAS and A-1 employees be treated as a single bargaining unit, and that the 1975 collective-bargaining agreement be applied to A-1.

Based on an original charge filed on January 13, 1976, as aforestated, a hearing was held before me on August 2 and 3, 1976, on 8(a)(1), (3), (4), and (5) allegations contained in the amended complaint. On December 28, 1976, I issued a decision holding that the refusal to recognize the Union as the collective-bargaining representative of *all* employees, and the transfer of work from CAS to A-1, violated Section 8(a)(5) of the Act. I also found that CAS and A-1 formed a single employer for collective-bargaining purposes; that George Corcoran had changed work assignments to reduce the amount of work for CAS; and that the sprinkler fitters of CAS and A-1 together formed a single appropriate bargaining unit. I further held that the Union had not engaged in any actions that would, by estoppel or waiver theories, forestall a finding that the Employer violated Section 8(a)(5). Finally, I found that the Employer had violated Section 8(a)(3) and (4) of the Act by refusing to hire Michael Nunn in retaliation for the Union's filing of an unfair labor practice charge.

An appeal of this decision was then taken to the National Labor Relations Board, and on October 18, 1977, the Board issued its decision dismissing the 8(a)(5) violations, but affirming findings of 8(a)(3) and (4) violations.[2]

Timely appeals and cross-appeals were then filed with the United States Court of Appeals for the District of Columbia by all parties. On April 11, 1979, the court of appeals' decision issued, 600 F.2d 918 (D.C. Cir. 1979), and the court's decision affirmed the finding of the 8(a)(3) and (4) violations, but remanded the 8(a)(5) violations back to the Board for further consideration on the questions of refusing to bargain and in the extension of the terms of the CAS contract with the Charging Party

[1] A "double-breasted" operation is one in which a contractor operates two companies, one unionized and the other nonunionized. Depending on how the companies are structured and operated, each may be a separate corporation or else both may be so interrelated that they constitute a single employer or one may be the alter ego of the other. A collective-bargaining contract signed by one of the companies would not bind the other if each were a separate corporation, but would bind the other if both constitute a single employer and the employees of both companies constitute a single appropriate bargaining unit or the nonsignatory company is an alter ego of the signatory company. *Associated General Contractors of California*, 242 NLRB 891, 892 fn. 5 (1979), enfd. as modified 633 F.2d 766 (9th Cir. 1980), cert. denied 452 U.S. 915 (1981); *Burgess Construction*, 227 NLRB 765, 770–771, 773–774 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979); *George C. Shearer Exhibitors Delivery*, 262 NLRB 622, 623–624 (1982), enfd. mem. 714 F.2d 124 (3d Cir. 1983).

[2] The Board accepted my findings of fact and also affirmed the holding that the refusal to hire Michael Nunn violated Sec. 8(a)(3) and (4) of the Act. *A-1 Fire Protection*, 233 NLRB 39 fn. 2 (1977). The Board held, however, that the Employer did not violate Sec. 8(a)(5) either by refusing to extend the terms of the CAS collective-bargaining agreement to A-1 or by transferring work from CAS to A-1. The Board held that the Union had, by its prior actions, given up the right to demand that the CAS agreement apply to A-1 workers. Specifically, the Board decided that the parties had not intended the 1975 agreement to cover A-1 employees and that the Union, "at least inferentially, stipulated as to the appropriateness of the unit." With respect to my conclusion that Corcoran violated Sec. 8(a)(5) by transferring the work from CAS to A-1, the Board stated that Corcoran was free to use CAS or A-1 in any fashion he saw fit, and that the Union had accepted the "double-breasted" situation.

to cover and include A-1 and its employees and the transfer, bidding, and/or subcontracting of work or jobs from CAS to A-1 so as to reduce the amount of bargaining unit work under the contract.

On June 27, 1980, the Board, on remand from the United States Court of Appeals for the District of Columbia, issued its Supplemental Decision and Order[3] reaffirming its prior Order in which it, inter alia, dismissed the allegations in the complaint that Respondents had violated Section 8(a)(5) and (1) of the Act by transferring work from CAS to A-1 and by refusing to apply the 1975 collective-bargaining agreement between CAS and the Union to employees of A-1.[4] Thereafter, the Charging Party petitioned the court of appeals for review of the Board's Supplemental Decision and Order, and on April 27, 1982, the court ordered a second remand limited to the transfer-of-work issue.

In its second opinion, dated April 27, 1982, the court of appeals found that the Board still had not "confronted the central issues raised by [the Union's] claim that [Respondent's owner] Corcoran unilaterally transferred work from CAS to A-1 without fulfilling his statutory duty to bargain.[5] The court further stated that under the traditional test of whether work has been transferred away from a bargaining unit, "the proper question in this case, leaving aside a possible 'waiver' by the union, would seem to be whether Corcoran changed the scope of CAS' activities or changed the method of allocating work between CAS and A-1 so as to have caused the CAS bargaining unit to lose work, which in light of Corcoran's past practices, CAS would otherwise have been expected to perform,"[6] and in this regard, the court of appeals found that the Board had not made any findings as to the actual practice by which work was solicited for, or assigned to, CAS and A-1. Furthermore, the court found that the Board had not "directly confronted the [Administrative Law Judge's] conclusion, based in part on the credibility determinations left undisturbed by the Board," that Corcoran had altered the status quo ""by chang[ing] work arrangements' so as to divert work from CAS to A-1 that CAS would otherwise have performed."[7] Further, concluding that a union may forgo its right to bargin about a transfer of unit work only by "waiver," and not by "acquiescence," the court found that the Board did not apply the traditional "clear and unmistakable" waiver standard or explain why a different standard was appropriate. In remanding this case for the second time to the Board, the court of appeals specifically directed the following:

> The Board should determine whether Corcoran engaged in conduct that deprived CAS of work which, in light of Corcoran's past practice, CAS would otherwise have been expected to perform. If the Board finds that Corcoran did engage in such conduct, it should either apply the "clear and unmistakable" standard to test whether the union agreed to that conduct, or explain why a different standard is appropriate. If it concludes that there was an unwaived denial of the union's statutory rights, it should devise an appropriate remedy, which may, if warranted, include the extension of the CAS collective-bargaining agreement to employees of A-1.[8]

The Board, having duly considered the court's second opinion, the parties' statement of position, and the entire record in this proceeding, found that its disposition of the instant case would be facilitated by further hearing with regard to the specific issues of fact raised by the court's second remand. Accordingly, by order dated February 14, 1983, the Board directed that this proceeding be reopened and that a further hearing be held before an administrative law judge for the limited purpose of receiving evidence as to the issues of fact raised by the court's remand and on which the administrative law judge shall make findings of fact concerning, but not limited to, the following: whether CAS bid only on jobs requiring union labor or also bid on other jobs—and if the latter on what basis did Corcoran submit bids from CAS rather than from A-1; whether, during 1975, George Corcoran stopped submitting bids from CAS or continued to submit bids but was no longer successful; whether A-1 performed any work originally bid from and awarded to CAS; and whether A-1's performance of work for former customers of CAS occurrred at the suggestion of such customers or of Corcoran. It was further ordered that upon conclusion of such hearing, the administrative law judge shall prepare and serve on the parties a supplemental decision limited to findings of fact with respect to the issues on remand.

In accordance with the above, the reopened hearing was held before me on February 22, 23, 24, and on March 21 and 22, 1984, and at the hearing considerable latitude was permitted in the introduction of testimony and exhibits for possible considerations by reviewing authorities, but for my purposes I will only consider related testimony and evidence pertaining to findings of fact on the five issues and questions specifically directed and outlined by the Board, as aforestated.[9]

[3] 250 NLRB 217.

[4] In finding that Respondents had not violated Sec. 8(a)(5) by transferring work from CAS to A-1, the Board, although noting that the work of CAS had decreased while that of A-1 had increased, again relied on the Union's knowledge of Respondent's double-breasted operations; on the absence of evidence that jobs "bid for and performed by CAS were transferred to A-1"; and on the absence of evidence that Respondent's use of the related companies involved deception or misrepresentation.

[5] 676 F.2d at 832.

[6] 676 F.2d at 831–832.

[7] 676 F.2d at 833–834.

[8] 676 F.2d at 834.

[9] The Board noted in its Order Remanding Proceeding to the Administrative Law Judge (fn. 8), the following:

> After the court's first remand, the Union filed a motion to reopen the record for the purpose of introducing evidence to show that, within three months of the close of the 1976 hearing, CAS' operations were totally discontinued and all of its unit employees were terminated. The Board denied the Union's motion as untimely in its Supplemental Decision and Order, 250 NLRB 217, fn. 3. Since we are reopening the record for further hearing as to the issues of fact raised by the court, and since the court has indicated that the Board has discretion in reopening the record, 676 F.2d at 829, fn. 10, we *shall permit the parties to adduce evidence as to relevant events that occurred after the 1976 hearing, including the alleged cessation of operations by CAS.* [Emphasis added.]

In the remand hearing the Charging Party called George Corcoran to the stand, and through him solicited testimony to the effect that in 1976 CAS was still a signatory to a bargaining agreement with the Union,[10] but that CAS, other than finishing a few remaining jobs, has not done any active work or business since November 1976; stated that during the period when both of his companies were active, he submitted the estimates and the competitive bids on all work, and did so for either company; testified that the kind of work that both performed is the same; that if a contractor asked him to bid nonunion, he bids nonunion, and frequently A-1 (the nonunion company) bids directly against union contractors or companies for sprinkler installation work and sometimes A-1 wins out, and at other times the union competition is successful as the low bidder.

Corcoran further testified that some of the work A-1 performs is subject to either Federal or state funds, and on those jobs he has to pay prevailing rates (equivalent to the union scale).[11] Corcoran agreed that Wares & Sons Plumbing and Heating Company is a union mechnical contractor, and he deals with them through A-1. Moreover, that he also dealt with union contractors Arms & Cole and ABI, Inc., and did business with them through A-1 on a nonunion basis.

The Charging Party introduced testimony through Robert Claflin to the effect that Claflin's employer, B. L. Harroun Company, sells, repairs, and installs sprinkler fire systems in the area and operates under a union contract with Local 669. Claflin testified that on occasions his employer also competed against nonunion companies including A-1—that one such job in mid-1983 involved an exhibition building at the Kalamazoo Fair Grounds and that B. L. Harroun Company was awarded this job as the party or builder involved wanted a union contractor. Claflin further testified that his employer also competed in 1981 and 1982 against A-1 on several other projects, but on these jobs lost the bids.[12] Claflin further testified that his employer has done repair work on a job initially installed by A-1—Welch Food in Lawton, Michigan.

Gordon Timm testified for the Charging Party that he works for Viking Fire Protection—a sprinkler contractor signatory to a bargaining agreement with Local 669, and that Viking competes for sprinkler jobs against A-1.

Timm testified that on the job for Meijer-Lansing, about 1983, 12 sprinkler contractors were involved in the bidding, and that A-1 was 1 of the 2 nonunion sprinkler companies submitting bids. Timm stated that on the Meijer Medical Center job, and also a project on which his company bid, A-1 was the low bidder among all the other union contractors.

Reference was made to a sprinkler job for Haworth, Inc. in 1983, and there was testimony by Timm that A-1 was also involved in this bidding, and the only other nonunion contractor bidding was Vander Wall Fire Protection, and that the same applies to a 1981 job in Grand Rapids involving Baker, Knapp & Tubbs, Inc.—where A-1 and Vander Wall were the only nonunion contractors bidding.[13]

Timm further testified as to a job or jobs relating to McCarthy Brothers Company and the bidders involved, and stated that A-1 was the only nonunion bidder.[14] He also testified that, on a Baker, Knapp & Tubbs' job, only A-1 and Vander Wall were nonunion bidders.[15]

The Charging Party also introduced testimony through Timm to the effect that if a management person (under a union contract) went out on a job and worked "with the tools" and installed a sprinkler system, that the bargaining agreement would then require fringe benefits contributions. Timm further stated that his company Viking Fire was asked in 1983 to inspect and repair a sprinkler system job (Hope College in Holland, Michigan) that had been installed by A-1.[16]

Jack Leadbetter testified that he is employed in the sprinkler business by Safeguard of Marquette, Inc. as its president, and that he has a bargaining relationship and contract with Local 669. Leadbetter stated that he subcontracts work from both union and nonunion contractors, and that sometimes his company, as the low bidder, is the only union trade on an otherwise nonunion contruction site. Leadbetter further testified that on several occasions within the last year his company has submitted bids against A-1—on Aircraft Organization Building at K.I. Sawyer Air Force Base; Douglas Hollis elderly facility in Houghton, Michigan; Houghton National Bank in Houghton; and also stated that some years ago his company bid on a Bayne City High School and Sheboygan Opera House remodeling job in competition with A-1. He testified that A-1 was the successful bidder on the Houghton National Bank job, but on some of the other jobs his company was the successful bidder. Leadbetter testified that quite often his company submits bids against both union and nonunion contractors for the same job.

The Employer maintains that George Corcoran had the right to bid jobs either as A-1 or CAS, and that there came a time in 1976 when CAS (the union company) was not allowed to use union fitters because the fitters were warned and harassed by Local 669 that if they went to work for A-1, they would not be able to work in the industry and, therefore, there came a point in time when CAS could not bid on any more jobs because it could not get union sprinkler fitters to work on their projects, and as a result CAS ceased bidding jobs at the end of 1976 (in November).

George Corcoran testified for Respondents that CAS is not presently active, but it is not out of business; that CAS and A-1 perform the same type of work; and that

[10] The last contract between CAS and the Union was signed in 1975, but this was a 2-year contract which renewed itself automatically unless notice of cancellation was given.

[11] See C.P. Exh. 9.

[12] Planewall Paper, Charlevoix Hospital, Meadow Brook Medical Center, Welch Food, and Marianne Shops in Traverse City. He also stated that his company and A-1 bid on a Musaski job in Battle Creek, but that Midwest, a union contractor, was awarded this job.

[13] See C.P. Exh. 10(a).

[14] See C.P. Exhs. 10(b) and (c).

[15] See C.P. Exh. 10(d).

[16] Timm, who has many years of experience in this business, was unaware of any sprinkler contractor in the Jackson, Michigan area with a similar name to A-1 Fire Protection.

in early 1977 CAS gave written notice to terminate its contract with the Charging Party. In fact, this record reveals that negotiations took place with the Charging Party in 1977 and that at least three negotiation sessions took place between the parties. George Corcoran testified there was agreement and concurrence in most areas of the contract with the exception of wages, and at the last negotiation session the Employer made its final offer on those items that were remaining, but the Union did not accept the Employer's offer and no contract was signed.

George Corcoran testified that commencing with the latter part of 1975 and continuing through 1976 CAS and its employees were the constant recipients of harassment from the Charging Party. Corcoran testified that he employed several Local 669 journeymen fitters on a regular continuous basis, and identified these employee-members of Local 669 as Dan Boyce, Pete Ostrander, Phil Young, and Darrel Ochs, who was his superintendent, plus his son Francis Corcoran, but stated that once the harassment of CAS and its employees began, Dan Boyce, Phil Young, and Darrel Ochs all quit CAS's employ during the spring, summer, and fall of 1976. George Corcoran further testified that his son Francis Corcoran and Pete Ostrander were fined after the Union filed internal charges alleging that they were working the nonunion help.[17]

George Corcoran testified that there came a time when CAS was not allowed to have union fitters, aforementioned, and that it started in 1975 when Mike Johnson became the business agent. Corcoran stated that the Union harassed Dan Boyce while he was working for CAS on a job at Central High School in 1975 or 1976. Francis Corcoran testified that Business Agent Johnson appeared on the CAS job at the Grand Blanc High School job in Grand Blanc, Michigan, and also on the job involving Central High School. Employee Pete Ostrander also testified that he encountered Mike Johnson while working for CAS at Grand Blanc High School and that this instance was the basis for charges being brought against him, his being fined $500, and being expelled from the Union, as aforestated. Ostrander testified that his first harassment contact with Business Agent Mike Johnson occurred in late 1975 in Kalamazoo, Michigan, at an A & P job while he was working for CAS. He testified Johnson came onto the job and wanted to see his book, and then began asking him questions regarding his travel pay and travel allowance.[18]

George Corcoran testified he was made aware of threats to CAS and its employees made by the Charging Party during a union meeting in February 1976, and that after being made aware of these threats, he had to take the men off the job—the employees in question were working for CAS on the Cadillac Mercy Hospital job. George Corcoran further testified he bid on approximately 150 jobs for CAS in 1976. He continued bidding on jobs up until the time his union fitters quit. Corcoran testified that once the last fitter quit in 1976, he was unable to get union fitters from Local 669, and also was unable to hire journeymen off the street unless all members of Local 669 were working. As a result he did not bid CAS until after November or December 1976.[19]

Corcoran stated that he first began bidding A-1 in prevailing rate jobs in 1977, and the reason that he did not bid on prevailing jobs for CAS is because he could not get employees to do the work. Corcoran also testified that as far as he knew, his operations were the only two-company or double-breasted contractor working in the area of Mike Johnson's jurisdiction, in Michigan, when Johnson assumed the business agent position for the Charging Party, in the spring of 1975, but that nonunion companies during the 1973–1976 period were increasing and that the significance of the increase in the number of nonunion operations soon became very apparent to him in that they were able to operate at a less labor cost; their hands were not tied because of work rule limitations such as a restriction where the prefabricating work had to be done; the number and amount of fittings that are to be placed on the pipe; and the requirement that there must be two fitters on each job to do installation. He stated that the nonunion operations did not have to abide by these work rule restrictions and could operate their business as they saw fit. Additionally, George Corcoran explained other labor and cost-saving factors such as the truckdriver is able to unload the materials, where on a union operation fitters do it at a higher labor cost, and the nonunion company does all of his own work rather than having to have higher priced tradesmen to do it. George Corcoran also gave a few examples of the saving in labor cost between bidding an A-1 job and having to bid the union job, and stated the labor cost savings were substantial, and with the increased number of nonunion operations, the substantial labor cost savings, and the fact that he could no longer obtain union fitters, he ceased bidding CAS jobs, but continued to bid jobs A-1 Fire Protection.[20]

Corcoran further testified that from 1976 until 1979 Union Representative Michael Johnson showed up on 69 of his jobs, and on those 35 jobs where Corcoran was actually present, he observed Johnson talking to employees, to the general contractor and union contractors, and

[17] It appears that Pete Ostrander was fined $500 and Francis Corcoran was fined $5000 and each of them was expelled from the Union. However, Francis Corcoran testified that in the end result the charges against him were dropped, and that he resigned his membership in the Union to eliminate all the hassle from Business Agent Johnson—R. Exhs. 17–20. Ostrander testified that he did not pay the fine against him, and that he also subsequently resigned from the Union. It further appears that the Union also filed internal charges aginst Dan Boyce under the allegation that he was working on a union job with nonunion help in violation of the bargaining agreement. Moreover, it was stipulated between the parties that several employees were disciplined by the Union for working for A-1, a nonsignatory contractor.

[18] Francis Corcoran testified that most of the regularly employed full-time CAS employees, previously mentioned herein, who were members of Local 669, quit CAS's employ in 1976 after either receiving threats by Local 669 or having charges filed against them, but some of these employees then went to work for A-1.

[19] While CAS did not bid nor do any work after November 1976, George Corcoran and his son Francis did complete jobs CAS previously had bid on and had not completed and as a result CAS may well have done some "wrap up work" on its jobs into 1977.

[20] Corcoran testified that in 1978 and 1979 he filed with the Board 8(b)(4) unfair labor charges against the Union alleging violations of the Act on jobs involving Genessee Valley and a job at Traverse City.

in so doing attempted to get them off the job. As a result reserve gates were put up on some of the A-1 jobs and picketing continued at the reserve gate. Corcoran stated that at the Genessee Valley job in 1979, the Union came on the scene with about 150 pickets, and injunctions were then issued against Local 669 and several other unions.[21] He stated that the Union picketed his A-1 jobs quite often.

On cross-examination, Corcoran testified that Schostak Brothers is an example of a customer of CAS that was *later* a customer of A-1 and admitted that the same is true for Miller Fire, De Jagger Construction, Davanay, Arms & Cole, Remer Plumbing, Spence Brothers, Mid-State, and Lawrence Properties.

Corcoran further testified and admitted that at no time after 1976 did he ever call Michael Johnson and inquire if he knew of any union sprinkler fitters available for work, but he had advertised in a local paper, on March 1, 1984, requesting fitters for his open shop company (A-1).[22]

Corcoran identified Charging Party Exhibit 15 as a purchase order from Visser Brothers for Fables Restauarant, a private prevailing wage job, to A-1 dated June 2, 1982; Charging Party Exhibit 16 is an order from Gerace Construction, a prevailing wage job, to A-1 on April 5, 1982; and Charging Party Exhibit 17 is a purchase order from L & L Construction Co., Tecumseh Plaza, to A-1 on June 22, 1982.

Francis Corcoran testified that in 1976, 1977, and 1978 Mike Johnson would come to the A-1 jobsites and inquire if he had union employees, and then after asking similar questions, would put up a picket line on some of the jobs (10 to 15 times) and the other trades would then leave the job. Francis Corcoran stated that he went directly to A-1 after leaving CAS.

Peter Ostrander testified that while he was working for A-1, starting in late 1975, Mike Johnson visited the jobs quite a few times (seven jobs) over a 4- to 5-year period, and on two occasions at the Kroger Stores in Port Huron he put up picket lines.

Robert Murray testified that he has been working for A-1 since mid-1975, but before worked for CAS. Murray stated that he worked on the CAS Grand Blanc High School job, and that Mike Johnson came to the jobsite and inquired if Murray had a membership card,[23] and when informed that he had no card, Johnson told Murray he would have to leave the job, and Murray did so. Murray also testified that he worked on a Kroger Store job in Essenville, Michigan, and Johnson came to the site and asked him if he had a card. Murray said he did not answer and just continued working. Murray could not recall if this was a job for A-1 or CAS. It appears that Murray also worked on a K-Mart job at Grand Rapids and testified that Johnson arrived at the site and wanted to give him and others a "sheet of paper" indicating the pending filing of unfair labor practice charges against A-1. Murray also recalled the A-1 job at Genessee Valley wherein about 100 men arrived on the scene and wanted employees of A-1 to leave the job because they were working for a nonunion company. He also testified that on this occasion the State Police were brought in.

The Employer argues that what must be initially remembered is the fact that the Union had been aware of A-1's existence as a nonunion company doing sprinkling installation work as early as December 1973; and was also aware that A-1 was doing the same type of work as CAS. Moreover, maintains the Employer, there were examples in 1974 and 1975 of the Union permitting A-1 to hire CAS employees to avoid having more of its members on layoff status, and the Union knowingly accepted the Respondent's double-breasted operation and permitted CAS and A-1 to compete for both union and nonunion jobs, and consented to its continued operation without challenge prior to November 1975, and in light thereof, the Board correctly determined that there had been no deprivation of work to CAS and its members, and accordingly, it was unnecessary for the Board to ascertain if in fact the Union had waived its right to bargain about the transfer of such unit work.

Counsel for Respondents further points out that the General Counsel and Charging Party have maintained in their arguments and contentions that George Corcoran deliberately diverted work to A-1, which would otherwise have gone to CAS, by submitting in behalf of A-1 a bid or bids which were lower than a bid already made for CAS; and then further maintains that this conduct is equivalent to unilaterally shifting of unit work reserved for CAS employees to A-1. The Employer, on the other hand, has always maintained that the fallacy in this argument is the assumption, unsupported by evidence, that work performed by A-1 would have been "reserved for CAS employees" if A-1 had not bid on it, and George Corcoran's testimony regarding the relative labor costs between his union operation and nonunion operation, as aforestated, more than supports the Employer's contention that CAS would not have received the work had A-1 bid on it.[24] Moreover, argues the Employer, George Corcoran's testimony revealed that during the year 1976 he bid on approximately 150 jobs on behalf of CAS and during that same period of time he bid an equal number of jobs for A-1, and it was not until the end of 1976, when all of his journeymen fitters had quit with the exception of Pete Ostrander and his son, when Corcoran was unable to obtain any more union fitters that he discontinued bidding jobs on behalf of CAS.

[21] By letter dated December 21, 1978, mechanical contractor Wares & Sons was advised by Local 669 that the Union had a dispute with A-1 and that they intended to engage in peaceful picketing at the Traverse City Hospital job. See C.P. Exh. 12.

[22] It appears that from time to time sprinkler fitters solicit their own jobs. Corcoran stated that you hired members of the Union first, and then if not supplied, you had the right to go on the street and pick up a man and pay him the fitter's wages and benefits.

[23] Murray testified that he sought admission to the apprenticeship program of Local 669 on three occasions (first time in October 1974), but was never admitted because during that period people in the area were being laid off.

[24] Corcoran also testified that A-1's labor costs were approximately 90 percent less than those of CAS and that the percentage figure has maintained its constancy from 1974 through the present. Corcoran stated that labor costs represented approximately 28 percent of A-1's total costs, but the figure was significantly higher for CAS and other union employer operations.

Respondents maintain that the existence of double-breasted operations whereby a single owner operates two companies—one union and one nonunion—is common in the construction industry and its legitimacy has been long recognized—*South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976), and, as a result of such decision, both a union and nonunion employer can exist side by side competing for the same general type of work without there being illegal transfers of work, deprivations of work, or subcontracting of work in violation of Section 8(a)(5) of the Act, and that under such double-breasted operations each company bids on jobs which the other cannot, or may not be able to obtain. Moreover, it is also recognized that on certain jobs contracts can only be awarded to unionized firms—see *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980)—and the work on such jobs may be viewed as "reserved" for employees of unionized companies for there is no possibility that nonunion companies can get the subcontract no matter how low their bids. On the other hand, argues the Employer, on jobs which do not have to be subcontracted to unionized companies, the lowest bidder will normally get the subcontract, and it can be expected nonunion companies, which have lower labor costs than union ones, are able to submit lower bids, as George Corcoran so testified. Therefore, the two companies in a double-breasted operation work in essentially different markets, and the size of the two markets is not constant—demands may decrease for one company's work and increase for the other, and if such happens the employer is not guilty of "diverting" work to one company which has been "reserved" for the employees of the other company and cannot be required to bargain about conditions over which it has no control. Cf. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 729, 733 (3d Cir. 1978).

The Employer maintains the evidence here shows no more than this—that CAS and A-1 were simultaneously created, that the purpose of forming CAS was to do union construction jobs, that through this entire period of time CAS earnings were always larger than A-1 and continued to increase through 1975 despite the existence of A-1 and until the time CAS was unable to obtain further union help CAS and A-1 were operating in separate markets. Moreover, there was only one instance where both CAS and A-1 bid on the same job and that was on the insistence of the contractor that it be done, but on those jobs requiring unionized contractors A-1 could not bid nor compete for such jobs and thus could not take work away from CAS. The decline in CAS's ability to be a successful bidder for jobs and projects was attributable to the fact that more and more nonunion contractors came into being and were able to undercut CAS and all other union contractors on those jobs not requiring all the contractors be union contractors. Therefore, the Employer contends the decrease in work for CAS can properly be attributed to declining demand for contracts to be performed under union conditions rather than a diversion of work through A-1 which otherwise CAS would have performed. Furthermore, argues counsel for Respondents, in the very latter part of 1976 and subsequent thereto, George Corcoran determined that he would cease submitting bids on behalf of CAS as he did not employ two journeymen fitters which was necessary under the Union's contract to perform any job. This occurred only after the Charging Party had caused all of CAS's journeymen fitters to quit, with the exception of Pete Ostrander, whom the Union had expelled, and CAS was not able to obtain any other union journeymen fitters.

Counsel for Respondents, in concluding his argument, contends that as time went on there was an increase and proliferation of nonunion sprinkler fitting companies, but no evidence was adduced which would support a finding that jobs subsequently obtained by A-1 would have gone to CAS had George Corcoran bid on them in behalf of CAS, that it was only after CAS ceased bidding on jobs when A-1 began performing work for a few customers CAS had previously worked for—that during the period of time prior to the close of the initial hearing in August 1976, the testimony of the Charging Party's agent revealed that many of its members were out of work, and from this the indication that not only CAS but other unionized firms generally were suffering from a decline in business. The Employer argues that it was this general decline in overall business, rather than any manipulations by George Corcoran, which caused the decline experienced by CAS. An inference that CAS lost work because of a decline in its market is amply warranted, as is the conclusion that work gained by A-1 was work which would not have been awarded to CAS in any event—that A-1 was under no obligation to refrain from bidding on sprinkling-fitting work, and in the absence of a showing the work would otherwise have gone to CAS, it cannot be said that the work was "transferred" out of the CAS bargaining unit.

Counsel for Respondents, in summary, maintains that an unlawful transfer of unit work is not established merely by showing that the work of CAS decreased while that of A-1 increased. Rather, it must be shown that A-1 and CAS engaged in some kind of conduct which resulted in A-1's obtaining work that would otherwise have been performed by CAS, and no such showing has been made. Thus, Respondents contend that neither the General Counsel nor the Charging Party has proven that CAS transferred work to A-1 in violation of Section 8(a)(5) of the Act through a process of bidding, subcontracting, transferring, or depriving CAS and its employees of work that they would have otherwise performed.

Final Conclusions

As the court of appeals recognized, the administrative law judge made certain findings of fact and credibility resolutions based on the record evidence after the initial hearing in 1976 which pertain directly to the "transfer of work" issue and which were not disturbed by the Board on its review of the case. 676 F.2d at 833–834; *A-1 Fire Protection*, 233 NLRB 38 fn. 1 (1977).

Specifically the judge found that George Corcoran "changed work arrangements so as to reduce the amount of work for the employees of [CAS]" and that "since early 1975 George Corcoran operated A-1 with the ap-

parent purpose of ultimately dissolving [CAS]." The administrative law judge further noted in his initial decision, inter alia, the following:

> Thus, in November 1975, George Corcoran, in reply to a question by [employee] Gary Sears regarding his employment security as a sprinkler fitter for A-1, stated that he generally only laid off union members but that nonunion employees of A-1 were never laid off. On this occasion George Corcoran also advised Sears that he would shortly phase out Respondent Corcoran [CAS] and that A-1 would take over the sprinkler work. Similarly, at a hearing in the fall of 1975 involving internal union charges against his son, as aforementioned, George Corcoran told Business Agent Johnson and others present that in a 6-month period there would be less people working for Respondent Corcoran. Moreover, the General Counsel's exhibit also clearly indicates that the gross earnings of A-1 have continually increased. In 1976 Respondent Corcoran had just one job, and George Corcoran likewise conceded that much of the work now being done by A-1 is being done for customers like Kroger stores and K-Mart, which were previously customers of Respondent Corcoran. Plainly, but for George Corcoran's attempts to rid himself of Respondent Corcoran and the Union, Respondent Corcoran would have performed this work. These arrangements, of course, had a serious and adverse impact on the work of the unit employees working for Respondent Corcoran and, in relation thereto, this record shows that while A-1 employed no sprinkler fitters until 1975, it now employs approximately 7 fitters, but just the opposite has occurred at Respondent Corcoran, who now employs only 2 sprinkler fitters while not so long ago it employed approximately 10. It follows from the foregoing that by so doing, and transferring work for Respondent Corcoran to A-1, Respondents withdrew and withheld recognition from the Union in violation of Section 8(a)(5) and (1) of the Act. [233 NLRB at 43 and 44.]

As pointed out, the original 1976 record also contained two clear examples of the transfer of work from CAS to A-1. Corcoran admitted that in January 1976 he transferred one job from A-1 to CAS in the hope of appeasing the Union but, after the underlying unfair labor practice charges were filed, the job was transferred back to A-1. 233 NLRB at 44–45. The original record also reflects an incident when Corcoran first submitted a bid to Englehart Construction on behalf of CAS and then called back and obtained the job on the basis of a lower bid on behalf of A-1.

The judge also determined that in November 1975, 6 months after the parties' second contract was signed, George Corcoran sent the Union a letter (G.C. Exh. 15) rejecting its demand to be recognized as the "bargaining representative of A-1 employees." 233 NLRB at 43. In this same letter, Corcoran represented to the Union that A-1 was not performing work within the scope of the CAS unit but instead was in the business of "sell[ing] fire extinguishers, smoke detectors, alarms, kitchen hood systems, inspection of sprinkler systems and the small jobs that were being done by *other companys than sprinklers companys*."

There has been nothing in the remand hearing—testimony, evidence, or otherwise—to change or alter in any way my conclusions and findings, as aforestated, in the initial 1976 decision.

Before turning to evaluating the evidence adduced at the remand hearing, it is necessary to briefly define the sprinkler installation market in which CAS and later A-1 have operated. As indicated, and according to George Corcoran himself, all his sprinkler jobs are obtained pursuant to a bidding process open to both union and nonunion contractors which compete directly against one another. Sometimes Corcoran's nonunion A-1 company has been successful when bidding against union sprinkler contractors, and sometimes it has not, as the union contractor is the low bidder. Corcoran further admitted that A-1 obtains work through direct subcontracting with union general contractors and, on occasions, performs work on jobs together with union trades.

At the remand hearing in February and March 1984, representatives of three sprinkler contractors—Claflin, Timms, and Leadbetter—all signatory to agreements with the Union and in business in the State of Michigan, testified, and in so doing confirmed Corcoran's statements that union contractors in Michigan are free to bid on *all* jobs and that their companies compete for work and bid directly against A-1 and other nonunion companies. Conversely to A-1's business dealings with union general contractors, union sprinkler contractors often obtain work by subcontracting directly from nonunion general contractors, as Jack Leadbetter testified. Moreover, it was also established that union sprinkler contractors have, on a number of occasions, been the only union trade on an otherwise open shop construction job. Thus, as pointed out, there have been no market conditions requiring Corcoran to phase out CAS, and no external economic circumstances to mandate the takeover of CAS's sprinkler work by A-1.

As has been set forth previously herein, in 1973, CAS was established and became signatory to its first collective-bargaining agreement with Local 669, and from 1973 until late 1976, CAS employees performed bargaining unit work defined essentially as the installation and maintenance of automatic fire protection systems pursuant to the terms of the applicable collective-bargaining agreement. A-1 was likewise established in 1973, but it remains unclear when A-1 first became active in the business of sprinkler installation. As noted, Respondents submitted a summary of jobs performed by A-1 (R. Exh. 13) but, as pointed out by the Union, the summary fails to differentiate between unit and nonunit work and, as illustrated by the attachment to this exhibit, an unknown portion of the work included on the summary is probably not unit work. I am in agreement that during 1973 the amount of work performed by A-1, unit or nonunit, was not substantial. In 1974, compared to subsequent years, only small jobs were done, but in 1975, A-1 began to perform jobs of significant size, and this is confirmed by the fact

that A-1 did not employ its first sprinkler fitter until sometime in 1975, and also by George Corcoran's *November 1975* letter to Local 669, which stated that A-1 had been in the business of selling fire extinguishers, smoke detectors, alarms, and kitchen hood systems, and doing other work not performed by sprinkler companies such as CAS, as aforestated. Thus, it apparently was not until sometime during the middle or fall of 1975[25] that A-1 became significantly active in the installation of sprinkler systems, and as Corcoran had promised, CAS was thereafter phased out and the sprinkler work was taken over by A-1. During 1975, as far as it can be ascertained, CAS performed some 35 sprinkler installation jobs[26] and of the 31 or 32 jobs for which a general contractor was identified, 10 or 11 jobs were for contractors who later became customers of A-1, as previously named herein.[27] In 1976, CAS obtained only one or two small jobs.

As further detailed, after performing only two jobs of *significant size* in 1975 (R. Exh. 13), A-1 performed *24* jobs in 1976 including 8 substantial size jobs of over $10,000 each, and of the *18* sprinkler jobs performed by A-1 in 1976 for which a general contractor was identified *7* of the jobs were for a former customer of CAS. By November 1976, 3 months after the initial hearing in this matter and 1 month before the administrative law judge issued his decision, Corcoran stopped bidding work for CAS and it became inactive.

In all, and admittedly so, at least nine general contractors who were customers of CAS before 1976 subsequently became customers of A-1, and there is no indication in this record which would even tend to establish that any of these contractors suggested, much less insisted, that they would prefer doing business with A-1 rather than CAS.

As indicated in the testimony and arguments I have set forth previously herein, several different explanations were offered by Respondents for the decision by George Corcoran to stop bidding on behalf of CAS in November 1976, and thereafter to bid work only for A-1.

The first explanation was that union sprinkler fitters would not work for him, and that he was unable to employ sprinkler fitters for CAS. I am in agreement that if CAS had no sprinkler fitter employees it was because Corcoran had laid them off. He admittedly never called to the Union to request available employees and never advertised for CAS employees although he did advertise in the newspaper for *nonunion* employees for open shop A-1, as aforestated. Further, he was well aware that CAS was not required by the pertinent collective-bargaining agreement to employ only union members or to accept only referrals from the Union. Apparently, A-1 had no difficulty finding a sufficient number of qualified workers.

A second related contention made by Respondent is that CAS went out of business because of harassment by Local 669. However, a close scrutiny of the evidence reveals that the Union acted generally against only A-1 by way of peaceful picketing and demonstration, and not against CAS. Moreover, as also pointed out, the alleged harassment attributable to Local 669 was either picketing of A-1 jobs to protest its alleged unfair labor practices, along with a notice of picketing in compliance with Federal law (C.P. Exh. 12), or fining and expelling union members for working with nonunion A-1 people in violation of the Union's bylaws. There is some testimony in this record, as aforestated, that Mike Johnson came on CAS jobs and harassed employees. However, the testimony of Respondents' witnesses in this regard is not always clear as to what job they were on or what company they were working for at the time in question, but even assuming they were on CAS jobs, there is still lacking any real evidence that they were in any way harassed. If Johnson did visit these CAS jobs, about the only thing he did was ask questions which were followed by a few internal charges and dismissals because certain member employees were working with nonunion people. But the main thrust of the Union's complaints was directed against A-1, the nonunion company, and admittedly all the picketing was on the jobsites where A-1 was working. Due to such circumstances it is difficult to believe that Corcoran could not hire fitters for his CAS operations when this was his union company. In fact, counsel for the Union suggested that one would have thought that Local 669's continued protest of A-1's activities would, if anything, have encouraged bidding on behalf of CAS, but this was not the case.

It appears that the third alternate justification for George Corcoran's decision in November 1976, to close the CAS operation and to instead solicit sprinkler work through his nonunion company, was A-1's lower labor costs. As indicated, while wages paid by A-1 were undeniably below those in the pertinent union contract, this explanation was then undermined by Corcoran's admission that he bid state and Federal prevailing wage jobs through A-1 rather than CAS, even though there could have been no labor savings on these jobs.[28]

As further noted, another issue as to which the court of appeals solicited additional evidence was whether the Union "agreed" to the diversion of work from CAS to A-1 or "waived" its right to protest this otherwise illegal conduct. I am in agreement the undisputed record evidence clearly refutes any such contention.[29]

---

[25] While there is no specific date in the record for this change in business operation, Respondent witness Robert Murray testified on cross-examination that A-1 began operating out of the CAS fabrication shop during the "middle or towards the end of 1975." He recalled the time because he left the employ of CAS and joined A-1 at approximately the same time. Respondent's exhibits from the prior hearing reflect Murray's transfer from CAS to A-1 to have occurred at the end of September 1975. R. Exhs. 8 and 9.

[26] See R. Exh. 13.

[27] See R. Exh. 14.

[28] Even if labor savings were Respondents' primary motive, it has long been held that an employer may not shift work away from a bargaining unit simply because it is to his economic advantage, and the Board recently reaffirmed this principle in *Otis Elevator Co.*, 269 NLRB 891 (1984)—that decisions made by management which turn on a direct reduction of modifications of labor costs are subjects for bargaining. There is no evidence in the instant case that CAS bargained with the Union at any time over the subject of the shift in work from CAS to A-1, and related labor costs.

[29] The employer maintains the clear and unmistakable standard, to ascertain if the Charging Party waived its right to bargain over CAS's de-

Continued

First, the relevant provisions in the 1975 agreement between the parties required that all work within the Union's trade jurisdiction be performed pursuant to its terms and prohibits "any *sale* [*or*] *transfer* . . . to evade the terms of this agreement." (C.P. Exh. 6, arts. 3 and 18.) The agreement also prohibited signatory contractors from subcontracting unit work to companies which were not signatory to an agreement with the Union. Thus, the contract clearly did not reflect an agreement or a waiver to the transfer of unit work.

Further, as indicated, there is no evidence that the subject of transfer or diversion of work was "fully discussed" or "consciously explored" during collective-bargaining negotiations in 1975, and, of course, the parties' silence cannot be equated with a waiver of the right to bargain. Moreover, the diversion of work from CAS to A-1 occurred primarily after the 1975 agreement was executed,[30] and while the Employer made reference at the remand hearing to subsequent negotiations in 1977, as aforementioned, there is no evidence that diversion of unit work was discussed and, in any event, the instant unfair labor practice proceeding was long underway by that time precluding any alleged "waiver" or "agreement" on the part of the Union.

In the final analysis, I have been directed by the Board in the order of remand to receive evidence on the following issues and to make a finding of facts limited to these issues.

1. *Whether Corcoran Automatic Sprinkler (CAS) bid only on jobs requiring union labor or also bid on other jobs.*

Counsel for Local 669 contends that the Board's position and statement on this issue is predicated on a fallacious assumption that the construction market for sprinkler systems is somehow segregated into union and nonunion segments but, as the three Michigan representatives of union contractors (Claflin, Timm, and Leadbetter) all testified, as aforementioned herein, that there is no such thing as a job which precludes union labor, or union and nonunion sprinkler contractors, from competing directly against one another for jobs, and also subcontracting work from both union and nonunion general contractors.

Whatever the full impact of the above argument might be, there is no doubt that until sometime in late 1975 all jobs of significant size for which George Corcoran submitted bids were performed by CAS, as this record duly reflects.

2. *Whether CAS bid on jobs other than union jobs, and on what basis did CAS rather than A-1 submit bids.*

I do not believe it has been established that CAS bid on projects other than union jobs. It must be remembered that Corcoran testified in the initial 1976 hearing that it was his intention in 1973 to operate one company as a union company (CAS), and his nonunion company (A-1) would bid on jobs where nonunion contractors were permitted.

3. *Whether during 1975 Corcoran stopped submitting bids from CAS or continued to submit bids, but was no longer successful.*

It is quite clear from this record, as noted, that from the middle or fall of 1975 onward A-1 took over progressively more of the sprinkler installation work from CAS until George Corcoran simply stopped bidding for CAS in November 1976, but in 1975, CAS did successfully submit numerous bids. (See R. Exh. 14.)

4. *Whether A-1 performed any work originally bid from and awarded to CAS.*

The two relevant examples in the record come from the initial hearing in which it was demonstrated that one project (Alma College) was obtained by A-1, transferred to CAS, and then transferred back to A-1 in January 1976.[31] The second example was when Englehart Construction called CAS in August or September 1975 and obtained a price for a job, but was then called back by George Corcoran on behalf of A-1 with a lower price.

5. *Whether A-1's performance of work for former customers of CAS occurred at the suggestion of such customers or of Corcoran.*

There is no evidence that a single CAS customer contacted Corcoran and expressly requested a bid from A-1.

As I indicated previously, we are concerned here with the protection of historic bargaining unit jobs from complete abolition. Respondents were not content to operate both sides of their double-breasted entities simultaneously. Instead, as the records plainly show, they are now engaged in an overt effort to transfer all work to the nonunion corporation thereby causing the demise of the represented unit.

Counsel for the Employer has also argued that there is no showing that work performed by A-1 would have been reserved or awarded to CAS if A-1 had not bid on it. However, this argument must be viewed in the total circumstances surrounding this case. Corcoran specifically informed Gary Sears that he would phase out CAS and A-1 would take over the sprinkler work. Moreover, after the charges were filed in the instant case by the Union he then decided to do the Alma College job as A-1—that he did not feel there was any reason for him

---

cision to stop bidding, is not applicable in this particular situation in light of the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and the Board's decision in the *Milwaukee Spring II*, 268 NLRB 601 (1984), and argues that from the holdings in these cases it is eminently clear the Union does not have any right to require the Employer to bargain over entrepreneurial decisions such as closing a portion of its operation and/or relocating a portion of its operation during the term of the contract; that such actions are considered entrepreneurial and go to the heart of an employer's managerial-making authority and as such are not mandatory subjects of bargaining. Moreover, argues the Employer, CAS had the inherent right to make the determination it would stop bidding on new installation work and thereby cease doing business, that this decision was only arrived at after CAS lost its journeymen union fitters because of the pressure and harassment placed on them by Charging Party and CAS's continued inability to hire other journeymen fitters to replace them.

[30] Robert Murray testified that in the middle or towards the end of 1975 the fabrication began to increase for A-1.

[31] At the initial hearing, in reference to which company would do the Alma College job, and the circumstances under which the job was shifted from one company to another—all the parties stipulated that Corcoran made the following statement in his affidavit given to the Board during its initial investigation:

> After getting the charges I decided to do the job as A-1 and not subcontract it to Corcoran. I didn't feel there was any reason for me to show the Union a sign of good faith after they filed the charges against me.

to show good faith after the Union filed charges against him. While such statements do not show that CAS would have secured the jobs in question if A-1 had not bid, they certainly do show open hostility and shed light on later events.

Prior to the fall of 1976, CAS was a successful operational sprinkler contracting company actively bidding on and performing many sprinkler-fitting contracts, and it is George Corcoran who makes the decisions for both CAS and A-1 as to which jobs to bid on. It is also noted that even after Corcoran discontinued bidding on any jobs for CAS, as of November 1976, he continued to do business with and bid on jobs for some of the same customers he had been formerly doing business with under the union contract with CAS, but now only bidding A-1, and with customers which A-1 had never before dealt with or submitted bids to. Further, nonunion A-1, since George Corcoran stopped bidding any jobs as CAS, has bid against union sprinkler contractors, sometimes winning such contracts and sometimes not. There is also testimony that since the cessation of CAS bids A-1 has performed work on construction sites where union trades are also present and, as further pointed out, A-1 has performed subcontracting for a mechanical contractor. Moreover, despite George Corcoran's testimony that A-1 became more successful on bids because its labor costs were lower, he still utilized A-1 to bid on jobs rather than CAS even when the labor costs for A-1 and CAS would be virtually identical because of the Davis-Bacon Act requiring the payment of the prevailing wage—normally the union pay scale in the area involved.

In view of the above, I am convinced that CAS would have successfully bid and secured several jobs, at least from its old customers, had A-1 not been in the bidding. In this respect it is noted that B. L. Harroun, Viking Fire Protection, and Safeguard of Marquette, represented in the remand hearing by Claflin, Timm, and Leadbetter, are signators with Local 669 as *union* contractors, and also actively competing against several nonunion companies in the sprinkler business, and all three of them obviously getting their share of the projects on which they bid, as aforestated. Certainly, if these union companies over the many years can remain profitable enterprises in their bidding endeavors, then there must be constant demands for sprinkler work by signatory companies with Local 669, and in view of the good past record of CAS in getting such jobs, it is most likely that had this company continued in their endeavors, it too would have been awarded its share of the union work.

On the basis and for the reasons as set forth and discussed above, I reaffirm my findings that George Corcoran deliberately phased out CAS so that A-1 could take over the sprinkler work here in question without bargaining with the Union and that the Union did not agree or waive its right to protest Respondents' conduct.

Accordingly, I adhere to my original decision.

* U.S. GOVERNMENT PRINTING OFFICE: 1986-461-629:20003